PRACTICE

OF THE

SUPREME COURT

OF THE

STATE OF NEW-YORK.

A

TREATISE

ON THE

PRACTICE

OF THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK

IN

CIVIL ACTIONS.

THE SECOND EDITION.

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OF THE HONORABLE LAW SOCIETY OF GREY'S INN, LONDON;
AND CITIZEN OF THE UNITED STATES OF AMERICA.

Lex mundi harmonia.

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—1794.—

TO THE

Hon. ROBERT YATES,
JOHN SLOSS HOBART,
JOHN LANSING,
MORGAN LEWIS, and
EGBERT BENSON,

JUSTICES

OF THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK;

This Work,

On the Practice of that Court,

Is inſcribed, by

The AUTHOR.

PREFACE.

TO trace with accuracy even the outlines of the legal Practice of the Supreme Court of this State, would form a work of considerable utility to Students in the Profession. Extensive as that Practice is, not a single Treatise exists capable of guiding the Student through the various niceties and intricacies which he will unavoidably meet in the prosecution of a suit. The English books applied to this subject, though consulted through necessity, are not only imperfect, but often erroneous.

The Practice of the British Courts, it must be acknowleged, is the model of that of our Supreme Court; but the various architects of the latter have not always adhered to their model; in many respects there is a material difference. When the Student reads in Crompton, and other English practical treatises, of service of process with notice, of affidavits to hold to bail, of delivering declarations by the bye, of summonses for time to plead,

of

of demands of plea, of the mode of ſigning judgments, of carrying in and docquetting rolls; in ſhort, of various other proceedings not conſiſtent with the practice reſulting from the law and cuſtom of this State, it naturally bewilders his ideas: he is perplexed with a ſpecies of learning productive of confuſion to himſelf, if not early corrected by extenſive practice, as he will not have the power to diſcriminate what is the legal practice here from that which is peculiar to the other ſide of the Atlantic.

To obviate, in ſome meaſure, this evil; to lead the way towards furniſhing young practitioners with a ſyſtem of principles for the conduct of an action, is the object of this work; towards the attainment of which, recourſe has been had to the very few rules* occaſionally ordained by the Court, for the regulation of ſome modes of proceeding. Theſe rules are interſperſed through the work, and form, it is conceived, a uſeful branch of themſelves, if the Treatiſe is not deemed ſo in other reſpects. The ſta-

tutes

* Previous to the publication of this work, ſome Rules were propoſed to the court for the regulation of their practice. Had they been adopted, a copy would have been inſerted in an appendix. On comparing them, however, with the practice laid down in the enſuing Treatiſe, they do not appear to make any material alteration neceſſary, being ſimply a new modification of the original practical rules, with ſome additions. When ſanctioned, they will be printed and preſented to the purchaſers of this volume.

tutes of the ſtate are the next ſource whence a conſiderable part of this compilation is drawn. In quoting them, I have nearly followed the words of the original, omitting ſuch as do not add to the ſenſe, though neceſſary in a formal act of the legiſlature. Some practical ſketches in manuſcript, one paſſing under the name of a perſonage of high reſpectability, have been conſulted; and whatever appeared of importance has been incorporated in the following pages. Theſe, added to ſuch parts of the Engliſh Practice, as have been adopted in this court, and extracted from the numerous works on that head, conſtitute the baſis of the enſuing ſyſtem. After ſuch an acknowlegement, it is preſumed the Author will not be charged with plagiariſm, ſince the very nature of this work precludes the idea of novelty, and only comprehends an *arrangement* of exiſting knowlege.

With reſpect to the method, in which ſuch a Work ought to be compiled, the following order appeared to me the moſt comprehenſive, on which account it was purſued.

1. In the firſt part is deſcribed the progreſs of a ſuit, through every intermediate ſtage, from the commencement of the action to final judgment and execution. Under this head are explained the various kinds of proceſs, and mode of ſuing them out, the doctrine of bail, the rules of pleading, and the neceſſary requiſites in order to bring the cauſe to

trial, with the conſequent proceedings. The particular points at which a cauſe often reſts for default of one of the parties, with the remedy of the other in ſuch caſe, will here properly come under conſideration.

2. As the proceedings muſt naturally differ from the common form, where one of the litigants, either plaintiff or defendant, poſſeſſes a privilege of ſuing, or being ſued, in a peculiar manner; as infants, attornies, &c. or are exempted from ſuits during particular times; as members of the legiſlature; or where the ſituation, in which either of them ſtand relates to the cauſe of action different from the mode in common caſes; as that of an executor or adminiſtrator, and, in divers other inſtances, the method of purſuing an action wherein either of theſe occur, conſtitute the ſubject of a ſecond part.

3. There being likewiſe a number of actions, the practice in which is variant from thoſe commonly happening; ſuch as replevin, *qui tam*, ejectment, &c. and likewiſe caſes that do not fall under the denomination of actions; as, attachment, arbitration, *certiorari*, &c. the conſideration of theſe make a third part.

Such are the outlines of the plan upon which the enſuing Treatiſe is formed; ſuch as it is, the Author ſubmits it to the judgment of an impartial public. The only merit he aſcribes to himſelf is that of laborious

laborious diligence, which being attainable by common abilities, with attention alone, he truſts will not be conſtrued arrogance.

It was contemplated, by way of illuſtration, to add a conſiderable collection of precedents, with notes on their nature and uſe, and directions for varying them according to the circumſtances of the caſe; but, from the unavoidable length of the preſent volume, the idea was laid aſide. The Author has, however, a large and extenſive collection of precedents taken from actual practice, peruſed and ſanctioned by ſeveral Gentlemen of repute at the Engliſh bar, which, with little alteration, will ſerve for this ſtate, beſides a great number of approved forms uſed by many eminent practiſers in the court. Theſe are intended to be the contents of a ſeparate volume ſhortly to be publiſhed, as a companion to this Treatiſe.

It may poſſibly be deemed a bold attempt for a young man, almoſt a ſtranger in the country, to ſtep forward and deſcribe a practice with which it may be ſaid he can ſcarcely have had many opportunities to be acquainted, and which, from its indefinite ſtate, is not wholly known to the moſt experienced practitioner. This has indeed been an idea ſported by ſome *liberal* Gentlemen, who have likewiſe expreſſed the very *benevolent* intention of diſcountenancing and injuring a Work publiſhed under

theſe circumſtances. As to the identity of the *candid critics* alluded to, the adage *qui capit ille facit*, will be a ſufficient deſcription to themſelves. Without indulging a juſt indignation at ſuch ſplenetic threats, the Author throws himſelf on the candor of the Profeſſion at large:—he leaves them to judge what can be the motives for condemning his Work unſeen, ſo contrary to the rules of juſtice in a country which boaſts the enjoyment of Freedom. What little pretenſions he may claim to merit, he reſts upon the voice of an impartial Public; and if, unfortunately, he has miſtaken his *forte*, will willingly ſacrifice the ſubſequent pages at the ſhrine of oblivion, ſince utility, and not fame, was the motive which influenced the publication.

W. WYCHE.

New-York, May 1, 1794.

TABLE

TABLE OF CONTENTS.

INTRODUCTION.

CHAP. I.

Page.

Of the Jurisdiction of the Court, its Officers, and the Terms, ... 1

CHAP. II.

Of the Circuit Court, ... 11

CHAP. III.

Of Actions, ... 13

PART I.

PROGRESS OF A SUIT IN COMMON CASES.

CHAP. I.

Page.

Of Process, ... 41

CHAP. II.

Of Proceedings upon Process previous to Appearance—the Arrest—Bail-Bond—Return of Writ—Rules thereupon, ... 50

CHAP. III.

Of Appearance and Bail, ... 57

CHAP. IV.

Of Proceedings upon the Bail-Bond, ... 71

CHAP. V.

Of Proceedings against the Sheriff to compel him to return the Writ and bring in the Body, . . . 76

CHAP.

CHAP. VI.

Page.
Of Declarations, ... 81

CHAP. VII.

Of Time for Pleading and Imparlance, . . 100

CHAP. VIII.

Of Paying Money into Court, . . . 104

CHAP. IX.

Of Pleas, ... 107

CHAP. X.

Of Replication, Rejoinder and ſubſequent Pleadings to the Iſſue; and of Plea *Puis le Darrein Continuance*, 132

CHAP. XI.

Of Diſcontinuing, ... 136

CHAP. XII.

Of Steps preparatory to the Trial, . . . 138

CHAP. XIII.

Of Trial by Jury, ... 152

CHAP. XIV.

Of Trial by Record—Inſpection—Certificate—Witneſſes, ... 170

CHAP. XV.

Of Demurrers, ... 173

CHAP. XVI.

Of New Trials and Arreſt of Judgments, . . 176

CHAP. XVII.

Of Coſts, ... 179

CHAP. XVIII.

Of Judgments, ... 186

CHAP. XIX.

Of Executions and entering up Satisfaction, . 195

PART

PART II.

PROCEEDINGS BY AND AGAINST PARTICULAR PERSONS.

CHAP. I.

Page.

Of Proceedings by and againſt Members of the Legiſlature, ... 201

CHAP. II.

Of Proceedings by and againſt Attornies and other Officers of the Court, ... 202

CHAP. III.

Of Proceedings by and againſt Infants, . . . 206

CHAP. IV.

Of Proceedings by Paupers, ... 208

CHAP. V.

Of Proceedings againſt Juſtices, Officers and others, 209

CHAP. VI.

Of Proceedings againſt Priſoners, ... 210

CHAP. VII.

Of Proceedings againſt Bail, ... 216

CHAP. VIII.

Of Proceedings by and againſt Corporations, . 217

CHAP. IX.

Of Proceedings by and againſt Executors and Adminiſtrators, ... 219

CHAP. X.

Of Proceedings by and againſt Heirs and Deviſees, 225

CHAP. XI.

Of Proceedings by and againſt Huſband and Wife, . 227

CHAP. XII.

Of Proceedings relative to the Diſcharge of Inſolvent Debtors, ... 229

PART III.

PARTICULAR ACTIONS AND CASES.

CHAP. I.

Page.

Account, ... 233

CHAP. II.

Arbitration, ... 238

CHAP. III.

Attachment, ... 244

CHAP. IV.

Certiorari, ... 248

CHAP. V.

Dower, ... 251

CHAP. VI.

Ejectment and Action for Meſne Profits, . . 258

CHAP. VII.

Error, ... 272

CHAP. VIII.

Habeas Corpus, ... 285

CHAP. IX.

Limitation—of ſuing out Proceſs to ſave the Statute, 291

CHAP. X.

Original and Outlawry, ... 292

CHAP. XI.

Partition, ... 306

CHAP. XII.

Qui tam Actions, ... 308

CHAP. XIII.

Replevin, ... 315

CHAP. XIV.

Scire Facias, ... 326

CHAP. XV.

Waſte, ... 330

CHAP. XVI.

Writ of Right, ... 331

A

TREATISE

ON THE

PRACTICE

OF THE

SUPREME COURT OF NEW-YORK.

INTRODUCTION.

CHAPTER I.

Of the Juriſdiction of the Court, its Officers, and the Terms.

THE various powers exerciſed by the three great courts for the adminiſtration of juſtice in England, viz. the king's bench, the common pleas, and the plea ſide of the court of exchequer, are all, in this ſtate, united together, and repoſed in one tribunal, called, from its extenſive juriſdiction, the ſupreme court of judicature. Real actions, ſolely cognizable in the common pleas; criminal proſecutions, the original peculiar province of the king's bench; the legal branch of the exchequer, and perſonal actions common to each of them---all centre in this court. It ſeems to poſſeſs the judicial powers of the ancient *wittena-gemote* of the Saxons, and ſince exerciſed by the *aula regis* before its diviſion. Either originally, or by

appeal,

appeal, its authority extends over all actions, whether real, perſonal, or mixed. Prohibitions to reſtrain inferior courts within the limits of their juriſdictions, iſſue from this court. It grants a habeas corpus to relieve perſons wrongfully impriſoned, and exerciſes a diſcretionary authority of admitting to bail in all caſes whatever. It is alſo a court of appeal by writ of error from the common pleas; and may examine, correct, and reverſe the judgments of inferior courts.

But to preſerve its dignity, and to ſave expence to the ſuitors, it is enacted by ſtatute, 10 ſeſſ. ch. 72. ſect. 1. "that if in any perſonal action commenced and proſecut-"ed in the ſupreme court, the plaintiff does not recover "above 20l. beſides coſts, he ſhall pay taxed coſts to "the defendant; if the plaintiff recovers upwards of "20l. and under 100l. he ſhall only be intitled to com-"mon pleas coſts, and even them not to exceed 10l." But it is provided, "that where the ſuit is commenced "in the common pleas, and removed at the inſtance of "the defendant, if the plaintiff obtains judgment for any "ſum exceeding 10l. he ſhall have full coſts." By the ſame ſtatute "no perſonal action commenced in the "common pleas, where the matter in controverſy does "not exceed 100l. can be removed by habeas corpus, "certiorari, or other writ except error."* This act does not however extend "to any ſuit or action where-"in the ſtate is concerned, nor where freehold, inheri-"tance, or title to lands or tenements ſhall come in queſ-"tion; nor to actions of replevin, aſſault and battery, "falſe impriſonment, or ſlander; nor to actions by or "againſt the mayors, aldermen and commonalty of the "cities of New-York, Albany, or Hudſon."†

The *judges* of this court conſiſt at preſent of a chief and four others, who receive their commiſſions from the council of appointment, and by the 24th article of the

* Sect. 2. † Sect. 8.

the conſtitution, hold their offices during good behaviour, or until the age of 60 years. It is provided alſo by the 25th article, that judges ſhall hold no other office except that of delegate to the general congreſs upon ſpecial occaſions; but if elected to another, it ſhall be at their option which to ſerve. On entering into office, each judge ſwears, "that he will, to the beſt of his knowlege and "ability, execute his office according to the conſtitution "and laws of the ſtate, in defence of the freedom and "independence thereof, and for the maintenance of li-"berty and the diſtribution of juſtice among the citizens "and inhabitants, without any fear, favor, partiality, "affection, or hope of reward."* The ſalary of the chief juſtice is 800l. a year, and that of the others 750l. each; but this is in lieu of all fees, and intended as a full compenſation for their ſervices in their reſpective offices.†

The number of ſubordinate officers, which make ſo great a ſhow in the Engliſh books of practice, and which renders the knowlege of that practice, from the variety of buſineſs tranſacted with each officer, ſo extremely difficult to the ſtudent, are nearly in this court reduced to one ---the *clerk*. His office is the general fountain of all the legal buſineſs of the court, and to this we may, in ſome meaſure, attribute the greater eaſe with which the practice of the law in this ſtate is conducted than that of Great-Britain. The clerk is appointed by the judges, and his general duty may be gathered from his oath, which is, "that he will juſtly and honeſtly keep the records, "parchments, papers, and writings committed to him, "and in all things, to the beſt of his knowlege and un-"derſtanding, faithfully and honeſtly perform the duty "of his office and the truſt repoſed in him, without fa-

"vor

* Laws of N. Y. 11 ſeſſ. ch. 28. ſect. 3.
† Ibid. 15 ſeſſ. ch. 63. ſect. 1, 2.

" vor or partiality."* His particular duties will appear under the different branches of this work. The office of the clerk muſt be kept at the city of New-York, and that of his deputy at Albany. All papers filed with the deputy are to be removed once in every ſix months to New-York.† The fees of the clerk are eſtabliſhed by ſtatute.‡

With reſpect to the *practiſers* of the court, it is ordained by the conſtitution,§ " that attornies and counſellors " be appointed by the court, and licenſed by the firſt " judge, and be regulated by the rules and orders of the " court." By ſtatute 10 ſeſſ. ch. 36. " no perſon ſhall " be admitted as counſellor or attorney in any court, but " ſuch as have been brought up in the ſame court, or are " otherwiſe well practiſed in ſoliciting cauſes, and have " been found by their dealings to be ſkilful and of honeſt " diſpoſition." Upon this branch of the ſtatute, and the rules of the court, the preſent mode of admitting attornies and counſellors is grounded. To be admitted an attorney, the ſtudying three years‖ in the office of a practitioner of the court, is in general deemed a pre-requiſite; and no perſon is qualified for an admiſſion under the age of twenty-one years.¶ The practice is to produce a certificate from ſuch practitioner of the three years ſtudy, that he deems the applicant ſufficiently qualified, and that he is of good moral character;** and the court is thereupon moved for a rule to examine his abilities. This examination is directed by rules of court,†† and by the laſt quoted ſtatute, enacting, that the candidates " ſhall, " before

* Laws of N. Y. 11 ſeſſ. ch. 28. ſect. 6.
† Ibid. 8 ſeſſ. ch. 71. ſect. 5.
‡ Ibid. 12 ſeſſ. ch. 24. ſect. 1.
§ Art. 27.
‖ Rule S. C. Apr. T. 1778, Apr. T. 1783.
¶ Ibid. Apr. T. 1767.
** Ibid. Apr. T. 1778, Apr. T. 1783.
†† Apr. T. 1778, Apr. T. 1783.

" before admiſſion, be examined by the juſtices of the " court, and ſuch only as ſhall be found virtuous and of " good fame, and of ſufficient learning and ability, ſhall " be admitted; and their names ſhall be put in a roll or " book to be kept for that purpoſe." Upon this certificate the court appoints examiners, who, at a time and place appointed, queſtion the ſtudent on the practice, and if he is deemed properly qualified, he is licenſed by the chief juſtice. The new attorney muſt next appear in open court, and take and ſubſcribe the uſual ſtate oaths, together with the following:---" I do ſwear, that I will " truly and honeſtly demean myſelf in the practice of an " attorney, according to the beſt of my knowlege and " ability." After which he is enrolled, and may be admitted to practiſe in any court of the ſtate or of the United States.

The rules relative to admiſſion have not always been ſtrictly adhered to in particular circumſtances.* The attorney, after two years practice, may apply for a counſellor's licence, which is granted upon examination in the ſame manner.† There is now no diſtinction of dreſs obſerved by either the judges or the gentlemen at the bar, though, by the rule of January term, 1765, abrogated only by cuſtom, counſel are to be habited in the bar gown and band uſed by the Engliſh barriſters.

The admiſſion of attornies from other ſtates is regulated by a late rule of court,‡ which ordains, " that any " perſon admitted an attorney of the ſupreme or ſuperior " courts of any of the United States, applying to be ad- " mitted as an attorney of this court, upon his producing " his own affidavit of his intent to reſide in this ſtate, and " a certificate of one of the judges of the court in which " he

* Rule S. C. Apr. T. 1779, Jan. T. 1782, Apr. T. 1782, Jan. T. 1789.

† Ibid. Apr. T. 1783.

‡ July T. 1793.

" he has been admitted, certifying his admiſſion, that he " is of good moral character, that he is an attorney of " three years ſtanding, that he has ſerved as a clerk with " ſome practiſing attorney for the term of three years " previous to his admiſſion, or that he has ſerved as a " clerk as aforeſaid, and has practiſed as an attorney in " ſuch court, and that the periods of ſuch clerkſhip and " practice, collectively taken, complete the term of three " years, ſhall be admitted to an examination. That any " perſon admitted as a counſellor of any ſuch court, " applying to be admitted as a counſellor of this court, " upon producing a like affidavit, and a certificate of one " of the judges of the court in which he has been admit- " ted a counſellor, certifying his admiſſion, that he is " of good moral character, that he is a counſellor of " five years ſtanding, or that he has ſerved as a clerk " with ſome practiſing attorney for the term of three " years previous to his admiſſion, and that he is an at- " torney of two years ſtanding; or that he has ſerved " as a clerk as aforeſaid, and practiſed as an attorney " aforeſaid; and that the terms of ſuch practice and " clerkſhip, collectively taken, complete the term of " three years, and that he is of two years ſtanding as a " counſellor, (excluſive of ſuch clerkſhip and practice) " ſhall be admitted to an examination."

The laſt cited ſtatute, [ſect. 11.] prevents the clerk of the court, or any under ſheriff, ſheriff's clerk, coroner, or bailiff, from acting as a counſellor or attorney: and there is an inſtance of a perſon, who ſtudied with the clerk of the court, being refuſed admiſſion on that ground alone.

The confidence neceſſarily placed in the members of the legal profeſſion is a reaſon ſufficiently obvious why the utmoſt care and circumſpection are requiſite to prevent perſons of improper character from being admitted, or if they ſhould inadvertently obtain a licence, or be afterwards guilty

guilty of mal-practice, to ſtrike them off the roll on the firſt appearance of diſhoneſt conduct. When it is conſidered that the fortunes, nay, ſometimes the lives of their clients are repoſed in the care of profeſſional men, it will not be thought that the legiſlature have acted harſhly or unwiſely in ordaining, "that if any counſel or attorney be "found notoriouſly in default of record or otherwiſe, that "he ſhall be put out of the roll, and never after be receiv-"ed to act in any court;"* nor likewiſe, that "if any "counſellor or attorney do any manner of deceit or col-"luſion in any court, or conſent unto it in deceit of the "court, or beguile the court or party, and thereof be "convicted, he ſhall be puniſhed by fine and impriſon-"ment, and pay to the party grieved treble damages and "coſts."†

To prevent impoſition and extortion, the law has ſettled every fee which a practitioner can demand for his trouble and attention;‡ and as a farther guard, it is enacted, that "if any attorney ſhall wilfully delay his client's ſuit to "work his own gain, or wilfully demand by his bill any "ſums of money or allowance for or upon account of "any money which he hath not laid out or diſburſed, or "become anſwerable for, the party grieved ſhall have his "action, and recover treble damages and coſts; and ſuch "attorney ſhall be put out of the roll, and be diſcharged "from thenceforth from being an attorney any more."§ To give the client an opportunity of inquiring into the legality of his attorney's demand, it is likewiſe ordained, that "no attorney ſhall commence a ſuit or action, for fees, "charges, or diſburſements, until *eight* days after he ſhall "have delivered to the party charged therewith, or left "for him or her, at his or her dwelling houſe, or laſt place "of

* Laws of N. Y. 10 ſeſſ. ch. 36. ſect. 4.
† Ibid. ſect. 5.
‡ Ibid. 12 ſeſſ. ch. 24. ſect. 1.
§ Ibid. 10 ſeſſ. ch. 36. ſect. 4.

" of abode, a bill of ſuch fees, &c. written in a common " legible hand, in Engliſh, (except law terms, and the " names of writs) and in words at length, (except times " and ſums, and ſuch abbreviations as are common in " Engliſh) ſubſcribed with the proper hand of ſuch at- " torney."* Upon a branch of the Engliſh ſtatute from which this is nearly taken, it has been adjudged, that if an attorney's bill has been delivered the time mentioned in the ſtatute, and not referred for taxation, the defendant, in an action brought againſt him, cannot be permitted to queſtion the reaſonableneſs of the items on the trial,† ſince he had a more ſummary remedy. In a late caſe which happened in the mayor's court of New-York,‡ it was ſaid by Mr. Recorder, that the delivery of the bill eight days before action brought, in conformity to the above ſtatute, muſt be proved by the plaintiff on the trial, ſince the defendant may either take advantage of it by pleading ſpecially, or in a motion for a nonſuit: yet, if the defendant reſides without the juriſdiction of the court, this proof is not neceſſary.

An attorney cannot be changed by his client without leave of the court or order of a judge, on payment of his bill as taxed; and when changed the new attorney muſt, at his peril, take notice of all ſubſiſting rules in the cauſe.§ An attorney has alſo a lien on his client's deeds, papers, or money, for his bill,‖ though he cannot detain writings delivered to him on ſpecial truſt for money due to him in that buſineſs.¶ He may obtain an order to ſtop his client from receiving money recovered in a ſuit in which he was employed for him, till his bill be paid.** It is to be obſerved, that a bill for conveyancing only is not

* Laws of N. Y. 10 ſeſſ. ch. 36. ſect. 7.
† Doug. 198.
‡ B. Livingſton v. Kennedy.
§ 7 Mod. 50. Doug. 217.
‖ Doug. 104, 238.
¶ Mod. Caſes in Law and Eq. 306.
** Doug. 104, 131.

not to be taxed; but if part be for conveyancing and part for buſineſs done in court, the whole is to be taxed.*

For the more eaſy ſervice of notices, &c. on attornies dwelling at a diſtance, thoſe who reſide out of the city of New-York muſt appoint agents therein, and thoſe not reſident in Albany muſt appoint agents in that city. Notice of ſuch appointments muſt be left in the office of the clerk in the city where the agents ſhall be reſident; and the clerk, or his deputy, muſt put up liſts of ſuch agents in their reſpective offices. The leaving or filing of any rule or notice, and other matters neceſſary to be ſerved on ſuch attorney, in the office of the clerk or his deputy, ſhall be good ſervice as to any non-reſident attorney who ſhall have appointed no agent.†

There are alſo a ſpecies of perſons, who may not improperly be ſtiled officers of the court; theſe are *commiſſioners to take affidavits* to be read in the ſupreme court: they receive their authority from ſtatute 11 ſeſſ. ch. 46. ſect. 25, which empowers the court "to commiſſion, "under their ſeal, ſo many perſons as they think fit, in "each of the counties in the ſtate, to take affidavits con-"cerning any matter, cauſe, or thing depending in the "court, which ſhall be filed with the proper officer, and "then be read in the ſame manner as if taken before a "judge; and every perſon forſwearing himſelf, ſhall be "liable to the ſame penalties as if taken in open court. "The fee of taking ſuch affidavit, ſhall be one ſhilling "and no more." By virtue of the power veſted in the court by this ſtatute, they have ordered all the judges of the different courts of common pleas to be commiſſioned to take affidavits for the purpoſe mentioned in the ſtatute.‡ Beſides which, ſeveral other perſons, in the cities of New-York and Albany, have the like authority.

* Doug. 199.
† Rule S. C. Oct. T. 1772, Jan. T. 1789.
‡ Ibid. Oct. T. 1782.

The sheriff of the city and county where the court sits, and his deputy or deputies are likewise officers of the court, and are bound to attend and obey its directions.* The duty and power of this sheriff are similar to that of the marshal of the king's bench in England, for he has the custody of all the prisoners.

In consequence also of a variety of rules,† the sheriffs of the several counties of this state ought to attend the sittings of the court in person, or by deputy, and likewise to appoint deputies where the court sits, for the purpose of receiving writs, rules and process which may be necessary to be served on such sheriff, on pain of such fine as the court shall inflict. The sheriffs can only take such fees as are allowed by statute, 12 sess. ch. 24.

The *terms* or times in which this court is held, are four in the year. By statute, 8 sess. ch. 61. the supreme court is to sit at New-York every third Tuesday of January and of April, and at Albany on every last Tuesday of July and third Tuesday of October. The terms of January and July may continue every day (except Sunday) till the end of the Saturday in the ensuing week; and the terms of April and October, from their respective commencements until the end of the third Saturday afterwards. But when the business of the court is completed, it may adjourn without sitting till the end.

Every day of the term is a return day except Sunday.‡

By a rule of court, made October term, 1703, the first day of each term ought to be set apart for the grand jury and receipt of the docquets; the second day for trials, and if that be not sufficient, those remaining, to be tried the last day but one, by special order; the third day for arguments;

* Rule S. C. Apr. T. 1754.

† Sept. T. 1706, March T. 1723-4, Apr. T. 1755, Apr. T. 1763, Oct. T. 1767, Jan. T. 1786.

‡ Same stat. sect. 4.

guments; the fourth day for judgments of the court. No ſpecial motion will be heard on the laſt day of term. A rule alſo of October term, 1762, appoints the firſt Thurſdays and Saturdays of the term of April and October, for the hearing of all arguments and ſpecial motions. But theſe rules are not adhered to, though they remain in force.

CHAPTER II.

Of the Circuit Court.

THE great inconvenience which muſt inevitably ariſe from the trial of all cauſes at the bar of the ſupreme court, in cauſing the jurors and parties, with their witneſſes, to come from their homes to one of the cities where that court uſually ſits, naturally ſuggeſted the idea of erecting circuit courts: by means of which, as is commonly obſerved, juſtice is brought to the door of every man, and the expence of law-ſuits conſiderably leſſened. It is therefore provided by act of 9 ſeſſ. ch. 41. ſect. 1. "that "the juſtices of the ſupreme court in the vacations, at "leaſt once in a year, and oftener if need be, ſhall hold "a court in each of the counties of this ſtate, as well "where the court ſits as in the others, for the trial of all "iſſues joined in the ſupreme court, or in any other "court and brought into the ſupreme court to be tried, "and which are or may be triable in the reſpective "counties; which courts ſhall be called the circuit "courts, and may be held ſo many days as the juſtice "holding the ſame may think neceſſary." By ſect. 2 of the ſame ſtatute, "the juſtices of the ſupreme court "in term, ſhall appoint the holding of the circuit courts,

"which

"which are always to be kept in the court-houſe of each "county, except for New-York and Albany, which "are to be at ſuch places as the ſupreme court ſhall di- "rect."

"All iſſues in the ſupreme court, triable by a jury "of the county where the court ſits, may be tried ei- "ther at the circuit or at the bar of the ſupreme court, "without any order for that purpoſe."*

"The juſtices of the ſupreme court, and every of "them as ſuch, and without any commiſſion, are au- "thoriſed and required, at the ſaid circuit courts, to "try all ſuch iſſues, and take all ſuch inqueſts by de- "fault or otherwiſe, as are or ought to be tried and ta- "ken in the ſaid circuit courts, and to record nonſuits "and defaults, and do and execute all other matters and "things as any juſtices of *niſi prius*, or of aſſize may do "by law. And the ſaid juſtice or juſtices ſhall return "the proceedings before him or them to the ſupreme "court, at the next term, who are to receive and re- "cord the ſame and give judgment. The juſtices are "alſo to take aſſizes at the circuit court, and may return "the ſame to the ſupreme court, which, after judgment, "are to be remitted back to the circuit court."†

By ſect. 23 of the ſame ſtatute, circuit courts may award a *tales de circumſtantibus*.

The chief officer of this court is the clerk of the circuit, who attends it at every ſitting, and has the cuſtody of the records. His fees are regulated by ſtatute, 12 ſeſſ. ch. 24.

The ſheriffs of the ſeveral counties are alſo, in purſuance of their offices, bound to attend theſe courts in their counties, and to make the neceſſary returns, &c.

* Laws of N. Y. 12 ſeſſ. ch. 28. ſect. 3.
† Ibid. 9 ſeſſ. ch. 41. ſect. 4.

CHAPTER

CHAPTER III.

Of Actions.

AN action is the legal demand of one's right. In conſidering the ſubject of this chapter I ſhall endeavor to point out the general diviſion of actions and the different ſpecies; where the plaintiff has his election to bring one kind or the other; who may ſue and be ſued; when the plaintiff may demand ſpecial bail or not; and in what caſe he muſt give ſecurity to pay coſts, if he ſhould not ſupport his action. Firſt, as to the general diviſion.

Actions are either criminal or civil. The latter are alone the object of our preſent concern. Civil are of three ſorts; real, perſonal, and mixed. The firſt, as may be inferred from their name, relate to real property; the ſecond, to perſonal; and the third, to a demand of real property, with perſonal damages for the detainer.

Real actions are ſuch, in which real eſtates of inheritance, or for life, are demanded. They are of two ſorts; *poſſeſſory* and *auncеſtrel*, according as the demandant himſelf, or his anceſtors, were ſeized. Till lately theſe actions have been much diſuſed, owing to their intricacy and to the invention of ejectments; yet the ſtatutes of limitation render recourſe to them neceſſary, where the title is above twenty years ſtanding. Indeed, they have experienced a kind of revival within theſe few years, writs of right having been proſecuted, both in England and in this ſtate, in ſeveral modern inſtances.* Theſe actions are ſubdivided into a number of minute heads, which fall not within our preſent purpoſe.

Perſonal

* Wilſon 419, De Riemar v. Verrien, S. C. July T. 1784; Ferdon v. Holſt, S. C. Jan. T. 1786.

Perſonal actions concern the perſon only, and may moſt properly be divided into ſuch as ariſe *ex contractu* or *ex delicto*. The firſt have their origin from ſome contract expreſſed or implied, and are brought to recover a debt or perſonal duty, or damages in lieu thereof: the latter are referred ſolely to *tort*, or wrong, and are founded on forcible violence, either actual or imputed by law: by theſe the plaintiff claims a ſatisfaction in damages for ſome injury done to his perſon or property. A principal uſe of this diſtinction is to mark what actions may be brought by, or againſt executors or adminiſtrators. Perſonal actions are generally ſaid, by a very improper diſcrimination, to die with the perſon: for thoſe founded on contract ſurvive, and may be inſtituted by or againſt the repreſentatives of either party; and in regard to ſuch as are founded on *torts* only, thoſe which ſeek a reparation for an injury done to the *perſon* or *character* of the *deceaſed* abate.

I. Actions founded on contracts, are

1. *Annuity* is brought for the recovery of the arrears of an annual ſum, which is a mere perſonal charge, and not a lien on land. It is now found more expedient to eſtabliſh the annuity by a decree in chancery, ſo that the proceeding at common law is nearly obſolete. Such action however, when brought, is founded on the expreſs *contract* which created the annuity.

2. A writ or action of *account* may be grounded either on an expreſs or implied contract: for it lies * againſt a guardian in ſocage, bailiff, a receiver, or a factor, and by or againſt the perſonal repreſentatives of the original parties, † and by one joint-tenant, or tenant in common, againſt the other, as bailiff, for receiving more than his ſhare. ‡ This action is very rare, for generally a ſuit in equity is a more eligible remedy.

3. An

* 1 Inſt. 90. b. 172. a.
† Laws of N. Y. 10 ſeſſ. ch. 19. ſect. 1 and 10.
‡ Ibid. 11 ſeſſ. ch. 4. ſect. 2.

3. An action of *covenant* is that which is brought to recover damages for ſome breach of covenants entered into by deed under ſeal.

4. Actions of *debt* may be brought wherever a determinate ſum is claimed as due, and for an indeterminate demand,* which may readily be reduced to a certainty; for it is not now underſtood to be neceſſary that the plaintiff ſhould recover the exact ſum demanded. In the caſe of ſimple contracts, this action has been long diſuſed; for in theſe caſes the defendant might have waged his law; but this reaſon is now at an end, ſince the ſtatute [10 ſeſſ. ch. 5.] has aboliſhed law wager. Actions of debt, though here claſſed under ſuch as ariſe *ex contractu*, may alſo be brought where a contract cannot always be ſuppoſed to intervene; thus it may be founded on a *judgment* in a former action. Sometimes actions of debt clearly ariſe *ex delicto*: for this is the mode of ſuing for thoſe penalties which are inflicted by numerous ſtatutes, as conſequent on certain tranſgreſſions and omiſſions. Debt is likewiſe the proper remedy againſt an officer, who, intruſted with the cuſtody of a priſoner charged in execution, permits him to eſcape.†

5. *Detinue* has a very cloſe affinity to debt, and only differs in this, that by the latter money is demanded, by the former goods. When a plaintiff purpoſes to recover a ſpecific chattle, this action may be ſued, and ‡ it may ariſe either *ex contractu*, as bailment, or by the accidental poſſeſſion, and wrongful detention of the goods. Trover for this injury is the action now in common uſe, though, with the abolition of law wager, the reaſon for the diſuſe no longer ſubſiſts. It is ſtill the proper ſpecific remedy, at common law, for detainer of charters and title deeds of eſtate.

* Doug. 6, 732, T. Jon. 184, 3 Lev. 429, 2 Keb. 225, 2 Cro. 618, 2 Com. Dig. 528.

† Saund. 218, 2 Term Rep. 129, 2 Inſt. 382.

‡ 1 Inſt. 286. b.

eſtate.* The judgment † in detinue is always to recover the ſpecific chattel or its value.

6. Actions of *aſſumpſit* are either founded on ſome writing, or on unwritten promiſes, poſitive or implied. As to writings, however, it is to be obſerved, that if, under ſeal, aſſumpſit cannot be brought, but debt or covenant, as juſt diſtinguiſhed; and it has been determined in an action on a promiſory note, where a ſealed inſtrument was produced without proof of the ſeal, that the evidence was inadmiſſible.‡ This rule is built on the general polity of the ancient law, by which particular remedies were provided for different wrongs, that cauſes might not be brought into court confuſedly and immethodically, and that the record might at once aſcertain the matter to be tried. As to poſitive or expreſs aſſumpſit, it is to be obſerved, that, in general, all writings unſealed, in which any promiſe or contract is expreſſed, may ground an aſſumpſit. Of theſe, the moſt uſual are promiſory notes, bills of exchange, and policies of inſurance. This, likewiſe, is the proper remedy on the written or printed articles or conditions of a public auction or ſale. Some agreements are deemed of ſo important a nature, that they ought not to reſt in promiſe only, as they cannot be proved but by the memory (which ſometimes will induce the perjury) of witneſſes: to prevent which, the ſtatute for the prevention of frauds § enacts, that, in the five following caſes, no promiſe ſhall be a ſufficient ground for an action, unleſs the agreement, or ſome memorandum or note thereof, ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized:---1. Where an executor or adminiſtrator promiſes to anſwer damages out of

* Barker v. Green, B. R. E. T. 8 G. 3.
† Co. Ent. lib. Detinue.
‡ Dall. Rep. 208. 1 Roll. Ab. 11.
§ 10 ſeſſ. ch. 44. ſect. 11.

of his own eſtate: 2. Where the defendant undertakes to anſwer for the debt, default, or miſcarriages of another perſon: 3. Where any agreement is made upon conſideration of marriage: 4. Where any contract or ſale is made of lands, tenements or hereditaments, or any leaſe or intereſt in or concerning them: 5. Where there is any agreement not performed within one year from the making thereof. In all theſe caſes a mere verbal aſſumpſit is void. The ſame law farther ordains, "that no contract for the "ſale of any goods for the price of 10l. and upwards, ſhall "be allowed to be good, except the buyer ſhall accept "part of the goods ſo ſold and actually receive the ſame, "or give ſomething in earneſt to bind the bargain or in "part of payment, or that ſome note or memorandum in "writing of the ſaid bargain be made and ſigned by the "parties to be charged therewith, or their agents there-"unto lawfully authoriſed."*

An implied aſſumpſit is raiſed, by intendment of law, on principles of natural juſtice. Thus, if a man employ another in the way of his profeſſion or occupation, without any mention of reward, law and reaſon imply to the employer a promiſe of making a ſuitable recompence, and he thereby becomes as liable to an action of aſſumpſit as if he had expreſsly ſtipulated for the price. When a man has received money to the uſe of another, there is an implied aſſumpſit to pay it to the owner. This ſingle count in particular for *money had and received*, has been ſo liberally extended in its application, that this brief formulary may be adopted, without ſtating the ſpecial circumſtances on record, in all caſes where the defendant has received money which, *ex æquo et bono*, ought to be deemed as belonging to the plaintiff.† This count‡ is available where any ſum has been paid by miſtake, and which there was

* Sect. 15. † Bur. 1010.

‡ Bur. 1012. 1 Term Rep. 134, 286-7, 387. 2 Term Rep. 370.

no ground in conſcience to claim; or upon a conſideration which happens wholly to fail, or has been got through impoſition, extortion, or oppreſſion; or wherever the defendant, upon the circumſtances of the caſe, is obliged, by the ties of natural juſtice and equity, to refund the money. Although actions of aſſumpſit are conſidered as ariſing *ex contractu*, and not *ex delicto*, that diſtinction reſpects only the origin of the cauſe of the ſuit, which we have juſt ſeen is a promiſe. But the defendant's breach of promiſe is looked upon as fraudulent, and an aſſumpſit is legally ſtiled an action of *treſpaſs* on the caſe upon promiſes.

II. We are now to conſider perſonal actions ariſing *ex delicto* or from *tort*; in the firſt ſpecies of which no breach of contract is ſuggeſted, and no forcible violence imputed to the defendant. This negative deſcription is the only one that can eaſily be given of what are denominated *actions of treſpaſs on the caſe*; ſo called, becauſe this is the univerſal remedy for every caſe where none is ſpecifically provided by law. Injuries that may be proſecuted for in this kind of action, either affect the *perſon* or the *property* of men. Attacks on the perſon may be conſidered as affecting the *reputation*, *ſafety*, *health*, or *quiet* of the plaintiff.

1. *Slander*. This action on the caſe is the remedy for defamation, whether by *words* ſpoken, or *libels* written. The words which are moſt univerſally actionable, are ſuch as charge men with felony, perjury, and many other, if not all, indictable offences,* and ſuch as malign them with having (not merely with having had) an infectious diſeaſe. Perſons may likewiſe ſupport actions for defaming them, in *reſpect to their particular ſtations in life*; as to ſpread a calumny againſt a judge, or to ſlander a man in the way of his trade or profeſſion. Words, not actionable in themſelves, may become ſo where any ſpecial damage in

* 2 Lev. 233. Al. 11. 2 Term Rep. 475.

in conſequence accrues: of this nature is *ſlander of title*, that is, any expreſſions derogatory from the plaintiff's title to his eſtate: for no ſuch words are actionable,* unleſs the plaintiff ſhows, that by means thereof he loſt an opportunity of ſelling or leaſing the eſtate. But if the defendant claim a title, in himſelf, to the lands, no action lies.† The occaſion of ſpeaking the words muſt be wilful and malicious, or no action can be maintained.

2. An injury more heinous than defamation, and which at once endangers the plaintiff's *character* and *ſafety*, is, concerning a *falſe and malicious proſecution*. This lies wherever the party has been put to expence, and even if the indictment be returned ignoramus.

3. As to injuries detrimental to the *health* or *quiet* of individuals, theſe are uſually termed *nuiſances*. As they affect the plaintiff with reſpect to his local habitation, they may alſo be looked upon as injurious to his property. Thus, if a man near the manſion of another, ſet up and exerciſe an offenſive and unwholeſome trade, as keeping a ſmelting furnace, &c. an action upon the caſe may be commenced for damages.

I now proceed to the various injuries remediable by bringing an action on the caſe affecting the plaintiff's property.

1. Injuries to the plaintiff's *reverſion in real eſtates*. As to thoſe immediately affecting real property of a corporeal nature, treſpaſs *vi et armis* is the proper mode of redreſs. But when the intereſt is of the future expectant kind, ſuch *reverſionary* proprietor may have caſe, and *vi et armis* may alſo be maintained by the immediate occupier.‡

2. *Diſturbance*. This action lies for ſuch injuries as affect

* 1 Cro. 197.
† 4 Co. 18. a. 1 Sal. 14. 1 Cro. 197, 427. 1 Rol. 409
‡ 3 Lev. 209.

affect any *incorporeal right* of the plaintiff. Thus a right of *common** may be disturbed in an actionable manner, by inclosing, ploughing, or surcharging the place where it is claimed, or by putting cattle there without authority. The same action may be brought for a right of *way*.

3. *Deceit.* This lies where a man uses injurious deceit to the prejudice of another. This action may be commenced for deceit in sales, as for vending damaged wares or provisions, unsound horses, or the like, at a price which such articles usually cost in a good and merchantable condition; it lies although no † express warranty or affirmance of their value was made by the defendant. Neither‡ is it incumbent on the plaintiff to prove, at the trial, that the defendant knew the things sold to be of such trivial or inferior worth. If a broker, or other person, employed by the plaintiff, have conducted himself fraudulently and contrary to the trust reposed in him, an action upon the case lies for such deceit. This remedy § also may be pursued where a man assumes a fictitious character, falsely personating the plaintiff himself, or any stranger, to the plaintiff's detriment. The same action lies against a man who professes any trade or science, and the plaintiff, confiding in his pretended skill, is thereby deceived and damnified. It may be also brought for using deceit in games of chance, and thereby winning the plaintiff's money.‖ If there be any intention to deceive, as by falsely representing a third person to be a man safely to be trusted and given credit to, and the plaintiff trust him accordingly and be damnified in consequence thereof; this action lies without proving, that the defendant who made such

* 2 Cro. 629. 1 Cro. 198. 2 Leon. 184. Lut. 107. 9 Co. 111 b.

† 2 Term Rep. 745.

‡ Skin. 66. 1 Vent. 366.

§ 1 R. A. 100. Moor. 538.

‖ 1 R. A. 100.

ſuch aſſertions was any gainer thereby himſelf, or colluded with him of whom he gave a fictitious character.*

4. Another claſs of actions on the caſe is referred to *negligence*. Where the act is generally lawful in itſelf, but done in an improper place or manner, or without ſufficient care, whereby the plaintiff hath ſuſtained damage: thus, if a man ſhoot off a gun in the middle of the town, by means whereof the plaintiff's horſe ſtart and throw him, this will warrant an action. Maſters alſo are anſwerable for the negligence of their ſervants; as if, through the want of ſkill or care in the perſon driving a cart, it be forced againſt, and break the plaintiff's carriage: alſo, if a man be the owner of any noxious or ferocious animal which does miſchief. The remedy is the ſame for the negligence of perſons in particular ſtations and offices; as, if a priſoner arreſted at the plaintiff's ſuit, through the negligence of a ſheriff or jailer, make his eſcape out of cuſtody before judgment, this action may be brought. So an action on the caſe lies againſt a *common innkeeper*,† if the goods of his gueſt be ſtolen or loſt by the negligence of himſelf or his ſervants; or againſt a *common carrier*,‡ for hire by land or water. But in the latter caſe it is now more uſual to bring aſſumpſit.

5. Actions upon the caſe for *wilful miſfeaſance* are ſometimes ſpoken of as a diſtinct claſs, though many of the inſtances already enumerated may be conſidered in that light. Other examples of this kind, not hitherto alluded to, may be, like the following, contempts or abuſes of legal proceſs; as, if an attorney ſue in another's name without a warrant; if a party be arreſted without any cauſe of action,§ and maliciouſly holden to bail;

* 3 Term Rep. 51—65.
† 2 Cro. 224.
‡ 1 R. A. 2. 1 Sal. 282.
§ 3 Term Rep. 185.

bail; or if a ſheriff, by poſitive connivance (not ſimple negligence) ſuffer an eſcape. An action upon the caſe, being a ſupplemental courſe of proceeding, where there is no appropriated remedy, lies in caſes, not ſpecially provided for, of damage unjuſtly ſuſtained. Other acts, then, of wilful misfeaſance, remediable in this way, happen where any unjuſt hindrance is given to a man, in the acquirement of his lawful emoluments; as, where a tradeſman's profits * are unduly intercepted, by threatening his cuſtomers or workmen. Thus alſo it is, if a deed,† under which I claim a beneficial intereſt, come into the poſſeſſion of another, who defaces it, or tears off the ſeal, he ſhall anſwer, in this action, for the damage which I may have incurred. To theſe, and ſimilar inſtances, the legal remedy, by an action on the caſe for misfeaſance, may be applied; it being neceſſary to remember, that the ground ‡ of complaint be not *damnum abſque injuriæ*, but that there be actual detriment injurioufly ſuſtained.

6. *Trover* and *converſion* is another kind of action very frequent in practice, in which the declaration ſurmiſes, that the plaintiff's goods came by *finding* into the poſſeſſion of the defendant, who wrongfully *converted* them to his own uſe. This action is brought to obtain a ſatisfaction in value, for the goods, as detinue, ſpoken of before, ſeeks a ſpecific reſtitution of the things themſelves. T[illegible]r is the moſt general mode of trying the right of property, in any perſonal chattels. The finding is commonly a mere fiction in the formal part of the ſuit; for all ſorts of property, as *ſhips*,§ may be the ſubject of actions of trover. To entitle the plaintiff to recover, two things are neceſſary to be proved; property in himſelf, and

* 2 Cro. 567.
† 2 Cro. 255.
‡ 3 Term Rep. 51, 65.
§ 2 Term Rep. 462. 3 Ibid. 406.

and a wrongful converſion by the defendant to his own uſe.

7. Another ſpecies of actions upon the caſe, are ſuch as are grounded upon ſome *ſtatute*: for in every act of the legiſlature, where no ſpecific penalty is inflicted, an action upon the caſe may be commenced, grounded upon the ſtatute. Such is the action,* which may be proſecuted for cheating by falſe ſigns and tokens, though that is alſo an indictable offence. To this head muſt now alſo be referred, the redreſs ſought for any violation of literary property; ſince that right is no longer holden to ſubſiſt at common law, but merely upon the ſtatute. Of the ſame nature are actions upon the caſe brought for invading a patent right.

Having thus curſorily conſidered the divers ſpecies of actions upon the caſe, it is proper to obſerve, that ſeveral occaſions of bringing them, as againſt a common carrier,† or for deceit in ſelling unſound horſes, or the like, are, eſpecially of late years, uſually *declared upon in aſſumpſit*; becauſe ſomething being commonly paid down, the plaintiff, by adding a count for money had and received, may recover thereupon, and at leaſt prevent a nonſuit.

The next claſs of perſonal actions, ariſing *ex delicto*, comprehends ſuch, where the injury, for which they are brought, is ſuppoſed to be accompanied with force. Of this ſort may be accounted *replevin* and *treſpaſs*.

The word "replevin" ſignifies a ſubſtitution of one pledge in the room of another: for it is brought where goods or chattels are taken or diſtrained; the legality of which caption, or diſtreſs, is intended to be conteſted. To this end they are delivered back to the claimant, upon his undertaking and giving ſecurity, to try the right in

* Laws of N. Y. 10 ſeſſ. ch. 65. ſect. 2. 2 Term Rep. 581. 3 Term Rep. 98.

† 1 Term Rep. 277.

in an action, and to reſtore the thing taken, if determined againſt him.

Treſpaſs vi et armis may be conſidered as the wrong. for which it is brought, affects the *perſon* of the plaintiff, his *real property*, or his *goods*. This action is, therefore, of three kinds; though any of them may be united in the ſame declaration, and even be joined in the ſame count.

I. Injuries to the plaintiff's perſon are,

1. *Aſſault*, which is an attempt, or offer with force and violence, to do a corporeal hurt to another. This inchoate outrage will not, it ſeems, ſupport the action, unleſs * it be attended with an actual, or what amounts to a conſtructive,

2. *Battery*, for this term includes every injury done to the perſon of a man, in an angry, revengeful, rude, or inſolent manner.

3. *Mayhem* is defined † to be ſuch a hurt of any part of a man's body, whereby he is rendered leſs able, in fighting, either to defend himſelf, or annoy his adverſary.

4. *Impriſonment* includes battery; that is, no farther or other battery need be proved. Falſe, unwarrantable, or actionable impriſonment, is any detention of another's perſon, without an authority, both lawful in itſelf, and lawfully executed.

But, beſides injuries to the plaintiff's own perſon, a man may ſometimes ſue for damages, on the ground of injurious violence offered to the perſon of another. Thus a maſter, or parent, may maintain an action for the battery of his ſervant or child: but then the declaration muſt allege, that the plaintiff loſt the benefit of the ſervice of the ſervant or child ſo beaten. This is the form of action in uſe againſt an adulterer, for criminal converſation with

* 1 Hawk. 134, *ſed aliter* of an indictment.
† 1 Hawk. 111.

with the plaintiff's wife; and force and violence * are, in law, ſuppoſed to accompany that atrocious injury to the huſband; for, in reſpect to him, her conſent is as nothing.

II. Treſpaſs affecting real property, is called treſpaſs *quare clauſum fregit*, becauſe the defendant is required to account, "wherefore he broke and entered the plaintiff's cloſe;" that is, any land, of which he has the preſent poſſeſſion. In this action, the *tort* itſelf, which is the ground of the ſuit, muſt be directly and immediately injurious to the plaintiff's property and poſſeſſion; otherwiſe, according to a diſtinction firmly eſtabliſhed, not treſpaſs, but an action on the caſe is the proper remedy. Of the ſame nature, with this ſuit, is that of breaking and entering the plaintiff's dwelling-houſe, or treſpaſs *vi et armis quare domum fregit*.

III. An actionable treſpaſs againſt the *goods* of another, may be committed by taking them away, or by damaging them, without the diſpoſſeſſion of the owner. If the wrong be committed, while the goods can be ſaid to be in the owner's poſſeſſion, this action lies, as well as where they are taken from him; for the *giſt* of the action is the invaſion of poſſeſſion: therefore, if the defendant come to goods, by delivery of the plaintiff, it is not maintainable. †

As to mixed actions, they are ſuch wherein the plaintiff recovers not only his real eſtate or property, but damages for the injury he has ſuſtained. The principal of theſe in uſe are waſte and ejectment.

1. An action of *waſte* is the remedy for waſte injurioufly committed in houſes, gardens, woods, and other lands. The nature and proceſs of this action will be more fully treated of in the third part of this work.

* 7 Mod. 81. 2 Salk. 552.
† 2 R. A. 555.

2. *Ejectment.* This action, in its original nature, was a ſuit commenced to recover a term of years, in the premiſes, from which the plaintiff was *ejected*, together with damages for ſuch wrong done. But by fiction it has nearly ſuperſeded all recourſe to real actions, and has now become the moſt uſual mode of trying the title to lands.

Having thus defined the nature of actions in general, I proceed to ſtate in what caſes the plaintiff has his election to bring one kind of action or another.

Aſſize or *caſe.* If a man entirely ſtops the way, watercourſe, &c. of another, who is ſeized in fee, the injured party may have an aſſize, or an action on the caſe, though caſe is generally preferred.*

Treſpaſs, trover or *caſe.* If any one takes out of my poſſeſſion, wood cut down by me, being my property, I may maintain treſpaſs or trover. So if one detains a ſhip going a voyage, the maſter, who had the poſſeſſion, ſhall have an action on the caſe, or treſpaſs.† In ſome of theſe inſtances caſe may be preferable to treſpaſs, as the former ſpecies of action ſeldom admits of ſpecial pleading, and, conſequently, the proceedings will be leſs intricate.

Caſe or *debt.* Upon every contract executory, either of theſe actions may be brought.‡

Debt or *covenant.* Where a man covenants to do a thing under a penalty, the other may have debt or covenant; but the former action is moſt eligible; ſince, if the plaintiff eſtabliſhes his right, the jury cannot give leſs than the penalty; in covenant, they may give as ſmall damages as they pleaſe. Beſides, in debt, the judgment is final, and, ſhould it go by default, the trouble, expence and delay of a writ of inquiry are ſaved.§

Aſſumpſit

* 1 Com. Dig. 128. † Ibid.
‡ 4 Co. 95. 1 R. A. 593. lib. 10.
§ 1 Com. Dig. 129.

Aſſumpſit or *account.* Where a man is accountable for money or goods, aſſumpſit lies againſt him, or account, at the election of the plaintiff.*

Detinue, replevin, treſpaſs or *trover.* A man may have either of theſe actions for goods taken from him by wrong;† but replevin is ſeldom uſed, except where a diſtreſs is made for rent, ſervices, &c. If the plaintiff's damages do not exceed the value of the goods, trover is more eligible than treſpaſs; as, in the former action, the merits are tried upon the general iſſue.

Actions upon ſtatute, or *at the common law.* If a ſtatute gives a remedy in the affirmative (without a negative, expreſſed or implied) for a matter which was actionable by the common law, the party may ſue at the common law, or upon the ſtatute; for this does not take away the common law remedy.‡

As to the perſons who may ſue, generally ſpeaking, this is the privilege of every one, who is under no legal diſability, viz. not attainted of treaſon, or felony; outlawed; an alien enemy; feme-covert without her huſband; infants, but by *prochein ami,* or guardian; nor an ideot, or a lunatic in proper perſon. Executors or adminiſtrators, though outlawed, may ſue in right of their teſtator or inteſtate.§

Executors, when plaintiffs, muſt all be named; but in an action brought againſt them, ſuch only as are qualified to act muſt be named.

Alſo joint-tenants muſt ſue jointly, and tenants in common ought to join in perſonal actions, though not in real. Where a joint action of treſpaſs lies againſt ſeveral perſons, and ſome of their names are known, and ſome not, the action may be brought againſt thoſe who are known, by their particular names, *ſimul cum aliis,*‖ &c.

Every

* 1 Com. Dig. 129.
† Cro. Eliz. 824. 2 Cro. 50. 1 Com. Dig. 128.
‡ 2 Inſt. 200.
§ Co. Lit. 128, 131. 9 Rep. 3. 10 Mod. 6.
‖ 2 Lill. Abr. 469. Comb. 260.

Every ſubject of the ſtate may be ſued, though convicted or attainted; but, if in cuſtody on a criminal proſecution, he ought not to be charged with a civil action, without leave of the court,* though a priſoner for felony may be detained by a latitat.† Feme-coverts may be ſued, but their huſbands ought to be made defendants with them. Actions lie againſt infants for neceſſaries, and nothing elſe.

The next ſubject which remains to be conſidered, is, in what actions the defendant may be held to bail, and in what not. This is ſometimes conſidered in practical treatiſes, under the head of putting in bail; but, ſince it is a part of knowlege neceſſary previous to ſuing out proceſs, the law, relative to the ſubject, comes moſt properly in this place.

Formerly, by the common law, the defendant could not be arreſted at all, for a civil injury unaccompanied with force. But this impunity of the defendant's perſon, in caſe of peaceable though fraudulent injuries, producing great contempt of the law, in indigent wrongdoers, a practice was introduced of commencing the ſuit, by bringing an original writ of treſpaſs *quare clauſum fregit*, for breaking the plaintiff's cloſe *vi et armis*, which, by the old common law, ſubjected the defendant's perſon to be arreſted, by the writ of capias; and then, by connivance of the court, the plaintiff might proceed for any other injury. Afterwards, by divers ancient Britiſh ſtatutes, all recognized by ſtatute, 10 ſeſſ. ch. 9. ſect. 1. a capias was alſo allowed, in all actions of account, debt, detinue, annuity, covenant, conſpiracy, and of the caſe, and in actions of replevin, when the capias in withernam is returned *nulla bona*.

Under this law, a defendant might have been holden to bail, for any ſum of money, upon a general proceſs, not

* Forſt. Cr. Law 61. Salk. 354. 1 Wilſ. 217.
† Hil. 9 Geo. 3. 2 Crompt. 6.

not expreſſing any particular cauſe of action. To remedy the miſchiefs ariſing from this, the ſtatute, 10 ſeſſ. ch. 26. ſect. 2. enacts, "that no perſon arreſted "by any ſheriff, &c. by force, or colour of any bail-"able writ, bill, or proceſs iſſuing out of this court "(except capias utlagatum, attachments upon reſcous, or "upon contempt, and attachments of privilege) wherein "the certainty and true cauſe of action is not expreſſed "particularly, ſhall be compelled to give ſecurity for his "appearance, in any penalty, or ſum exceeding 40l. "and all ſheriffs, &c. ſhall deliver ſuch perſon upon ſe-"curity, in the ſum of 40l. and no more, or on indorſing "his appearance upon ſuch proceſs." This ſtatute has given riſe to the inſertion in a writ, of what is denominated the *ac etiam*, by means of which, the cauſe of action is expreſſed, in addition to the general complaint of treſpaſs.

In all actions of a bailable nature, this *ac etiam* muſt be inſerted, as a warrant to the ſheriff to demand bail: and the general rule, which, however, is liable to many exceptions, is, that where there is a certain debt, or damages which may be reduced to a certainty, as in aſſumpſit, or covenant for the payment of money,* ſpecial bail is demandable of courſe. But where the damages are uncertain, as in ſlander, aſſault and battery, or treſpaſs,† other than for goods or on lands, the defendant ought not to be held to bail, without a ſpecial order of the court, or a judge, founded on an affidavit of the circumſtances. Yet the court have determined, that in debt, for the penalty in a covenant, bail may be taken for ſuch penal ſum, becauſe it is that which the parties themſelves have elected.‡ It is not uſual to grant a ſpecial order, unleſs there has been an outrageous battery,

or

* Bar. 79, 80.
† Bar. 108.
‡ S. C. Jan. T. 1793.

or mayhem, or the defendant is about to quit the ſtate. There are ſome exceptions, however, to this doctrine, where the defendant may be held to bail of courſe, in an action for uncertain damages;* or where in an action brought for a ſum certain, bail cannot be demanded. Of the former kind are trover, treſpaſs upon lands, and *pro aſportatione bonorum*; of the latter, debt on penal ſtatutes.

In an action of trover, the defendant may be held to bail of courſe, though the action be brought for uncertain damages; for this is more an action of property, than a *tort*. The like reaſon applies to treſpaſs *pro aſportatione bonorum*. In actions of treſpaſs upon lands, the ſtatute 11 ſeſſ. ch. 46. ſect. 29. entitles the plaintiff to ſpecial bail; and gives liberty to inſert an *ac etiam*, or proper clauſe for that purpoſe, in the firſt proceſs.

In an action of debt on a penal ſtatute,† citizens of this ſtate or of the United States, ſued in this court, upon any penal law, may appear by attorney without bail. This is founded on the maxim, that every man ſhall be preſumed innocent of an offence, till he be adjudged guilty. Though upon a remedial ſtatute, as for money won at play,‡ or on a ſtatute, which expreſſly authorizes an arreſt, as for double rent,§ the defendant may be held to bail.

In action of debt upon a recognizance of bail, or upon a bail, or replevin bond,‖ the defendant cannot be held to bail; for, by taking the bail or aſſignment of the bond, they are admitted to be ſufficient: and beſides, if an arreſt were allowed in ſuch actions, there would be bail *ad infinitum*.

Where

* Yelv. 53.
† Laws of N. Y. 11 ſeſſ. ch. 9 ſect. 5.
‡ 2 Str. 1079. 2 Wilſ. 67.
§ Laws of N. Y. 11 ſeſſ. ch. 36. ſect. 21.
‖ 1 Salk. 99.

Where there have been mutual dealings between the parties, the balance is conſidered as the debt at law, as well as in equity; and, therefore, upon an unliquidated account, if the defendant were held to bail for the ſum due to the plaintiff, on the debtor ſide only, where the balance would not warrant his being ſo held to bail, the defendant would be intitled to an action for a malicious arreſt.*

The defendant having once given bail, ought not to be again compelled to do ſo for the ſame cauſe of action. *Nemo debet bis vexari pro eadem cauſa.* Thus, where the defendant was arreſted on a writ, taken out pending a prior action, wherein he had previouſly given bail for the ſame cauſe, the court diſcharged him on common bail.† But where, in a ſimilar caſe, it appeared the bail in the [illegible] action were forſworn, the court refuſed to aſſiſt the defendant.‡

This rule of not permitting the defendant to be twice held to bail for the ſ[illegible]e cauſe, was formerly ſo rigidly adhered to, that where the plaintiff was nonproſſed for want of a declaration, he was afterwards only intitled to common bail, in a ſecond action.§ But a different doctrine now prevails; for the plaintiff‖ is ſaid to ſuffer enough by paying [illegible]ſts in the firſt action, and therefore, ought not to be in a worſe condition than before. For a ſimilar reaſon, [illegible]re the plaintiff, having miſconceived his action, moves to diſcontinue upon payment of coſts, he may, after the coſts are taxed and paid,¶ take out a new bailable writ for the ſame cauſe.** But where the plaintiff, not liking the bail in the former action, obtained a rule

* 4 Bur. 1996.
† 2 Str. 1209.
‡ Ibid. 1216.
§ 1 L. Raym. 679. Com. Rep. 96.
‖ 1 Str. 439.
¶ 2 Str. 1209.
** 2 Will. 381.

rule for leave to diſcontinue, upon payment of coſts, and afterwards proceeded to charge the defendant in cuſtody, with a declaration in a new action, the court, conceiving this to be a trick, diſcharged the rule: ſo that the bail, in the former action, ſtill continued liable.* Wherever the ſecond action appears to be vexatious,† or the defendant is detained in cuſtody, after being ſuperſeded or ſuperſedable in a former action, by the laches of the plaintiff,‡ the court will diſcharge the defendant on common bail, even though he be arreſted on a note, given ſubſequent to the ſuperſedeas.§

Upon the ſame principle of not permitting the plaintiff to demand ſpecial bail twice of the defendant, for the ſame cauſe, it is holden,‖ that in an action of debt upon judgment, whether after verdict or by default, the defendant cannot be held to bail, if he was previouſly ſo in the original action; even if the bail in that action have become inſolvent;¶ or if the defendant has ſurrendered in their diſcharge, and obtained a ſuperſedeas.** But where the defendant has been ſuperſeded by ſurpriſe, he ſhall be held to bail.†† If the defendant has not given ſpecial bail in the original action, he may be compelled to do it in an action of debt upon the judgment, provided there was originally a bailable debt, or cauſe of action.‡‡ But where there was originally no debt at all, as where the judgment is merely for coſts upon a nonſuit,§§ or the debt was originally not ſufficient to hold defendant to bail, but is raiſed to

* 4 Bur. 2502.
† 2 Bla. Rep. 809.
‡ 2 Str. 782, 943, 1039. 2 Wilſ. 93. Cowp. 72.
§ 2 Str. 1218.
‖ 2 Str. 782. Say. Rep. 43. Pr. Reg. 55, 6.
¶ Say. Rep. 160.
** 2 Str. 1039.
†† 1 Bar. 50.
‡‡ Pr. Reg. 55, 6.
§§ 5 Bur. 2660. 2 Bla. Rep. 1274.

to a larger ſum by the addition of coſts;* or the action was for general damages, which are reduced by the judgment to a ſum certain,† the defendant cannot be held to bail, either upon the judgment itſelf, or upon a ſubſequent promiſe, in conſideration of forbearance, to pay the debt and coſts. Yet where a cauſe, in which the defendant has once given bail, is referred to arbitration, he may be held to bail again in an action on the award.‡

Having conſidered in what caſes ſpecial bail depends on the nature of the action, I ſhall next examine, when the defendant is privileged from arreſt, which is either perſonally, or by reaſon of the time and place, in which he is found.

1. By the law of nations, as declared by an act of the United States, chap. 9. ſect. 25. any proceſs ſued out, whereby any ambaſſador, or public miniſter, received as ſuch by the preſident, or any of their domeſtic ſervants, may be arreſted, or their goods diſtrained, ſhall be void, and the perſon ſuing the ſame liable to puniſhment. But § a defendant, claiming the benefit of this act as domeſtic ſervant to a public miniſter, muſt be really and *bona fide* his ſervant, at the time of the arreſt; and muſt clearly ſhow, by affidavit, the general nature of his ſervice, the actual performance of it, and that he did not contract the debt prior to entering into the ſervice of ſuch miniſter:‖ for, by the law of nations, a public miniſter cannot protect a perſon who is not *bona fide* his ſervant. It is the law which gives the protection; and though the proceſs of the law ſhall not take a *bona fide* ſervant out of

* 2 Str. 975, 1077. 3 Bur. 1389. 4 Bur. 2117. Bar. 432, contra.

† 2 Str. 1243. 1 Wilſ. 120.

‡ 2 Term Rep. 756.

§ 2 Str. 797. 2 L. Ray. 1524. Fitzgib. 200. 1 Wilſ. 20, 78, 1 Bla. Rep. 48. 1 Bur. 401. 3 Bur. 1478. 1 Bla. Rep. 471, 3 Bur. 1676, 1731. 3 Wilſ. 33.

‖ See the ſtatute, ſect. 27.

the ſervice of a public miniſter, yet, on the other hand, a public miniſter ſhall not take a perſon, who is not *bona fide* his ſervant, out of the cuſtody of the law, or ſcreen him from the payment of his juſt debts.* This privilege, however, extends to the ſervants of a public miniſter, being natives of the country where he reſides, as well as to his foreign ſervants;† and not only to ſervants lying in his houſe, for many houſes are not large enough to contain all the ſervants of ſome public miniſters, but alſo to real and actual ſervants lying out of his houſe.‡ Nor is it neceſſary, to intitle them to the privilege, that their names ſhould have been regiſtered in the ſecretary of ſtate's office, and tranſmitted to the marſhal of the diſtrict wherein congreſs reſides;§ though, unleſs they have been ſo regiſtered, the ſheriff, or his officers, cannot be proceeded againſt for arreſting them.‖ Neither is it to be expected, that every particular act of the ſervice ſhould be ſpecified. It is enough, if an actual *bona fide* ſervice be proved; and, if it be ſufficiently made out by affidavit, the court will not, upon bare ſuſpicion, ſuppoſe it to have been merely colorable and colluſive.¶

2. By the conſtitution of the United States,** the ſenators and repreſentatives in congreſs ſhall be privileged from arreſt, during their attendance at the ſeſſion of their reſpective houſes, and in going to and returning from the ſame. By a law of this ſtate,†† no member of the legiſlature thereof, or his ſervant, ſhall be liable to arreſt, on any civil proceſs, while coming to or returning from the place where the legiſlature ſits, to the place of ſuch member's

* 4 Bur. 2016, 2017.
† 3 Bur. 1676.
‡ 2 Str. 797. 3 Wilſ. 35.
§ 4 Bur. 2017. 3 Term Rep. 79.
‖ See the ſtatute, ſect. 27. 1 Wilſ. 20.
¶ 4 Bur. 1481.
** Art. 1. ſect. 6.
†† Laws of N. Y. 11 ſeſſ. ch. 34. ſect. 1.

member's reſidence; but ſuch coming, or returning, ſhall not exceed fourteen days.

3. Members of corporations aggregate, not being liable to a capias, cannot be arreſted for any thing done in their corporate capacity.*

4. Inſolvent debtors, duly diſcharged under the act,† are not liable to be arreſted for debts contracted prior to the aſſignment of their effects;‡ nor for the coſts of ſuing for ſuch debts.§ If an inſolvent, having obtained his diſcharge, conſcientiouſly promiſe to pay a debt contracted prior to the aſſignment, he cannot be arreſted thereon,‖ for that would be taking advantage of his conſcientiouſneſs, to uſe it againſt conſcience. But wherever there is a fraud, this diſcharge will be void.¶ Where the defendant is intitled to the benefit of this certificate, he is diſcharged by pleading the general iſſue, and giving it in evidence, if in time;** and it is preſumed, when his certificate is obtained after judgment, the court would ſet that judgment aſide upon motion; or recourſe may be had to an *audita querela*.

5. Heirs, executors and adminiſtrators cannot be held to bail, where they are merely ſo chargeable, and have duly adminiſtered the effects of the deceaſed. But, where the executor or adminiſtrator have perſonally promiſed to pay a debt or legacy, they may be held to bail on ſuch promiſe.†† So they may be in an action of debt on judgment, ſuggeſting a *devaſtavit*,‡‡ if it appears by affidavit,

* Bro. tit. Corporations, 43.
† Laws of N. Y. 11 ſeſſ. ch. 92.
‡ Ibid. ſect. 7.
§ 2 Str. 1196. 1 Wilſ. 41. Cowp. 138. but ſee 1 Str. 477.
‖ 2 Bur. 736. Cowp. 549.
¶ Laws of N. Y. 11 ſeſſ. ch. 92. ſect. 11.
** Ibid. ſect. 10.
†† 1 Term Rep. 716.
‡‡ 1 Sid. 63. 1 Lev. 39. Carth. 264. 1 Mod. 16. 1 Salk. 98. Highmore on Bail, 10.

affidavit, or the ſheriff's return,* that they have waſted the effects of their teſtator or inteſtate.

6. In actions againſt huſband and wife, the huſband alone is liable to be arreſted, and ſhall not be diſcharged, until he has put in bail for himſelf and his wife.† If the wife be arreſted on meſne proceſs, ſhe ſhall be diſcharged on common bail, and that, whether arreſted ſingly, or jointly with her huſband.‡ So, in an action againſt the wife only, if it be clear and notorious, that ſhe is covert, common bail ought to be received;§ but if her coverture be doubtful, or the plaintiff has truſted her as a feme ſole,‖ ſhe muſt find ſpecial bail. Likewiſe, if the wife is taken in execution,¶ ſhe ſhall not be diſcharged, unleſs it appear that there is fraud and colluſion between the plaintiff and her huſband, to keep her in priſon.

7. Attornies and officers of the court, on account of the ſuppoſed neceſſity of their attendance, in order to tranſact the buſineſs of the court, are, generally ſpeaking, privileged from arreſt.** But there are cases in which this privilege is waived, though they will more properly be treated of when we conſider the mode of proceeding againſt theſe officers.

8. The parties to a ſuit, and their witneſſes, are, for the ſake of public juſtice, protected from arreſt, in coming to, attending upon, and returning from the court.†† Nor have the courts been nice in ſcanning this privilege, but have given it a large and liberal conſtruction. Thus, where

* Comb. 206, 325.

† 1 Vent. 49. 1 Mod. 8. 6 Mod. 17, 86.

‡ Cro. Jac. 445. Pr. Reg. 65, 66.

§ 6 Mod. 105. 7 Mod. 10.

‖ Wilſon v. Campbell, M. 20 Geo. 3.

¶ 2 Str. 1167, 1237. 1 Wilſ. 149. Bar. 203. 3 Wilſ. 124. 2 Bla. Rep. 720.

** 1 Mod. 10.

†† 2 Roll. Abr. 272. 2 Lill. Pr. Reg. 369. 1 Mod. 66. 1 Vent. 11. Gilb. C. P. 207.

where the defendant was attending his cauſe, and, though it was put off early in the day, ſtayed in the court till five in the afternoon, and then went, with his attorney and witneſſes, to dine at a tavern, where he was arreſted during dinner, the court held, that ſuch a neceſſary refreſhment as this, ought not to be looked on as a deviation, ſo as to cancel the defendant's privilege *redeundo*.*

9. Every man is privileged, by the common law, from arreſt, in his own houſe, provided the outer door be ſhut;† or in any place where the people's juſtices are actually ſitting.‡

10. Voters at elections, for delegates to congreſs, are protected from the ſervice of any civil proceſs, between the day preceding the election, and the day ſubſequent to the cloſing the poll.§

Laſtly, by ſtatute 11 ſeſſ. ch. 42. ſect. 3. no perſon ſhall ſerve or execute any proceſs on a Sunday, (except for treaſon, felony, or breach of the peace.) However, one who is convicted on a *penal* act, cannot be arreſted on a Sunday, for non-payment of the forfeiture.‖ But a priſoner, who has eſcaped, may be retaken on a Sunday; and that, either by the officer upon freſh purſuit, or by virtue of an eſcape warrant;¶ for this is not an original proceſs, but the party is ſtill in cuſtody, on the old commitment. Alſo, it is holden, that bail may take their principal on a Sunday, in order to ſurrender,** for this is not by virtue of any proceſs at all; and, in fact, he may be conſidered as in their cuſtody. It ſhould ſeem, that proceſs of contempt, being of a criminal nature, may be ſerved upon a Sunday.††

In

* Bla. Rep. 1113. 2 Str. 982.
† 5 Co. 91. but ſee Cowp. 1, 63.
‡ 3 Inſt. 140. 1 Sid. 211. 1 Lev. 206. 2 Mod. 181.
§ Laws of N. Y. 16 ſeſſ. ch. 5. ſect. 9.
‖ 1 Term Rep. 265
¶ 2 L. Raym. 1028. 2 Salk. 626. 6 Mod. 95.
** 6 Mod. 231. 1 Atk. 239.
†† 12 Mod. 348. 1 Atk. 55.

In ſome of the preceding caſes, the proceſs is declared to be void, as againſt ambaſſadors, or through being ſerved on the firſt day of the week, &c. In others, the court is expreſſly required to diſcharge the defendant, as an inſolvent debtor. It may be remarked in general, that where the defendant is intitled to privilege, as the arreſt is irregular and unlawful, the court will diſcharge him, upon motion, and not put him to the neceſſity of ſuing out a writ of privilege.*

The mention of ſome of theſe latter caſes may be imagined rather a digreſſion, from the laſt part of this chapter, namely, the ſhowing in what caſes the practitioner ſhould require bail, by his proceſs; but the near alliance it bears to that point induced me to treat of it in this part of the work.

I have now conſidered the nature of the different kinds of actions, or remedies pointed out by the law to an injured party; who are intitled to bring thoſe actions; againſt whom; and, laſtly, in what caſes the defendant muſt put in ſubſtantial ſecurity, to appear and abide the deciſion of the ſuit, or have his perſon detained in cuſtody. The mode of commencing and purſuing an action in general will therefore be our next taſk.

But, previous to entering upon that, it may as well be obſerved here, as in any other place, that, where the plaintiff reſides out of the ſtate, he ought, previous to ſuing out proceſs, to file ſecurity for the coſts. The ſecurity required, is a bond from the plaintiff to the defendant, with one ſufficient ſurety, being a freeholder, and reſiding within the ſtate; or a bond from any ſufficient freeholder ſo reſiding to the defendant, in the penalty of 20l. with condition for payment of coſts to the defendant, in caſe the plaintiff ſhall not proſecute his ſuit to effect, be nonſuited, or diſcontinues without leave of

* 2 Str. 989. Fort. 159. Com. Rep. 444. but ſee 1 Wilſ. 278.

of the court. If the plaintiff applies for a writ in his own name, the clerk ought not to iſſue a writ, without this ſecurity. Where the plaintiff's attorney neglects to do this before bringing the action, the defendant's attorney may, at any ſtage of the proceedings, lay the plaintiff under a rule to file ſuch ſecurity, or be non-proſſed. This rule is granted *niſi cauſa*. If the rule is complied with, notice of filing the ſecurity muſt be ſerved on the defendant's attorney; and, after that, the plaintiff may proceed in the action. If the rule is not obſerved, it is made abſolute, and judgment of non-pros may thereupon be entered.

PART

PART I.

PROGRESS OF A SUIT IN COMMON CASES.

CHAPTER I.

Of Proceſs.

THE uſual method of commencing an action in the ſupreme court, where the defendant lived in New-York or Albany, was to iſſue a proceſs, ſtyled a bill of either of thoſe cities, in the nature of, and formed on the ſame principle as the bill of Middleſex in England, or proceſs which iſſued if the defendant lived in the county where the court ſat. But this has, of late, given place to the *capias*, a writ compounded of that uſed in the Engliſh common pleas, and the bill of New-York; and always uſed, where the defendant lived in any other county. This is a writ iſſued by the clerk, in the name of the people of the ſtate of New-York,* grounded, or ſuppoſed to be grounded on an original writ, and is directed to the ſheriff of the county, where the defendant reſides; it is in the following form:---

" The people of the ſtate of New-York, by the grace " of God, free and independent: to our ſheriff of our *city* " *and* county of New-*York*, greeting: we command you,

* Conſtitution of New-York, art. 31.

" * that you take *Benjamin Bell*, if he may be found in " your bailiwick, and him ſafely keep, ſo that you may " have his body before us, at our city of *Albany*, on the " third Tueſday of October next, to anſwer unto *Abra-* " *ham Adams*, of a plea of treſpaſs ;† and have you then " and there this writ. Witneſs *Robert Yates*, eſq; chief " juſtice, at our city of *Albany*, the *eleventh* day of " *Auguſt*, in the *ſeventeeth* year of our independence.

" *C. Clark*, attorney. *M'Keſſon.*"

If the defendant is not taken on the *capias*, the plaintiff may have an *alias*, and *pluries capias*, directed to the ſame ſheriff, commanding him as *before*, or as *oftentimes*, he has been commanded to take the defendant, &c. or he may have a *teſtatum capias* directed to the ſheriff of a different county (and afterwards, if neceſſary, an *alias teſtatum capias*) ſuggeſting, that the defendant lurks and wanders in that county: ſo that, by a combination of circumſtances, the plaintiff may have recourſe to an *alias* or *pluries teſtatum capias*, which is the moſt complex writ againſt the defendant's perſon, and commands the ſheriff as *before*, or as *oftentimes* he has been commanded, to take the defendant, it being teſtified that he lurks and and wanders in his county.

Since ſome practiſers may chooſe to proceed by bill, a few words explanatory of that mode will not be deemed unneceſſary. It is proper, however, to mention, that it has been doubted, whether the bill can legally be uſed here,

* In an *alias*, here inſert, " as before it was commanded " you;" and if a *pluries*, " as oftentimes it has been command- " ed you." This direction may likewiſe ſerve to make an *alias*, or *pluries*, of the ſubſequent writs, though, in the bill, ſay, of the ſheriff, *him* inſtead of *you*.

† When ſpecial bail is meant to be taken, an *ac etiam* muſt be here inſerted, adapted to the nature of the action; *vide* p. 46. The like inſertion, in the ſame caſe, muſt be made in the other writs.

here, ſince the conſtitution* directs, that all writs and other proceedings ſhall run in the name of *the people of the ſtate of New-York*, and be teſted in the name of the chancellor, or chief judge of the court whence they iſſue: it is therefore ſaid, that as the bill does not run in the name of the people, nor has any teſte, it is contrary to the conſtitution. With all due reſpect to this opinion, it may be obſerved, that if we recur to the ſpirit of the conſtitution, it does not ſeem to have much weight. Before the revolution, writs ran in the name of the king, and originals were likewiſe teſted in his name; the apparent meaning of the article is not, therefore, to make a new practice, but to accommodate the old to the preſent circumſtances; and accordingly the obvious intent is to put the *people* where the king *was uſed formerly*; and to teſte originals in the name of the chancellor. That this is a juſt expoſition may be inferred from the article itſelf, which does not mention *writs* only, but *other proceedings:* a declaration and a plea are other proceedings, and it may with as much propriety be obſerved, that they muſt run in the name of the people, and be teſted, as that the bill muſt, unleſs the clauſe is conſtrued to mean ſuch writs and proceedings alone, as before the conſtitution were neceſſary to run in the name of the king and to have a teſte. As to the direction in the conſtitution, that all *writs* muſt be teſted in the name of the chief judge, there is not an *Engliſh law book* but ſays the ſame; and that it does not apply to the proceſs we are ſpeaking of is obvious, for the bill is not a *writ*, but a *precept*. It is likewiſe ſaid, that as the court ſits in two counties, the bill cannot be uſed, for it muſt ſometimes be made returnable in a different county than whence it iſſues. This, at all events, is no reaſon againſt the practice where the teſte and return are in the ſame county, and where the contrary ariſes a *capias* may be ſued out: for

* Article 31.

for the principle upon which this bill is uſed, is, that it iſſues into the county where the court ſits. I give, however, no decided opinion on the practice, only the reaſons *pro* and *con*. It is ſcarcely neceſſary to obſerve, that if the bill cannot be uſed, ſo cannot the *latitat*; ſince it is not only founded on the bill, but recites it. I proceed to the nature of this proceſs. As the *capias* was founded on an original writ; the bill of New-York or Albany, and the *latitat*, were grounded on a bill, or complaint ſuppoſed to be previouſly filed. This appears from the words "by bill," at the end of the bill of New-York.* The form of the proceſs is as follows:---

"*Albany*, *ſs*.

"The ſheriff is commanded,† that he take *Benjamin* "*Bell*, if he may be found in his bailiwick, and him "ſafely keep, ſo that he may have his body before the "people of the ſtate of New-York, at the city of *Albany*, "on *the third Tueſday of October next*, to anſwer *Abraham* "*Adams*, of a plea of treſpaſs;‡ and that he have then "and there this precept. By bill,

"*C. Clark*, attorney. *M'Keſſon.*"

If the defendant is not arreſted on this proceſs, it may be continued by *alias*, &c. as before. But if the defendant reſides in another county, a *latitat* may be ſued out, directed to the ſheriff of that county; thus:

"The people of the ſtate of New-York, by the grace of "God, free and independent: to the ſheriff of our county "of *Orange*, greeting: whereas we lately commanded our "ſheriff of *Albany*, that he ſhould take *Benjamin Bell*, if "he ſhould be found in his bailiwick, and him ſafely "keep, ſo that he might have his body before us, at our "city of *Albany*, at a certain day now paſt, to anſwer "*Abraham*

* Trye Jus Filiz. 100.

† If an *alias* or *pluries*, inſert the words directed in the *capias*.

‡ If bailable, inſert *ac etiam*.

" *Abraham Adams*, of a plea of treſpaſs;* and our ſaid " ſheriff of *Albany* at that day returned to us, that the ſaid " *Benjamin* was not found in his bailiwick; whereupon, " on the behalf of the aforeſaid *Abraham*, it is ſufficiently " teſtified in our court, before us, that the ſaid *Benjamin* " doth lurk up and down and ſecrete himſelf in your " county; therefore, we command you, that you take " him, if he ſhall be found in your bailiwick, and him " ſafely keep, ſo that you may have his body before us, " at our city of *Albany*, on *the third Tueſday of October* " *next*, to anſwer the ſaid *Abraham*, of the plea *and bill*† " aforeſaid; and have you then there this writ. Witneſs " *Robert Yates*, eſq; chief juſtice, at our city of *Albany*, " the *eleventh* day of *Auguſt*, in the *ſeventeenth* year of " our independence.

" *C. Clark*, attorney. *M'Keſſon.*"

This writ may be iſſued in the firſt inſtance, and if it prove ineffectual, an *alias*,‡ &c. may be repeated from time to time, till the defendant be arreſted.

In order to ſue out either of theſe writs, engroſs it on parchment in the proper form; carry it to the clerk's office, where it is ſealed; then deliver it to the ſheriff to be executed. At the time of iſſuing all writs, a *precipe*, ſpecifying the title of the cauſe, the nature of the action, with the teſte and return of the writ, and the day of ſuing it out, muſt be left with the clerk.

The *teſtatum capias* is ſeldom uſed; its neceſſity having ceaſed. Formerly the practice was, if the plaintiff declared out of the county where his action was commenced, he loſt his bail: but this is now held not to be a waiver of bail; ſo that, when the defendant lives in another

* If an *ac etiam*, it muſt be inſerted here.

† If no *ac etiam*, leave out theſe words, "and bill."

‡ The *alias* and *pluries latitat* are preciſely in the ſame form as the *alias* and *pluries capias*.

ther county than where you wiſh to try your cauſe, ſue out the *capias* into the county where he lives in the firſt inſtance.

In point of form, the *capias*, &c. are *general* without, or *ſpecial* with a clauſe of *ac etiam*. If the action is of a bailable nature, and you mean to hold the defendant to bail, it has been before ſhown,* that this *ac etiam* is neceſſary to be inſerted for the purpoſe of expreſſing the cauſe of action, purſuant to the ſtatute of 10 ſeſſ. ch. 26. ſect. 2. Though the defendant cannot be held to bail on a recognizance of bail, yet it is neceſſary to inſert an *ac etiam* in a writ thereon, otherwiſe the defendant, or his attorney, will not be bound to accept of a declaration in debt on ſuch recognizance. The following are the moſt uſual *ac etiams* required :---

In Treſpaſs on the Caſe.

" And alſo to a bill of the ſaid *Abraham*, againſt the " ſaid *Benjamin*, for 20l. upon promiſes according to the " cuſtom of our court, before us to be exhibited."

In Debt.

" For 200l. of debt."

In Covenant.

" For breach of covenant to the damage of the ſaid " *Abraham*, of 200l."

In Treſpaſs pro aſportatione bonorum.

" For taking and carrying away the goods and chat- " tels of the ſaid *Abraham*, to the value of 200l."

In Trover.

" For converting and diſpoſing of the goods and chat- " tels of the ſaid *Abraham*, to the value of 200l."

In Detinue.

" For detaining the goods and chattels of the ſaid " *Abraham*, to the value of 200l."

In

* Page 29.

In Aſſault and Battery.

" For beating, wounding, and ill treating (as the " caſe may be) the ſaid *Abraham*, to his damage of 200l." (double the ſum ordered by the judge.)

On Recognizance of Bail.

" For 200l. debt upon recognizance." This does not warrant holding the defendant to bail, but is only to prevent ſurprize. But if the action is on the baſt-bond, there is no occaſion for this clauſe, but ſay, " to anſwer " *Abraham* [illegible]s, aſſignee of *David Dunham*, eſq; ſheriff " of *Columbia* county, according to the ſtatute in ſuch caſe " made and provided, of a plea of treſpaſs ſeparately."

In Treſpaſs on Lands.

" And alſo to a bill of the ſaid *Abraham*, againſt the " ſaid *Benjamin*, for breaking and entering the cloſe of " the ſaid *Abraham*, and taking and carrying away his " timber, goods and chattels, to the value of 200l. ac- " cording to the ſtatute in ſuch caſe made and provided, " to be exhibited."

If the action is ſeveral, ſay, " to the ſeveral bills."

In the bill of New-York, the *ac etiam* runs thus:

" And alſo to a bill of the ſaid *Abraham*, againſt the " ſaid *Benjamin*, for 200l. upon promiſes, according to " the cuſtom of the court of the ſaid people, before the " people themſelves to be exhibited."

In aſſault and battery, and in actions where bail is not demandable of right, in order to hold the defendant to bail, affidavit muſt be made of the ſpecial circumſtances, and the judge will thereupon indorſe an order on the writ to hold the defendant to bail in a ſum certain.*

Care ſhould be taken to name the parties properly, and wherever they ſue, or are ſued, in particular characters, it ſhould in general be mentioned, as executors or the

* Page 29.

the like: though, if the writ is general, and the declaration is as executor, adminiſtrator, in *qui tam*, or as aſſignee of the ſheriff, it is good;* but this will not hold *e converſo*.†

The *alias capias*, &c. ſhould correſpond with the previous proceſs, in the names of the parties, &c.‡

The *capias*, &c. ſhould be directed to the ſheriff of the county, where the defendant is ſuppoſed to reſide; or, if the ſheriff is a party, to the coroner;§ and, if he alſo is a party, to *elisors* appointed by the court, or a judge.

The writ ſhould be teſted, (except the bill, which has no teſte) in the name of the chief juſtice,‖ or ſenior judge of the court, if there be no chief juſtice; and it may be teſted before the cauſe of action accrued, if ſued out after.¶ If it be ſued out in term time, it is uſually teſted on the firſt day of that term, and, if ſued out in vacation, on the laſt day of the preceding term;** if teſted in vacation it is merely void.†† All writs, in this court, are made returnable on a day certain in term, as on the third Tueſday of October next, or Saturday the 27th day of October inſtant. But they muſt not be teſted or returnable, on a *dies non juridicus*, as on a Sunday.‡‡ There is no neceſſity for any particular number of days between the teſte and return of a *capias*; (unleſs you proceed by original) even one day has been deemed ſufficient.§§ Though, as the proceſs is *de die in diem*, it cannot be made returnable on the day of ſuing it out.‖‖ This relative

* Str. 1232. Bar. 495.
† 4 Bur. 2417.
‡ 3 Term Rep. 660.
§ 1 Bla. Rep. 506.
‖ Conſtitution of New-York, article 31.
¶ 2 Bur. 967.
** Keb. 214. T. Jon. 149. 1 Vent. 363. 2 Bur. 962.
†† 2 Bur. 954, 967. 5 Bur. 2588. 2 Bla. Rep. 683.
‡‡ Trye Jus Filiz. 191.
§§ 2 Str. 917. 2 Barnardis 60.
‖‖ 2 L. Ray. 777. 2 Salk. 421. 7 Mod. 12.

lative to the direction, teſte, and return of the *capias*, &c. is applicable to the *alias* and other ſubſequent proceſs.

By ſtatute, 10 ſeſſ. ch. 35. ſect. 9. every proceſs for arreſting, and every writ of execution, or ſome label annexed, ſhall, before ſervice or execution thereof, be ſubſcribed or indorſed with the name of the attorney, or perſon, by whom the ſame is ſued forth.*

Whatever may have been the caſe in former times, the meſne proceſs may now be conſidered as the commencement of a ſuit, and the ſuing of it out as ſuch, may be replied to a plea of the ſtatute of limitations,† or a tender made after ſuing it out.‡ Penal actions have been held well commenced by a *latitat*.§ In general, it may be obſerved, the plaintiff has his election whether to conſider theſe writs as originals, or barely as proceſs to bring the defendant into court, grounded on ſome other writ or bill.‖

If the proceſs be defective in point of form,¶ or in its direction,** teſte,†† or return;‡‡ or the attorney's name be not ſubſcribed to it,§§ the defendant may move the court to ſet aſide the writ and proceedings conſequent thereon. It is to be noted, that the principal certainties required in writs, are, 1. a command to the proper officer to warn the party to appear;‖‖ 2. the cauſe in

* Rule S. C. Apr. T. 1702.

† Cowp. 456. Styl. Rep. 156, 178. 1 Sid. 53, 60. 2 L. Ray. 880, 1441. 1 Str. 550. 2 Str. 736. 2 Bur. 961.

‡ Cro. Car. 264. 1 Wilſ. 141.

§ 2 Bur. 950. 3 Bur. 1243. Cowp. 454.

‖ 1 Wilſ. 146, 147.

¶ 3 Term Rep. 660.

** 1 Bla. Rep. 506. Bar. 422.

†† 2 Bur. 954, 967. 5 Bur. 2588. 2 Bla. Rep. 683. Bar. 407, 408, 409, 420.

‡‡ 1 Str. 399.

§§ Wright v. Willes, M. 21 Geo. 3. *Per cur.* T. 29 Geo. 3. Bar. 415.

‖‖ 4 Bac. Abr. 450.

which he is to appear; 3. the time when; and, 4. the place where to appear. If any of theſe fail, the writ will not be good. But with reſpect to curing irregularities, and amendment of proceſs, it will be mentioned more fully hereafter.*

CHAPTER II.

Of Proceedings upon Proceſs previous to Appearance—the Arreſt—Bail-Bond—Return of Writ—Rules thereupon.

THE proceſs muſt be executed by corporal ſeiſing, or touching the defendant's body,† which is done by the ſheriff, or other officer to whom the writ is directed, or by his general or ſpecial deputy. The officer muſt likewiſe acquaint the defendant with the contents of the writ, and ſhow it, if required. The arreſt may be made at any *time* before, or *on* the day of the return of the writ, even after the riſing of the court.‡ A writ muſt not be executed out of the county, to the ſheriff of which it is directed:§ but where there is a diſpute as to the boundaries of the county, the court will not determine it on motion.‖ In an action againſt huſband and wife, it is ſufficient to arreſt

* Part iv. ch. 1. 1 Str. 155. Bar. 163, 167, 415. 2 Str. 1072. Wright v. Willes, M. 21 Geo. 3. 1 Term Rep. 782.

† 3 Bla. Com. 288.

‡ 2 Bur. 812. 1 Term Rep. 192. 2 Wilſ. 372. Pr. Reg. 352.

§ Doug. 369. 1 Term Rep. 187.

‖ 1 Wilſ. 77.

arreſt the huſband only. In making the arreſt, it is not neceſſary that the officer, who has the authority, ſhould be the hand that arreſts, or in the preſence of the perſon arreſted, or actually in ſight, nor is any exact diſtance preſcribed; it is ſufficient that he be near, and acting in the arreſt.*

It has been ſeen in the laſt chapter of the Introduction,† that many perſons, though otherwiſe liable to be arreſted, enjoy, by reaſon of ſome peculiar circumſtances of time or place, a temporary protection from the effect of civil proceſs. In order to prevent repetition, I refer to that part for a more minute inveſtigation of the cauſe and extent of ſuch privileges.

When the defendant is arreſted, he either remains in the cuſtody of the officer, who arreſted him; or he is diſcharged upon (either by himſelf or attorney) indorſing on the writ an undertaking, to appear at the return; or he is let out of cuſtody upon bail; or eſcapes; or is reſcued.

The proceedings againſt a defendant, who remains in cuſtody, will be conſidered in the ſixth chapter of the ſecond part.

If the writ has no *ac etiam*, or, in other words, does not require bail, the ſheriff cannot take greater ſecurity for the defendant's appearance than 40l. and muſt, on that being given, or the defendant's indorſing on the writ an undertaking to appear, deliver him out of cuſtody. The indorſement is in this form: "I promiſe to appear "at the return of the within writ, and pray the court to "enter my appearance accordingly. B. B." Sometimes an attorney gives this undertaking: "I promiſe to ap-"pear in behalf of the within named B. B. at the return "of the within writ, and pray the court to enter ſuch "appearance accordingly. D. D. his attorney."

By

* Cow. 65.

† Page 35, 36, 37.

By the ancient common law, the ſheriff was not obliged to deliver any perſon upon bail, without ſuing out a writ of mainprize, which was productive of great oppreſſion and extortion: to remedy this, the ſtatute [10 ſeſſ. chap. 26. ſect. 1.] enacts, "that ſheriffs, &c. "ſhall let out of priſon all manner of perſons arreſted, "or being in their cuſtody, by force of any writ, bill, "or warrant, in any perſonal action, or by reaſon of any "indictment for treſpaſs, upon reaſonable ſureties, of "ſufficient perſons having ſufficient within the counties, "where ſuch perſons be ſo let to bail, to keep their days "in ſuch places as the ſaid writs, bills, or warrants, "ſhall require, (except perſons being in their ward by "condemnation, execution, *capias utlagatum*, ſurety of "the peace, or by ſpecial commandment of any court or "juſtice.")

"And that no ſheriffs, &c. ſhall take, or cauſe to be "taken, any obligation for any cauſe aforeſaid, or by "colour of their office, of any perſon, or by any perſon, "who ſhall be in their ward by courſe of law, but only "to themſelves, and by the name of their office, and "upon conſideration written, that the ſaid priſoners "ſhall appear, at the day and place contained in the "writ, bill, or warrant. And if any ſheriffs, &c. take "any obligation in other form, by colour of their office, "it ſhall be void."

This ſtatute may be conſidered in two points of view; 1. as to the perſons to be let to bail; 2. as to the form of the ſecurity. Upon the firſt point, it has been determined, that the ſheriff cannot take bail upon an attachment for a contempt.* Though the words of the ſtatute ſeem to be confined to perſons arreſted, and in actual cuſtody, yet it has been holden, that the arreſt need not be ſtated in an action on a bail-bond;† and, if

* 1 Str. 479. Com. Rep. 264. 2 Salk. 608. *contra.*

† 1 Str. 643.

if ſtated, it is not traverſable;* for it would be of miſchievous conſequence, if a bail-bond taken civilly, without expoſing the party by arreſt, were not as effectual, as if he had been actually arreſted. Where the defendant is arreſted, and in actual cuſtody, it is the duty of the ſheriff to take bail, if required, and therefore, if a bail-bond be tendered with ſufficient ſureties, and the ſheriff refuſe to accept of it, he is liable to a ſpecial action on the caſe.† The clauſe, which requires reaſonable ſureties, was introduced for the benefit of the ſheriff, and, therefore, though he may inſiſt on two ſureties, yet he may take a bond with one only:‡ and to take one only, beſides the defendant, is the general practice. For a like reaſon, the plaintiff cannot maintain an action againſt the ſheriff, for taking ſecurities who are inſufficient, or do not inhabit within the county.§

The ſecond part of the ſtatute requires a ſecurity by bond,‖ reſpecting which there are three forms to be obſerved; 1. that it be made to the ſheriff himſelf; 2. that it be made to him by his name of office; and, 3. that it be only for the defendant's appearance, at the return of the writ.¶ Therefore, if the bond be not made to the ſheriff,** or be not made to him by his name of office,†† or if it be ſingle without any condition at all,‡‡ or with an impoſſible condition,§§ or the condition be not for the

* 1 Str. 444. Say. Rep. 116. but ſee Ray. 43. *ſemb. contra.*

† Gilb. C. P. 20. W. Jones 226. 1 Sid. 22: 2 Mod. 31, 84, 180. 2 Vent. 96.

‡ 10 Co. 100. b. Cro. Eliz. 624, 808, 852, 862.

§ Cro. Eliz. 808, 852, 862. Noy. 39. 1 Sid. 96. 2 Saund. 59. 1 Mod. 227, 239. 2 Mod. 83, 177. but ſee 1 L. Ray. 425. 1 Salk. 99. 6 Mod. 122. *ſemb. contra.*

‖ 1 Term Rep. 421.

¶ Cro. Eliz. 862. 4 Bac. Abr. 462.

** Dyer 119, 120. 10 Co. 100. a. b.

†† Ibid.

‡‡ Ibid.

§§ 3 Lev. 74. 1 Str. 399. Fort. 363. 2 Term Rep. 569.

the defendant's appearance,* or for that and ſomething elſe,† it is void by the ſtatute. If the objection appear upon the face of the declaration, or upon oyer, the defendant may demur; but otherwiſe he ſhould plead it; and when, by pleading or otherwiſe, it appears in any part of the record, he may move it in arreſt of judgment.‡

If the bail-bond be ſubſtantially good, it cannot be avoided for any trifling informality, or variance of the condition from the writ, in the deſcription of the plea, or of the time or place of appearance. Thus, where the writ was to anſwer the plaintiff in a plea of debt for 320l. or in a plea of treſpaſs with an *ac etiam*, and the condition was to anſwer the plaintiff in a plea of debt, or treſpaſs generally, or without mentioning the plea at all, the variances were holden immaterial:§ for the ſtatute only requires a bond conditioned for the defendant's appearance, and the deſcription of the plea is merely ſurpluſage.

Under the above ſtatute, it is uſual for the ſheriff to take a bond from the defendant, and one or more ſubſtantial perſons, in double the ſum for which bail is required by the precept, conditioned for the defendant's appearance at the return.

Where the ſheriff, having arreſted the defendant, ſuffers him to go at large, upon giving bail for his appearance, at the return of the writ, he is not liable to an action of *eſcape*, for he was obliged by the ſtatute to take bail.‖ Even where the defendant is ſuffered to go at large without bail, the ſheriff is not, it ſeems, liable to an action, provided

* Dyer 119, 120. 10 Co. 100. a. b.

† Ibid.

‡ 2 Term Rep. 569.

§ Cro. Jac. 286. 2 Lev. 123. 2 Show. 51. T. Jon. 137, 138. 6 Mod. 122. 10 Mod. 327. but ſee 2 Lev. 177. *ſemb. contra.*

‖ Cro. Eliz. 624, 852. Noy. 39. 1 Sid. 23. 1 Vent. 55. 3 Salk. 314, 315. Gilb. C. P. 22.

provided he have him at the return of the writ.* But if he have him not then, or afterwards ſuffer him to go at large, without lawful authority, he is, in either caſe, liable to an action.† Where an action is brought againſt the ſheriff, after he has taken bail, he muſt plead the ſtatute, and cannot take advantage of it on demurrer to the declaration, or in arreſt of judgment.‡

Where the defendant is *reſcued* upon meſne proceſs as he is going to priſon, the ſheriff may return the reſcue;§ but not where the defendant is reſcued after he is put in priſon, except by the enemies of the people.‖ Upon the ſheriff's return of a reſcue, the plaintiff has a triple remedy againſt the reſcuers, by attachment, action on the caſe, or indictment.¶ The return of a reſcue is of itſelf a conviction,** and the court will grant an attachment upon it in the firſt inſtance.†† But without the ſheriff's return, the court will not grant an attachment, upon a mere affidavit of the fact.‡‡ When the reſcuers are taken upon this attachment, the court will fine them according to their diſcretion, upon conſidering the circumſtances of the caſe.§§ As the ſheriff's return of a reſcue is not traverſable, the court will proceed to puniſh the reſcuers, without going through the ordinary courſe of examining them upon interrogatories.‖‖

When

* 2 Term Rep. 172.

† Nov. 39. 1 Mod. 228, 229. 2 Mod. 178. 2 Term Rep. 174. Gilb. C. P. 22, &c.

‡ Cro. Eliz. 460. Moor 428. 1 Sid. 22, 439. 1 Vent. 85. 1 Mod. 33, 57. 2 Saund. 154, 155.

§ Cro. Jac. 419. 3 Bulſt. 198. 1 Rol. Rep. 388, 440. 3 Lev. 46. 1 Str. 435. Gilb. C. P. 23. but ſee Cro. Eliz. 868. *contra.*

‖ Cro. Jac. 419. 1 Rol. Rep. 441. 1 Str. 435. 5 Bur. 2814.

¶ Com. Dig. tit. *Reſcous*, D.

** Caſ. *temp.* Hardw. 112.

†† 2 Salk. 586. Say. Rep. 121. 4 Bur. 2129.

‡‡ 2 Salk. 586. 6 Mod. 141. 1 Str. 531.

§§ 1 Str. 642.

‖‖ 4 Bur. 2129.

When the writ is returnable, it is the ſheriff's duty ſo return it on the return day;* and, if he does not, he may be ruled in the manner mentioned afterwards. If he ſends it to the attorney, who reſides within forty miles of either of the offices of the clerk, it muſt be filed within eight days after the term in which it is returnable; but if he reſides above forty miles, it muſt be filed within fourteen days thereafter.† If the proceſs has not been executed, the return is *non eſt inventus*, or that the defendant is not found within the ſheriff's bailiwick. If the defendant has been taken, the return is a *cepi corpus*, either with an appearance indorſed, or without, or in cuſtody.

When the writ is returned, the next ſtep for the plaintiff's attorney was originally to move the court for the common rule. If a *cepi corpus* is returned, with an appearance indorſed, the rule is, "that the appearance of the "defendant be entered, and that he plead in twenty days, "or judgment." If, in a bailable action, a *cepi corpus* only is returned, the rule is, "that the ſheriff bring in the "body ſitting the court, or be amerced forty ſhillings, and "that the defendant plead in twenty days, or judgment." But if it be returned *cepi corpus in cuſtodiæ*, the rule is, "that the defendant plead in twenty days after ſervice of "a copy of the declaration in this cauſe, and of the rule "on the ſheriff, or the defendant in cuſtody or judg-"ment."

If there be ſeveral defendants, ſome of whom are returned *non eſt inventus*, and the reſt taken, yet the plaintiff, by ſtatute 11 ſeſſ. ch. 46. ſect. 23. may proceed againſt thoſe defendants who are taken, and the rule, in ſuch caſe, is, that ſuch defendants plead in the ſame time as in the foregoing rules. Where the action is joint, againſt two or more, the rule is, that they ſhall jointly plead; and if ſeveral, that they ſhall ſeverally plead.

Theſe

* Rule S. C. Apr. T. 1755. Octo. T. 1767.
† Ibid. Octo. T. 1786.

Theſe motions are not now made in court, the rules upon them being eſteemed of courſe; and in order to obtain them, the attorney enters the title of the cauſe, upon his docquet, and from that the clerk tranſcribes the rules into the minutes. For the mode of preparing and time of filing a docquet, *vide* part iv. ch. 7.

CHAPTER III.

Of Appearance and Bail.

AT common law, the plaintiff and defendant muſt, in general, have appeared in perſon. Yet a corporation aggregate, not being capable of a perſonal appearance, could only have appeared by attorney appointed under their common ſeal.* But, by ſtatute 10 ſeſſ. ch. 35. ſect. 1. a general liberty is given to parties of full age, and ſound mind, of proſecuting, and defending by attorney in real and perſonal actions.† Yet there are certain perſons, ſuch as ideots, feme-coverts, &c. who, for want of legal diſcretion, are incapable of appointing an attorney, and muſt, therefore, appear in perſon;‡ and any one elſe, if he think proper, both by the common law,§ and by ſtatute,‖ may appear and proſecute, or defend his ſuit in the ſame manner, as is uſually done by attornies.

* Co. Lit. 66. b. Bro. Abr. tit. Corporation 28.
† Gilb. C. P. 32, 33. 2 Inſt. 376. F. N. B. 55.
‡ Co. Lit. 135. b. 2 Inſt. 390. F. N. B. 27.
§ Say. Rep. 217.
‖ Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 13.

Attornies were anciently appointed in court, when actually present;* but they are now uſually appointed out of court, by warrant, which ſhould regularly be in writing, and taken by a judge of the court, or the chancellor, or by commiſſion, in purſuance of a *dedimus poteſtatem*, out of chancery:† but an authority by parol is ſaid to be ſufficient to ſupport a judgment.‡ Even if an attorney appear without warrant, it is a good appearance, as to the court, though he is liable to an action.§ Where an attorney once appears, or undertakes to be attorney for another, he ſhall not be permitted to withdraw himſelf;‖ and, it is ſaid to be his duty to proceed in the ſuit, although his client neglect to bring him money.¶

The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution;** unleſs it be ſooner countermanded, by the act of the principal, or determined by the death of the attorney. Where an attorney, having been retained, has undertaken to appear, the defendant cannot countermand the appearance after his retainer;†† nor can he change his attorney at any time pending the ſuit, without leave of the court, granted upon payment of his bill, and upon notice to the adverſe party or his attorney.‡‡ If an attorney die pending the ſuit, his warrant is determined;§§ but the party, who employed him, muſt have notice of his death,‖‖ or of being put out of the roll,

* 1 Wilſ. 39.
† Laws of N. Y. 10 ſeſſ. ch. 35. ſect. 2.
‡ 2 Keb. 199. 1 Lil. P. R. 134, 137.
§ 1 Keb. 89. 1 Salk. 86, 88. 6 Mod. 16. but ſee 1 Term Rep. 62.
‖ 1 Sid. 31.
¶ Say. Rep. 173.
** 2 Inſt. 378. Gilb. Exec. 92, 93. Run. Ej. 152.
†† 1 Lil. P. R. 134, 143.
‡‡ Ibid. 1 Bla. Rep. 8. Doug. 206.
§§ 1 Lil. P. R. 141.
‖‖ Laws of N. Y. 10 ſeſſ. ch. 35. ſect. 4.

roll, or ceaſing to act; and, if he will not appoint another attorney, his adverſary may proceed in the action.*

At common law, the warrant of attorney might have been filed and entered of record, at any time before judgment.† But, by *ſtatute*,‡ "the attorney for the plaintiff "ſhall file his warrant of attorney, with the proper officer "the ſame term he declares, and the attorney for the de- "fendant the ſame term he appears, under penalty of "making ſatisfaction to the party grieved, according to "the diſcretion of the court." Notwithſtanding this ſtatute, it has, however, been determined, that the warrants of attorney may be filed, ſo as to ſupport the proceedings, at any time *pendente lite* or before final judgment, although the attorney may be fined, for not filing them in due time.§ The want of a warrant of attorney is aided after verdict, or judgment by *nil dicit*, &c. by the ſtatute of amendment and jeofails;‖ and, by the ſame ſtatute, a miſpriſion of the clerk in the warrant, may be amended, in affirmance of the judgment.¶

Appearance is the firſt act of the defendant in court,** and differs from bail, which is the act of the court itſelf;†† as is evident from the language of the bail-piece. If the writ is returned with an undertaking to appear indorſed, the rule, as it is ſeen in the laſt chapter,‡‡ is that the appearance be entered. This is agreeable to the ſtatute 10 ſeſſ. ch. 26. ſect. 2. which directs the clerk to enter all ſuch appearances as appear by the returns of the writs. In other caſes, the appearance is entered by the attorney

* 2 Keb. 275. 1 Lil. P. R. 137.
† Y. B. 41. Ed. 3. 1 b. but ſee 1 Wilſ. 39.
‡ Laws of N. Y. 10 ſeſſ. ch. 35, ſect. 8.
§ Dyer 180, 225. Cro. Jac. 277. March 121. 8 Mod. 77. Str. 526. 2 Str. 807. 2 L. Ray. 1532. Fitzgib. 191. 1 Wilſ. 39, 183. Doug. 110.
‖ Laws of N. Y. 11 ſeſſ. ch. 32.
¶ Doug. 109.
** Com. Dig. let. Pleader, b. 1.
†† 1 Salk. 8.
‡‡ Page 56.

attorney inſerting in his docquet the title of the cauſe, with the words, " I appear for defendant;" and of his being concerned, he gives notice to the plaintiff's attorney. In caſes where ſpecial bail is not required, this appearance is deemed ſufficient to bring the defendant into court, without filing what is called common bail, as is the practice in the court of king's bench in England, and which is there neceſſary to give the court juriſdiction; though ſome practiſers file common bail here.

But where the action requires good ſecurity, ſpecial bail muſt likewiſe be filed; and then two perſons (one of whom is real and reſponſible, and the other commonly fictitious) undertake generally, that if the defendant be convicted, he ſhall ſatisfy the plaintiff, or render himſelf into cuſtody, or that they will do it for him. This is to be done within twenty days after the term * in which the writ was returned, and motion made thereon. The defendant cannot diſcharge his bail to the ſheriff, by ſurrendering himſelf before the return of the writ; for, it is a ſettled point, that nothing can be a performance of the condition of the bail-bond, but putting in, and perfecting ſpecial bail.† This may be put in by the defendant's attorney, in conſequence of his undertaking, or by the ſheriff, or his bail,‡ for their own indemnity.

Exceſſive bail being prohibited to be required by the act concerning the rights of the citizens of this ſtate,§ if the defendant thinks himſelf aggrieved, by the enormity of the ſum in the *ac etiam*, his remedy is to move the court for a rule, that the plaintiff ſhow cauſe of action within two days excluſive, or that the defendant be diſcharged upon filing common bail, or elſe that he ſhow cauſe

* Rule S. C. July T. 1735.
† 5 Bur. 2683. and ſee Dalt. Sher. 356. *Poſt* 67.
‡ Laws of N. Y. 10 ſeſſ. ch. 1.
§ 2 Str. 876.

cauſe why the damages ſhould not be mitigated. This muſt be ſerved on the plaintiff's attorney. The plaintiff may ſhow cauſe, by making affidavit of the nature and extent of his demand; and, upon this, the court will either order the bail to ſtand as before, or, if they ſee reaſon, order in what ſum they think juſt. This may alſo be done in vacation before a judge, who will ſummon the plaintiff for the like purpoſe where bail is demanded by the ſheriff.

By the common law, the cogniſors of the bail muſt have been at the expence and trouble of going to one of the judges. But, by ſtatute 11 ſeſſ. ch. 46. ſect. 26. "the judges of the courts of common pleas, within the "reſpective cities and counties of the ſtate, are authoriſ- "ed within their cities and counties, to take recogni- "zances of bail, in the ſupreme court, in ſuch manner "and form as the juſtices of that court take the ſame; "which ſaid bail-pieces ſhall be forthwith tranſmitted by "the defendant, to one of the juſtices of the ſupreme "court, who ſhall accept and receive the ſame.

"And the judges of the common pleas ſhall examine "the ſureties to ſuch recognizance, as often as they ſhall "be requeſted, by any perſon intereſted by ſuch bail, "concerning the value of ſuch ſurety's eſtate and per- "ſonal circumſtances."

Since the ſtatute, on which the above is grounded, ſpecial bail may be taken, either by a judge of the court, or before a judge of the court of common pleas; but, in term time, the bail muſt be taken in court, if in either of the cities where it ſits.

The recognizance is taken on a bail-piece, made out by the defendant's attorney, ſtating the term, county, and names of the parties, together with the names and additions of the bail. The nature of this recognizance of bail is, that, "if the defendant be condemned in the "action, he ſhall ſatisfy the coſts, and condemnation,

"or

"or render himſelf to the cuſtody of the ſheriff, or that "they will pay the coſts and condemnation for him." The bail-piece is then left at the judge's chambers, until the bail be perfected, and muſt by him be entered in a book or docquet, to be kept for that purpoſe.

Before a judge of the common pleas, the recognizance of bail is taken on a bail-piece; and it muſt be tranſmitted to one of the judges of the ſupreme court, within the twenty days allowed after the term to put in bail, and notice thereof given, or the bail-bond may be aſſigned and put in ſuit.

Special bail are abſolute or conditional. They cannot be taken abſolutely, without the conſent of the plaintiff, or his attorney; and, when they are taken conditionally, the defendant's attorney ſhould give notice thereof in writing, within twenty days after the term in which the writ was returned, to the plaintiff's attorney. The notice of bail is, that they are put in and filed with the judge. The notice ſhould be properly intitled,* and ſhould ſet forth, with truth and certainty, the names,† degrees,‡ or myſteries,§ and places of abode of the bail, in order that the plaintiff may have an opportunity of inquiring after them.‖

The plaintiff, or his attorney, upon being ſerved with this notice, either accepts of, or excepts to the bail. If he *accept* of them, the defendant's attorney ſhould cauſe the bail-piece to be filed, within twenty days after ſuch acceptance, at the clerk's office, and then it becomes abſolute. But if the plaintiff's attorney be not ſatisfied with the bail, he may *except* to them, and thereby compel a juſtification. If the bail to the ſheriff become bail above, he is not at liberty to except to them, after he

* Lofft 237.
† Ibid. 187.
‡ Ibid. 281.
§ Ibid. 187.
‖ 6 Mod. 24.

he has taken an aſſignment of the bail-bond;* for, by ſo doing, he has admitted them to be ſufficient. The delivery of a declaration in chief, before ſpecial bail put in, is holden to be a waiver of bail; and, before juſtification, it is an acceptance of them. The plaintiff, however, may declare *de bene eſſe*, or conditionally, provided good bail be put in, or the bail already put in do juſtify: though the acceptance of a plea will, even then, be deemed a waiver of bail, or of juſtification.†

The exception to bail ſhould be entered on the back of the bail-piece, at the judge's, within twenty days after notice of bail put in or filed.‡ The exception being entered, *notice* thereof ſhould be given in writing, without delay, to the defendant's attorney, who muſt juſtify, or add other bail and juſtify them, within eight days after, or the bail-bond will be forfeited.

Where the bail already put in do not mean to juſtify, others ſhould be added § on the bail-piece, and, within the time allowed for their juſtification, the defendant's attorney muſt apply to the court for further time. When other bail are added, the court will order the names of thoſe who were excepted to, and did not juſtify, to be ſtruck out of the bail-piece.‖ But until this be done, they are liable to be proceeded againſt;¶ and if it be not done until after proceedings have been had againſt them, they muſt pay the coſts of ſuch proceedings.**

The juſtification of bail is either in perſon or by affidavit. If the exception be made in vacation, the defendant may juſtify before a judge, and ſend notice, with a copy of the affidavit of juſtification, to the plaintiff's attorney;

* 1 Salk. 97. 7 Mod. 62, 117. 6 Mod. 122.
† Barnes 92.
‡ 1 Salk. 98. 6 Mod. 24.
§ Impey 119, 120.
‖ Say Rep. 58. 1 Wilſ. 337.
¶ Say Rep. 308.
** 1 Bla. Rep. 462. 4 Bur. 2107.

attorney; but this is only conditional, for, if the plaintiff chuſe, he can oblige him to juſtify again in court, and for this he has four days in the enſuing term, within which time he muſt carry his bail into court. In order to juſtify, the real perſon on the recognizance muſt ſwear, that he is a houſekeeper, and worth double the ſum for which he is bound, after all his debts are paid, or excluſive of all debts or demands due from him to any perſon or perſons whomſoever. Bail put in before a commiſſioner, may alſo juſtify by affidavit before him: and this is commonly done at the time of putting in bail.

Where the bail already put in intend to juſtify, *two* days previous notice, excluſive of the day of ſervice, is ſufficient, unleſs Sunday intervene, and then there muſt be three days. The notice ſhould ſet forth, that the bail already put in will, on a certain day, juſtify themſelves in open court; or that others will be added, and juſtify themſelves as good bail for the defendant.* If the bail were put in before a commiſſioner, the notice ſhould expreſs that they will juſtify themſelves by affidavit.† Notice of juſtification by *three* bail has been holden good; but notice, that A, B and C, or *two* of them will juſtify, is irregular.‡

When the bail is to be juſtified in court, an *affidavit*§ muſt be made of the ſervice of notice of juſtification, to prove to the court, if the plaintiff does not appear, or admit ſuch ſervice. Juſtification is allowed of courſe, unleſs oppoſed by counſel *viva voce*; or, if taken before a commiſſioner, upon croſs affidavits.

The following are among the grounds of oppoſing bail: *Firſt*, that there is ſome defect in the *form*, or irregularity in the *ſervice* of the notice of bail or juſtification. *Secondly*, that they have *aſſumed names*, which are either feigned, or belong to other perſons. If they have

* Impey 119.
‡ Lofft. 26.
† Ibid. 125.
§ Impey 124, 125.

have aſſumed *feigned* names, the court will order them and the attorney to be ſet in the pillory.* "If any perſon "ſhall acknowlege, or procure to be acknowleged, any "recognizance or bail, in the name of any other perſon, "not privy or conſenting to the ſame; or before a perſon "authoriſed to take bail, ſhall repreſent or *perſonate* ano-"ther perſon, whereby he may be liable to the payment "of any ſums of money for debt or damages, being law-"fully convicted or attainted thereof, he ſhall be adjudged "guilty of felony."† But the court will not vacate the proceedings againſt the party perſonated, until the of-fender be convicted;‡ nor can a conviction take place, until the bail-piece be filed.§ A *third* ground of op-poſing bail is, that he is not a *houſe-keeper*. If he be, the rent of his houſe is immaterial, though ever ſo ſmall.‖ *Fourthly*, he may be oppoſed, on the ground of not being worth double the ſum in the action, after payment of all his debts. Under this head, may be ranked *inſol-vents*, who have not obtained their diſcharge.¶ Bail have been rejected for not knowing the defendant;** or, if they had been bail before, and did not know in how many actions, nor for what ſums.†† But it ſeems, that the circumſtance of not knowing the defendant, being only a mark of ſuſpicion, may be explained away. If the bail forſwears himſelf, he is liable to the puniſhment of wilful and corrupt perjury.‡‡ *Fifthly*, foreigners are not admitted to be bail, merely in reſpect of property *abroad*, which is not liable to the proceſs of the court.§§

* 1 Str. 141.
† Laws of N. Y. 11 ſeſſ. ch. 21. ſect. 1.
‡ T. Jon. 64. 1 Vent. 301. 3 Keb. 694. 1 L. Raym. 445.
§ 2 Sid. 90.
‖ Lofft. 148, 328.
¶ Mountain v. Wilkins, M. 21 Geo. 3.
** *Per cur.* M. 26 Geo. 3.
†† Lofft. 72, 194. ‡‡ Cro. Car. 146.
§§ 4 Bur. 2526, 2527. Lofft. 34, 147.

Though, in England, it has been ſaid, that merely having no property there, is not of itſelf a ſufficient objection, without auxiliary circumſtances.* *Sixthly*, it is a general doctrine, that no attorney ſhall be bail. This doctrine, which was calculated for the benefit of attornies, has been extended to their clerks:† and it is alſo ſettled on principles of prudent jealouſy, that no ſheriff or deputy ſheriff, or perſon concerned in the execution of proceſs, ſhall be permitted to be bail in any action.‡ But if either of them be put in the bail-piece, and are not excepted to, the plaintiff cannot take an aſſignment of the bail-bond, and proceed upon it, as if no bail had been put in.§ *Laſtly*, the court will not permit a juſtification of bail, after the expiration of the rule to bring in the body.‖

Where the bail do not attend, or are not permitted to juſtify, on account of a defect in the notice of bail, or juſtification, the court will, in general, allow them further time to juſtify.¶ But where they are rejected, on account of ſome perſonal inſufficiency, the court will ſeldom allow further time to add and juſtify others.** If the bail are taken in the country, and it is imagined they will be excepted to, the uſual way is to have an affidavit of juſtification taken at the time of putting in bail, before a commiſſioner, to prevent delay, as before obſerved.††

When the bail are allowed, either for want of exception, or by juſtification, the bail-piece ſhould then regularly

* 1 Bla. Rep. 444. 2 Bla. Rep. 1323, 1324.
† Cowp. 828. Doug. 450.
‡ 2 Str. 890. Lofft. 153. 2 Bla. Rep. 799.
§ Doug. 550.
‖ Lofft. 438. Highway and Tyers, M. 20 Geo. 3. Caſe of Overton's bail, M. 26 Geo. 3. Impey K. B. 125, 126. Thorold v. Fidler, E. 28 Geo. 3. C. B. *ſemb. contra.*
¶ Lofft. 72, 187. *Per cur.* M. 25 Geo. 3.
** *Per cur.* T. 24 Geo. 3. †† Page 64.

larly be filed in the clerk's office. In filing the bail, it is to be obſerved, that every bail, taken in the vacation, ſhould be filed of the preceding term; but where new bail are added, the new bail are to be taken and filed of that term, in which the firſt bail was put in.

Such are the means of putting in and perfecting bail above, where the defendant is at large, in order to prevent an aſſignment of the bail-bond, or proceeding againſt the ſheriff. Bail above, may alſo be put in and perfected at any time pending the action, where the defendant is in cuſtody of the ſheriff. But the bail, in ſuch caſe, muſt juſtify in open court, if the plaintiff deſire it, before the defendant is intitled to his diſcharge.

Ere the ſubject of bail is diſmiſſed, it will be proper to notice when, and in what caſes, they may be diſcharged, by the *render* of their principal.

Prior to the return of the writ in the original action, the defendant, not being delivered by the court into the cuſtody of his bail, cannot render himſelf, or be rendered in their diſcharge.* But ſubſequent to the return of it, he may render himſelf, or be rendered in their diſcharge, either before or after judgment,† at any time before the riſing of the court on the return day of the ſecond *ſcire facias*, or of the firſt, where a *ſcire feci* is returned.‡ It was anciently the courſe of the courts in England, not to allow a render after a return of *non eſt inventus* to the *capias ad ſatisfaciendum*. But a great miſchief reſulted from this practice, for the plaintiff would ſue out a *capias* returnable the next day, ſo that the bail had little or no time to bring in the body;§ to remedy which, the judges indulged the bail ſo far as to permit them to render the body, upon the return of the firſt

ſcire

* Barnes 88, 89. *Ante* 60.
† 1 Str. 198.
‡ 1 L. Raym. 157. 6 Mod. 238. 8 Mod. 340
§ 1 L. Raym. 157.

ſcire facias, if the *capias ad ſatisfaciendum* were returnable *de die in diem*.* But if it were returnable the next term, the bail were ſtrictly holden to render the principal by the return of it.† It has been extended ſtill farther in the court of king's bench, by chief juſtice Popham, who permitted the bail to render any time before the return of the ſecond *ſcire facias*, or upon the return *ſedente curiæ*,‡ which practice is now fully eſtabliſhed in this court.

If the plaintiff proceed by action of debt on the recognizance, the render may be made by the ſpace of eight days in full term, next after the return of the *latitat*, or other proceſs, againſt the bail.§ Where an action was commenced, and afterwards diſcontinued, and then the bail rendered the principal before the bringing of a new action, the court held the render to be good, it being before the return of the proceſs in this ſuit; and that it was the fault of the plaintiff not to begin right at firſt.‖

Before the return of the *capias ad ſatisfaciendum*, the render is a matter of right, and may be pleaded. But afterwards ¶ it is allowed by the grace and favor of the court, and therefore a ſubſequent render cannot be pleaded;** though, if made in time, the bail may be relieved on motion. If the bail, at any time after the return of the *capias ad ſatisfaciendum*, render the principal, and he eſcapes, or is reſcued before two days are elapſed after ſuch render, it will not be good, for the court will not ſuffer the plaintiff to be prejudiced by their indulgence to the bail.

Where

* Cro. Eliz. 618.
† Cro. Eliz. 738.
‡ Cro. Jac. 109.
§ 1 Salk. 101. 1 L. Raym. 721. 6 Mod. 132.
‖ 2 Str. 915.
¶ 1 L. Raym. 156, 157.
** Keeley and Medley, M. 24 Geo. 3. Barnes 106, 107.

Where the defendant is at large,* he may come and render himſelf, or be taken and rendered by his bail, before a judge at his chambers. For this purpoſe a certified copy of the bail-piece muſt be obtained from the clerk's office, and notice of the ſurrender to the ſheriff, or one of his deputies, to attend the judge, for the purpoſe of rendering the defendant into his cuſtody. The judge will then indorſe ſuch ſurrender, upon the certified copy of the bail-piece, which muſt afterwards be filed in the clerk's office. If the court is ſitting, the ſurrender muſt be made in court, and then the ſurrender need not be ſigned by the judge.

A copy of this *reddidit ſe*, or a certificate thereof, ſigned by the judge, is a warrant to the officer to keep him in cuſtody, though upon *it* muſt be entered, in every caſe, the ſtate of the cauſe at the time of the render; if before declaration, *the ſum in the* ac etiam *of the writ*; but, if after declaration, theſe words ſhould be added: *declaration filed*, or *iſſue*, or *interlocutory judgment*, as the caſe may be. If after final judgment in debt, *the debt and damages* muſt be noted; in other caſes, the *quantum of the damages*. Where the defendant is a priſoner at another's ſuit, he muſt be brought up by writ of *habeas corpus cum cauſa*, which may be made returnable immediate:† this being lodged with the jailer, in whoſe cuſtody the defendant is, he will bring him into court, or to a judge, to render him; and, upon this, the defendant will be remanded to his former cuſtody. This writ, with the return, is left with the judge.

Where the inſolvent is intitled to his diſcharge under the inſolvent act, the court will order an *exoneretur* to be entered, without the form of a regular ſurrender by his bail.‡

The

* Mod. 231.
† 3 Bur. 1875.
‡ Cowp. 824.

The defendant being rendered, *notice* thereof ſhould be given, without delay, to the plaintiff's attorney, and an affidavit made of the ſervice of ſuch notice; to the end that the plaintiff may, if he think proper, charge the defendant in execution; or, at leaſt, that he may not be at any further trouble or expence in proceeding againſt the bail. If the plaintiff, therefore, through want of notice, continue to proceed againſt the bail, though this will not vitiate the render, yet they ſhall not be relieved, until they have paid the charges.* But the notice need not be given before the riſing of the court, on the day of the render.†

If the plaintiff declare againſt the defendant for a different cauſe of action than what is expreſſed in the proceſs,‡ the bail are diſcharged; and they are alſo diſcharged where the defendant becomes inſolvent, and obtains his certificate,§ &c. at any time pending the action: and, on motion, the court will order an *exoncretur* to be entered on the bail-piece.

It may not be improper here to add, that bail cannot be a witneſs for the principal;‖ therefore, on an affidavit of his being a material witneſs, the court may be moved to ſtrike his name out of the bail-piece, on defendant's adding or juſtifying another; but the plaintiff may conſent to admit his evidence.

* 6 Mod. 238. 8 Mod. 281. 4 Bac. Abr. 420, 421.
† *Per cur.* H. 26 Geo. 3.
‡ 3 Lev. 235.
§ 1 Bur. 244, 245, 436. Cowp. 824.
‖ Wood 582. 1 Keb. 296. Law. Ev. 77. 1 Lil. Abr. 180.

CHAPTER

CHAPTER IV.

Of Proceedings upon the Bail-bond.

IF bail above be not put in and perfected in due time, the bail-bond is forfeited, and the plaintiff may either take an aſſignment of it, or proceed againſt the ſheriff for not bringing in the body.* If the plaintiff, however, be diſſatisfied with the bail below, he ſhould not take an aſſignment of the bail-bond; for, by ſo doing, he not only diſcharges the ſheriff,† but if the ſame bail be put in above, he cannot afterwards except againſt them.‡

By the old common law, the ſheriff was not compellable to aſſign the bail-bond;§ though, if he had not aſſigned it, the court would have amerced him;‖ and the old way was firſt to give a rule for the ſheriff to bring in the body, before the plaintiff could take an aſſignment of the bail-bond.¶ Another miſchief was, that, after an aſſignment of the bail-bond, the action thereupon muſt have been brought in the name of the ſheriff, who might have releaſed it, and thereby driven the plaintiff into a court of equity.** To remedy theſe inconveniences, it is enacted, by the ſtatute for the amendment of the law,†† "that if any perſon ſhall be "arreſted, by any writ, bill, or proceſs iſſuing out of "any court of record, at the ſuit of any common per-

"ſon,

* Gilb. C. P. 20.

† Ibid. 21. 1 Salk. 99. 1 Wilſ. 223. Williams and Jacques, M. 24 Geo. 3.

‡ *Ante* 62, 63. 1 Salk. 97. 7 Mod. 62, 117. 6 Mod. 122.

§ 1 Mod. 228.

‖ 1 Sid. 23. 2 Mod. 84.

¶ 1 Salk. 99.

** Gilb. C. P. 21.

†† Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 8.

" ſon, and the ſheriff, or other officer, take bail from " ſuch perſon, againſt whom ſuch writ, proceſs, or bill " was taken out, the ſheriff, or other officer, at the re- " queſt and coſts of the plaintiff, in ſuch action or ſuit, " or his lawful attorney, ſhall aſſign to the plaintiff in " ſuch action, the bail-bond, or other ſecurity taken " from ſuch bail, by indorſing the ſame, and atteſting " it under his hand and ſeal, in the preſence of two or " more credible witneſſes; and, if the ſaid bail-bond, or " other ſecurity taken for bail, be forfeited, the plaintiff " in ſuch action, after ſuch aſſignment made, may bring " an action or ſuit thereupon in his own name, and the " court, where the action is brought, may, by rule, or " rules, of the ſame court, give ſuch relief to the plain- " tiff and defendant in the original action, and to the " bail upon the ſaid bond, or other ſecurity taken from " ſuch bail, as is agreeable to juſtice and reaſon; and " that ſuch rule or rules of the ſaid court, ſhall have the " nature and effect of a defeazance of ſuch bail-bond, " or other ſecurity for bail."

Upon this ſtatute, it has been ſaid the bail-bond may be aſſigned *before* it is forfeited, though it cannot be put in ſuit till afterwards.* Where the defendant has neglected to put in and perfect bail above, the plaintiff is not out of court, by omitting to declare in the original action, within two terms after the return of the writ, but he may ſtill take an aſſignment of the bail bond;† for he is not bound to declare *de bene eſſe* within the time limited for the defendant's appearance, and, after that time, he cannot declare until the defendant has actually appeared.

The aſſignment may be made by the ſheriff, or by his deputy in *his* name, but not by the deputy's clerk.‡ Aſſignment

* Barnes 77.

† 2 Str. 1262. Carmichael v. Troutbeck, T. 24 Geo. 3. 2 Bla. Rep. 876. *contra.*

‡ 1 Str. 60. 10 Mod. 288.

ment may be made in any county, and the action may be laid either where the bail-bond was entered into or the aſſignment made.* But it muſt neceſſarily be brought in the ſame court whence the proceſs iſſued on which the bail-bond was taken;† otherwiſe the parties could not have the relief intended by the ſtatute. If the ſheriff ſhould die before aſſignment, the party muſt reſort to the old common law remedy, and ſue in the name of the ſheriff's executors or adminiſtrators.

To obtain the aſſignment, apply to the ſheriff, who is bound, by the ſtatute, to indorſe an aſſignment on the bond. To prevent delay, where the defendant is taken in a diſtant county, the court have ordained,‡ "that "the ſheriff or his deputy, on the return day of all "writs, be ready with the bail-bond, to aſſign the "ſame, in caſe the plaintiff ſhall be willing to accept "of ſuch aſſignment; and for this purpoſe, every ſheriff "ſhall have a deputy attending the court every day in "term time, and, in caſe of diſobedience in all or either "of theſe inſtances, and affidavits thereof firſt filed, an "attachment ſhall iſſue for contempt. And that if the "plaintiff, in any ſuch ſuit, ſhall refuſe to accept of "ſuch aſſignment of the bail-bond taken, or to be taken "for the defendant's appearance in ſuch caſe, the plain-"tiff, in ſuch ſuit, ſhall be at liberty to proceed againſt "ſuch ſheriff by attachment for contempt, in not bring-"ing in the body of the defendant, after the expiration "of the time allowed for putting in ſpecial bail." But this rule is ſhamefully neglected: and the practice is to write to the ſheriff for the aſſignment, by which means you have no opportunity of inquiring whether the bail he has taken are good or bad; ſo that the beſt way is to

* 2 Str. 727. 2 L. Ray. 1455. 1 Bur. 642. 3 Bur. 223. 4 Bur. 1923. 3 Wilſ. 348.

† 1 Bur. 642. 3 Bur. 1923. 3 Wilſ. 348. 2 Bla. Rep. 838.

‡ Rule S. C. October T. 1767.

proceed againſt the ſheriff. When the aſſignment is obtained, ſue out a writ againſt the perſons bound in the bond, and proceed as in other caſes; but you cannot hold them to bail. You ſtyle the plaintiff, "aſſignee of "*A.B.* Eſq. ſheriff of the county of *Columbia*." As the ſecurities are bound jointly and ſeverally, it was formerly the practice to ſue out ſeparate writs, and proceed againſt them in different actions: but, by ſtatute 12 ſeſſ. ch. 25. ſect. 5. "where ſeparate writs are iſſued againſt "the ſeveral obligors in one obligation, the plaintiff "ſhall in no caſe have more than one taxation of coſts; "and, where the defendants reſide in different counties, "the coſts on each writ ſhall be taxed together with "the reſidue of the coſts." This regulation has effectually contributed to prevent different ſuits on the ſame bond.

After obtaining the common rule, a declaration ſhould be filed with oyer of the bail-bond, in the manner hereafter directed; and, if an attorney is employed, a copy muſt be ſerved on him.

If the defendants have good cauſe of defence, they muſt plead it; as for inſtance, if the principal actually appeared, according to the condition of the bond, by putting in and perfecting bail in due time, the plea is *comperuit ad diem*; the replication whereunto is *nul tiel record*, or no ſuch record; which, upon rejoinder that there is ſuch a record, is tried in the manner after ſhewn. There is very ſeldom, however, any good defence that can be made to ſuits on bail-bonds; if, therefore, no plea is given in time, a motion for judgment muſt be made. The entering and filing the judgment roll, and taxation of coſts, is the ſame as in other actions, and will be mentioned more fully afterwards.

The proceedings on the bail-bond may be *ſet aſide* if irregular, or for any irregularity in the aſſignment; or ſtayed, if regular, upon terms, in order that there may be

be a trial in the original action. But the court will not order the bail-bond to be delivered up to be cancelled on the ground of a miſnomer.*

Where the plaintiff has not loſt a trial, the court will ſtay the proceedings on the bail-bond, upon putting in and perfecting bail above, paying the taxed coſts incurred by the aſſignment of the bail-bond, receiving a declaration in the original action, pleading iſſuably, and taking eight days notice of trial, or ſhorter, at the diſcretion of the court, ſo that the cauſe may be tried the ſame term.† Wherever the defendant is guilty of a neglect in not putting in bail in due time, by which the bond becomes forfeited, the notice (in caſe the party means to put in bail in order to ſtay proceedings on the bail-bond) ſhould be, that he will put in and perfect bail by ſuch a day; when the plaintiff may oppoſe them in court, without its being a waiver of the bail-bond.‡ But if the plaintiff has loſt a trial, the court will alſo require, that judgment be entered on the bail-bond, for the plaintiff's further ſecurity;§ after which, they are liable to immediate execution, if the defendant ſhould fail in the action, and they cannot diſcharge themſelves by a ſurrender.

Where, however, the delay is occaſioned by the plaintiff's own neglect, through his not putting the bail-bond in ſuit ſooner, the court will not bind the bail down to ſuch ſtrict terms. *Coleman page 57*

The ſheriff's bail are liable to pay the plaintiff what is really due to him, and coſts, to the full extent of the penalty of the bond;‖ and the court will not relieve them upon the death of the defendant in the original action, when

* 3 Term Rep. 572.
† Cowp. 71.
‡ Ibid. 769.
§ 2 Str. 1262. Carmichael v. Troutbeck, T. 24 Geo. 3.
‖ Savage v. Weſt, 5 Geo. 3. cited in Cowp. 71. H. Black. 76.

when the plaintiff might have had judgment againſt him, if bail above had been put in and perfected in time.* But where the defendant dies before the plaintiff could have had judgment againſt him, if there had been no delay in putting in and perfecting bail, the court will ſtay the proceedings on payment of coſts only.†

It is uſual for the attornies to agree among themſelves as to ſtaying proceedings, and the terms, without moving the court.

CHAPTER V.

Proceedings againſt the Sheriff to compel Bail, &c.

IF the plaintiff be diſſatisfied with the bail taken by the ſheriff, he may proceed againſt him to compel appearance, or bail to the action. But before he does ſo, the writ muſt be returned and filed; for by this the court becomes poſſeſſed of the cauſe. If, therefore, the ſheriff has not returned the writ (though he uſually does it without compulſion) the plaintiff's attorney muſt obtain a rule to enforce ſuch return. If there ſhould be any apprehenſion that he will not do it, the beſt way is to obtain this rule of the preceding term, to prevent delay. It cannot, however, be obtained before the return day.‡

A certified copy of this rule muſt be ſerved perſonally on the ſheriff, or his under ſheriff,§ and requires the return

* Cowp. 71. Barnes 112.
† Cowp. 71. Barnes 61, 70.
‡ 1 Term Rep. 552.
§ Doug. 404.

return to be made within eight days after ſervice, if ſerved in vacation; but if ſerved in term, within four days.

The ſheriff being ruled to return the writ, either does or does not return it. If there be no return, it is a contempt of the court, for which the conſtant courſe of proceeding is by attachment, whether againſt the late or preſent ſheriff: for as to the late ſheriff, he ought in ſtrictneſs to have returned the writ before he was out of office; and, therefore, the contempt was actually committed whilſt he was a ſervant of the court.

An action alſo lies againſt a ſheriff for not returning a writ. Likewiſe, by ſtatute 10 ſeſſ. ch. 32. ſect. 4. a mode is pointed out to obtain ſatisfaction for the not returning a writ, if the previous directed ſteps are taken. This act directs, "that ſheriffs and under-ſheriffs ſhall "give certificates of ſuch writs as are delivered to them, "in the county where they are to be executed, of the "plaintiff and defendant, and the day of delivery; and, "upon refuſal, credible witneſſes, preſent at the deli-"very, may give ſuch certificate; and, if the writ is "not returned by the ſheriff or other officer, and it was "to be executed in the county where the court ſits, an "inqueſt ſhall be thereupon taken, in the preſence of "ſuch ſheriff or other officer, if he will attend the "court, to inquire whether the writ was delivered, and "what damages the party hath ſuſtained, having regard "to the quality and quantity of the action, and the peril "that may happen by reaſon of the delay; and if it be "found that the writ was delivered, the party ſhall "have his damages, with coſts, and execution for the "ſame; but if ſuch writ was to be executed in any other "county, a writ judicial ſhall be awarded to the circuit "court to take this inqueſt."

The common return is *non eſt inventus*, or *capi* [illegible]. If the ſheriff return *non eſt inventus*, where he

might have taken the defendant, he is liable to an action for a falſe return.

The proceeding againſt the ſheriff, upon a return of *capi corpus*, in order to compel him to bring in the body, or put in and perfect bail above, is by *rule* of court, either for an amerciament or an attachment, but, againſt the late ſheriff, for a diſtringas.*

To proceed by amerciament, ſerve a certified copy of the common rule, "that he bring in the body ſitting "the court, or be amerced forty ſhillings." If upon this he makes default, the court, upon motion, will increaſe the amerciament, and ſo repeatedly till the plaintiff's demand is ſatisfied. But theſe ſeveral amerciament rules muſt be ſerved perſonally on the ſheriff or his deputy. Theſe amerciaments are paid to the clerk, and, to obtain them for the plaintiff, motion muſt be made that they be paid to him.

The moſt uſual way is, however, to proceed by attachment, which is done by moving, that "the ſheriff "bring in the body within ~~four~~ days, (if in term) or "ſhow cauſe why an attachment ſhould not iſſue againſt "him," and ſerving a certified copy thereof perſonally on the ſheriff. If the rule is ſerved in vacation, it is to bring in the body within ~~eight~~ 20 days; but if the ſheriff live at a great diſtance, it is uſual to make the rule returnable by the firſt day of the next term.

The *diſtringas* againſt the late ſheriff, is a writ iſſued by the clerk, in the name of the people, under ſeal of the court, and directed to the preſent ſheriff, teſted and returnable as other writs. This writ ſhould lay four days excluſive in the ſheriff's office, but need not be left there before the return; it being deemed ſufficient to leave it on the return day.†

Where

* 5 Bur. 2726.
† Pa. Ca. H. 23 Geo. 3.

Where bail above is put in, and notice thereof given to the plaintiff's attorney, the bail ſhould be excepted to, and notice of the exception given to the defendant's attorney before the ſheriff is called upon to bring in the body.* But when bail above is not put in at the time of calling upon the ſheriff, he muſt put in and perfect bail at his peril, without an exception.†

When the ſheriff is called upon to bring in the body, he muſt either bring it into court, or put in and perfect bail above, within due time after ſervice of the rule or execution of the diſtringas;‡ otherwiſe it is a contempt, for which he is liable to pay the debt and coſts; and, in order to enforce the payment, the plaintiff, on an affidavit of ſervice, and that no bail is put in, may move the court for an attachment, or, on the return of the diſtringas, ſue out an *alias*.

The attachment is a criminal proceſs, and lies againſt the *preſent* or *late* ſheriff for not returning the writ; but, for not bringing in the body, it lies againſt the preſent ſheriff only. Againſt the preſent ſheriff, it is directed to the coroner; againſt the late one, to his ſucceſſor. It muſt, as all other writs in this court, be made returnable at a day certain. The attachment may be moved for on the *laſt* day of term;§ and, until it iſſues, the proceedings are on the civil ſide of the court, and muſt be intitled with the names of the parties: but as ſoon as the attachment iſſues, the proceedings are on the criminal ſide; and from that time, the people are to be named as the proſecutors.‖

Upon the iſſuing of the attachment, the ſheriff uſually pays the amount of the debt and coſts; if he does not, he

* Lofft. 159.
† *Per cur.* E. 24 Geo. 3.
‡ 1 Will. 262.
§ 1 Bur. 651.
‖ 3 Term Rep. 133, 253.

he muſt be impriſoned till he does. The ſheriff, in order to reimburſe himſelf, muſt put the bail-bond in ſuit; but if he has taken none, it is dubious whether he has any remedy againſt the defendant at all.*

Upon the firſt diſtringas, the ſheriff to whom it is directed, only levies iſſues to the amount of forty ſhillings, which the plaintiff ſhould move to increaſe; and, if the debt be ſmall, the court will order the whole of it to be levied, with coſts, upon the *alias* diſtringas; but otherwiſe the plaintiff ſhould move again to increaſe the iſſues, and ſue out a *pluries* diſtringas, &c. When iſſues are returned to the amount of the debt and coſts, the plaintiff ſhould move for a ſale of them, under the ſtatute 19 ſeſſ. ch. 50. ſect. 33. enacting, "that the court, out of which "the writ proceeds, may order the iſſues levied, from "time to time, to be ſold, and the monies ariſing there-"by to be applied to pay ſuch coſts to the plaintiff as "the court ſhall think juſt, under all the circumſtances, "to order;" which ſtatute has been conſtrued to extend to all writs of diſtringas.† If the ſheriff, or coroner, being called upon by rule, neglect to return the attachment, or diſtringas, he may be attached himſelf, and the attachment againſt the coroner ſhould be directed to eliſors appointed by the court or a judge.

When the ſheriff is fixed for a contempt, he is abſolutely liable to the payment of the debt and coſts, and cannot be relieved on the ground of the defendant's death, after the contempt was incurred, and before the attachment iſſued.‡ But the ſheriff ſtanding in the ſame ſituation as the bail above, is only liable to the payment of the real debt, together with the coſts:§ and it ſeems, that if he ſhould come to purge the contempt, it would be

* 1 Term Rep. 418.
† 5 Bur. 2726.
‡ 3 Term Rep. 133.
§ Stackey v. Peel, E. 25. Geo. 3. H. Bla. 233. *contra.*

be competent for the court to moderate the puniſhment, and not impoſe a fine to the amount of the whole debt; though, in order to proportion it to the actual damages, they ſhould be aſcertained by a jury.* It is alſo ſettled, that, when the ſheriff is once fixed, the court will not permit a juſtification of bail. But where the defendant has merits, they will ſometimes let him in to a trial of them upon terms, and, in the mean time, ſtay the proceedings upon the attachment.†

CHAPTER VI.

Of Declarations.

HAVING explained, in the preceding chapter, the mode of bringing the defendant into court in actions requiring bail, as well as in actions which do not, the next ſtep to be taken, in either caſe, is to ſet forth the plaintiff's charge, or cauſe of action, againſt the defendant, fully and particularly in the declaration.

If the proceſs is general, the plaintiff may declare in any cauſe of action he thinks proper; but if there is an *ac etiam* in the writ, he muſt declare for the cauſe expreſſed in that alone.

The declaration, or, as it is called in Latin, *narratio*, is a legal ſpecification of the action. It ſtates the plaintiff's caſe, or ground of complaint, with the particulars of time and place, and ſpecifies the ſum at which he affects to compute the damages he has ſuſtained. There

* Doug. 447. † Ibid.

are certain emphatic words uſed in different declarations, expreſſive of the kind of action; as, in *aſſumpſit*, that the defendant "undertook and faithfully promiſed," and ſo in other inſtances. The forms of declarations are farther diverſified by the diſtinct occaſions, on which the ſame mode of action is allowed to be brought. The ſame declaration may alſo conſiſt of different *counts*, as they are called, in which the plaintiff repeats his caſe anew, with ſome variation, or uſually in a more general and uncircumſtantial manner, in order to adapt it more eaſily to the proof which he ſhall be able to adduce at the trial; or, perhaps, ſubjoins ſome other cauſe of action, of the ſame ſpecies with the former, and ſeeks a ſatisfaction for both. But cauſes of action foreign in their nature, as thoſe of *trover* and *aſſumpſit*, (one of which is ſuppoſed to be founded on a *tort*, and the other on a contract) cannot be joined in the ſame declaration.* Every ſeparate count is ſubſtantively a declaration, ſo that the plaintiff may have judgment on any one of them to which his evidence applies, and on which it is maintainable in reſpect to form. But if any of the counts be materially defective, and entire damages be given, that is, without diſcrimination of the particular counts, and the plaintiff's agents omit, at the trial, to ſelect ſome unexceptionable count, on which they profeſs their intention to rely, the judgment muſt be arreſted.† If, however, evidence were only produced on the good counts, and a general verdict given, it may be corrected from the notes of the judge.‡

The formal parts of a declaration are, 1. the caption; 2. the parties; 3. the nature of the action; 4. whence it accrued; 5. the time and place where; and, 6. the damage ſuſtained.

1. The

* 3 Lev. 99. 1 Term Rep. 276, 267.
† 1 Lev. 298. 6 Mod. 128.
‡ Doug. 376.

1. The declaration ſhould regularly be intitled of the day on which the writ was returnable;* and where there are ſeveral defendants, who are taken on writs in two ſucceſſive terms, the declaration muſt be ſtyled of the term in which the defendant, who was laſt taken, appeared.† In practice it is uſual, when the cauſe of action will admit of it, to intitle the declaration generally of the term in which the writ is returnable; and, though filed or delivered, it cannot regularly be intitled of a ſubſequent term.‡ But it ſhould always be intitled after the time when the cauſe of action is ſtated to have accrued; therefore, where the cauſe of action is ſtated to have accrued after the firſt day of the term in which the writ is returnable, the declaration ſhould be intitled of a ſubſequent day in that term; as, "of the term of "Tueſday the twenty-ſecond day of January, in the "year," &c. for a general title refers to the firſt day of the term; and, upon ſuch title, it would appear that the action was commenced before the cauſe accrued. Yet where the cauſe of action was ſtated to have accrued on the firſt day of term, the court, on demurrer, held that the declaration might be intitled of the term generally; for the delivery of the declaration is the act of the party; and, in ancient times, it could not have been delivered till the ſitting of the court; ſo that the cauſe of action might well have accrued before the delivery of the declaration.§ Where a declaration is improperly intitled, the plaintiff may have it corrected, on an affidavit of the fact;‖ or it may be ſet right at the inſtance of the defendant, if neceſſary for his defence: thus, where a declaration is intitled of the term generally, and the defendant

* Caſ. *temp.* Hardw. 141.
† 1 Wilſ. 242.
‡ 3 Term Rep. 624.
§ 1 Term Rep. 116.
‖ 1 Wilſ. 78.

dant pleads *plene administravit*,* or a tender made before the exhibiting of the bill, upon which he would give in evidence an admiſſion of aſſets, or tender made, between the firſt day of the term and the day of ſuing out the writ, he has a right to call upon the plaintiff to intitle his declaration properly.†

2. The declaration ſhould correſpond with the proceſs, in the names and deſcriptions of the *parties*; for, if there be a material variance, the court will ſet aſide the proceedings. But where proceſs is taken out againſt the defendant by a *wrong* name, and he appears by his *right* name, the plaintiff may declare againſt him by the name in which he appears, ſtating that he was arreſted by the other; for, by appearing, the defendant admits himſelf to be the perſon ſued, and the variance is immaterial.‡ By a leading caſe, however, on the ſubject of this variance from the meſne proceſs, it appears the court will not grant oyer of it, ſo as to plead it in abatement.§

Upon general proceſs the plaintiff may declare *qui tam*, or as executor or adminiſtrator,‖ &c. But this rule will not hold *e converſo*, for where the proceſs was to anſwer the plaintiff *qui tam*, &c. and the declaration in his own name only, the court held the variance fatal, and ſet aſide the proceedings.¶ In a ſubſequent caſe the proceedings were ſet aſide, where the proceſs was to anſwer the plaintiffs as aſſignees, and the declaration was in their own right; for the plaintiffs cannot declare generally on proceſs ſued out in a ſpecial character.**

3 and

* Caſ. *temp.* Hardw. 141.

† 1 Str. 638. 1 Wilſ. 39. 1 Wilſ. 304.

‡ Greene and Robinſon, H. 25 Geo. 2. Boyne v. Mills, M. 25 Geo. 3. 3 Term Rep. 611.

§ 2 Wilſ. 117.

‖ 2 Str. 1232.

¶ 4 Bur. 2417.

** Meggs and another, aſſignees of Cochran v. Ford, E. 25 Geo. 3.

3 and 4. As to the *nature of the action*, and *whence it accrued*. There are, according to the nature of the action, divers modes of commencing the declaration, which practice in the art of pleading will moſt effectually teach: ſome of the principal are as follows:---In *debt*, or *account*, "*Abraham Adams* complains of *Benjamin Bell*, "in cuſtody, &c. of a plea that he render to him;" then ſpecify the particular ſum due, or unaccounted for. If in *covenant*, "*Abraham Adams* complains of *Benjamin* "*Bell*, in cuſtody, &c. of a plea of breach of covenant;" though ſome do not mention of what plea. In *aſſumpſit*, *caſe*, *ejectment*, and *trover*, you ſay, "*Abraham Adams* "complains of *Benjamin Bell*, in cuſtody, &c. for that "whereas," &c. In *debt upon ſtatute*, uſually ſtyled *qui tam* actions, not having any word in Engliſh ſo conciſe as theſe two to expreſs the idea, the form runs, "*Abra*-"*ham Adams*, who ſues as well for the people of the "ſtate of New-York as for himſelf, in this behalf com-"plains of *Benjamin Bell*, in cuſtody, &c. that he render "to the ſaid people, and to the ſaid *Abraham*, who ſues "as aforeſaid, the ſum of 10l. current money of the ſtate "of New-York, which to the ſaid people and to the "ſaid *Abraham*, who ſues as aforeſaid, he owes and un-"juſtly detains, for that whereas," &c. then recite the act, together with the penalty and breach. In *treſpaſs*, "*Abraham Adams* complains of *Benjamin Bell*, in cuſtody, "&c. for this, that he on the firſt day," &c. [here point out the time and place,] "by force and arms," &c. and then ſtate the manner how the cauſe of action aroſe, the ſum of the damages, and the injury ſuſtained. Sometimes, where the declaration is on a ſpecialty, the defendant's name has an *alias dictus* added to it; but this is unneceſſary, and is attended with this inconvenience, that, if recited wrong, it may be productive of miſchief, though poſſibly the court would reject it as ſurpluſage.

The

The charge of the declaration ought to be expreſs and poſitive, and not merely by way of recital. Therefore, in treſpaſs, where the injury is immediate, a declaration ſtating, that *whereas* or *wherefore* the defendant did the act complained of, is bad on a ſpecial demurrer; and was formerly holden to be ſo, in arreſt of judgment:* but now it may be amended at any time before or after judgment, by a right bill or original writ, the time of filing which the court will not inquire into.†

The declaration muſt be clear, true, and certain, becauſe it is the foundation, or baſis, of the ſuit, and impeaches the defendant; and is that to which he muſt anſwer, and on which the court muſt give judgment.‡ This declaration muſt alſo eſtabliſh a title in the plaintiff, as well as deſtroy that of the defendant; for, when a man will recover a thing from another, it is not ſufficient for him merely to deſtroy ſuch perſon's title, but he muſt prove his own a better.§ It ſhall not, however, abate for want of form, if it hath ſubſtance.‖ But the *giſt*, and every thing that is of the plaintiff's action, muſt be ſet forth in the declaration; and, it may be laid down as a general rule, that what ſeems properly to be the eſſence of the action, is that without which the court could have no ſufficient grounds to give judgment: and this is to be determined in every action, according to its nature.¶ It is alſo a general rule, that ſurpluſage ſhall not abate a declaration; but a blank or ſpace left will.

Where a ſpecialty is the ground of the declaration, after reciting the date, it muſt be offered to the court, by a *profert*, as it is called; as, "and to the ~~court~~ *juſtices* of the "people of the ſtate of New-York, ~~before the people~~ "themſelves,

* 2 Salk. 636. 1 Str. 621.
† 2 Str. 1151, 1162.
‡ Co. Lit. 17.
§ Vaugh. 58, 60.
‖ Laws of N. Y. 11 ſeſſ. ch. 32. ſect. 5.
¶ 4 Ba. Abr. 8.

" themſelves, now here ſhown, the date whereof is the " day and year aforeſaid."

5. With reſpect to *laying the day* in declarations, the general rule is, that where the day is alleged as matter of form, it is not material; as in the caſe of a common aſſumpſit: but where the plaintiff is confined in evidence to the day mentioned in his declaration, it is material to lay the right day, for from that he cannot vary; as in the caſe of a promiſſory note.* So that in actions on a parol demiſe or promiſe, the day may be laid at any time after the cauſe of action accrued, and before the commencement of the action.

The *venue*, or place where the injury muſt be laid to have happened, is the next part of a declaration which merits conſideration.

Where the action could only have ariſen in a particular county, it is *local*, and the venue muſt be laid in that county; for, if it be laid elſewhere, the defendant may demur to the declaration;† or the plaintiff, on the general iſſue, will be non-ſuited at the trial.‡ But where the action might have ariſen in any county, it is *tranſitory*, and the plaintiff may, in general, lay the venue where he pleaſes, ſubject to its being changed by the court, if not laid in the very county where the action aroſe. Thus, in an action upon a leaſe for rent, &c. founded on the *privity of eſtate*, as in debt by the aſſignee,§ or deviſee,‖ of the leſſor againſt the leſſee, or by the leſſor,¶ or his perſonal repreſentative,** againſt the aſſignee of the leſſee, or againſt the executor of the leſſee, in the *debet and detinet*,†† or in covenant by the grantee

* 2 Str. 806. 21.
† 1 Wilſ. 165.
‡ Cowp. 410. 2 Bla. Rep. 1033.
§ Cro. Car. 183. 1 Wilſ. 165.
‖ W. Jon. 43.
¶ 6 Mod. 194.
** Latch. 197.
†† 2 Lev. 80. 3 Keb. 135.

grantee of the reverſion againſt the aſſignee of the leſſee,* the action is local and muſt be laid in the county where the eſtate lies. But, in an action upon a leaſe for rent, &c. founded on the *privity of contract*, as, in debt by the leſſor againſt the leſſee,† or his executor in the *detinet* only,‡ or in covenant by the leſſor§ or grantee of the reverſion‖ againſt the leſſee, the action is tranſitory, and the venue may be laid in any county, at the option of the plaintiff.

There are, however, ſome actions of a tranſitory nature, wherein the venue muſt be laid in a particular county. Such are all actions upon penal ſtatutes,¶ and actions upon the caſe, or treſpaſs againſt ſheriffs, coroners, juſtices, mayors, recorders, aldermen, bailiffs, conſtables, marſhals, collectors, overſeers of the poor, their deputies, or *other* perſons acting in their aid and aſſiſtance, or by commandment, for any thing done in their official capacity.** In theſe actions the venue muſt be laid in the county where the facts were committed, and not elſewhere. On the other hand, the venue in a tranſitory action is in ſome caſes altogether optional in the plaintiff; as where the action ariſes in another ſtate, or beyond ſea,†† or is brought upon a bond or other ſpecialty,‡‡

* Carth. 182. 3 Mod. 336. 1 Salk. 80. 1 Show. 191. 6 Mod. 194.

† 6 Mod. 194. 2 Str. 776.

‡ Gilb. *Debt* 403. Gilb. C. P. 91.

§ 3 Lev. 154.

‖ 1 Saund. 238. Carth. 183. 1 Wilſ. 165.

¶ Laws of N. Y. 11 ſeſſ. ch. 9. ſect. 2. "Except for maintenance, champerty, buying of titles, imbracery, or extortion, corrupt uſury, or for any cuſtom, duty, or impoſt, upon any goods, wares, or merchandizes, which may all be laid in any county."

** Laws of N. Y. 10 ſeſſ. ch. 27. ſect. 1.

†† Say. Rep. 77. Cowp. 176.

‡‡ 1 Keb. 65. 1 Sid. 87. Sty. P. R. 631. 2 Str. 878. Andr. 66. Balein v. Kent. E. 29 Geo. 3. Soames v. ——, S. C. April Term, 1792.

tial'y, promiſory note, or bill of exchange,* for a libel diſperſed throughout the ſtate,† againſt a carrier by land or by water,‡ for an eſcape,§ or falſe return;‖ and, in ſhort, wherever the cauſe of action is not wholly and neceſſarily confined to a ſingle county.¶ In theſe caſes the venue cannot be changed by the court but upon a ſpecial ground.**

In any other caſes the defendant, upon the common affidavit, that the cauſe of action, if any, aroſe in another county than what is laid in the declaration, may have it changed to that county: but even then, if the plaintiff will undertake to give material evidence in the firſt county, it ſhall not be changed; though, if he fails in ſo doing, he will be non-ſuited.

The plaintiff cannot change the venue upon a direct motion, but he may do it in effect under a rule to amend; and that even after the defendant has once changed it on the common affidavit.††

The county, in the margin of a declaration, will help but not hurt.‡‡ Hence if there be no venue laid in the body of the declaration, reference muſt be had to the margin; but where a proper venue is laid in the body, the words in the margin will not vitiate it.§§

6 The laſt part of a declaration is to ſtate the *damage* ſuſtained; and here it is neceſſary to obſerve, that in

* Andr. 66. 1 Term Rep. 571. Precious v. Bennet, E. 25 Geo. 3. but ſee 1 Wilſ. 41. Say. Rep. 7. *contra.*

† 1 Term Rep. 571, 647. 3 Term Rep. 306, 652.

‡ 2 Salk. 670.

§ 1 Keb. 65. 1 Sid. 87. 2 Salk. 670.

‖ 2 Salk. 669. 2 Str. 727. Say. Rep. 54. 1 Wilſ. 336.

¶ 2 Salk. 669. 1 Wilſ. 178. 2 Term Rep. 275.

** 1 Term Rep. 781.

†† Str. 1162.

‡‡ Car. *temp.* Hardw. 344.

§§ Ibid. 343. Barnes 483. 3 Term. Rep. 387.

actions for the recovery of ſome ſpecific thing, the amount of the damages to be laid is immaterial; for the thing demanded is the *giſt* of the action; but in ſuits founding in damages, or where you recover damages for an injury ſuſtained, or for the loſs of a thing detained, care muſt be taken to inſert a ſum ſufficient to cover the demand: for though the jury can give leſs, they can never give more than the ſum laid in the declaration, unleſs under the idea of coſts.

Declarations, in caſes of complaint, terminate in this mode and peculiar form of words, "and therefore he "brings his ſuit, &c." which was formerly meant as an offer to verify, by witneſſes, the cauſe of complaint. Againſt an attorney, the form is, "and therefore he "prays relief," becauſe the declaration is in the nature of a petition.

At the end of the declaration are added alſo the plaintiff's common pledges of proſecution, which are now mere names of form, and may be found any time before judgment,* though formerly they were real, and amerced if the plaintiff failed in his action.

The warrant of attorney is alſo generally inſerted at the foot of the declaration, in purſuance of the ſtatute, which directs, that it be filed by the plaintiff's attorney the ſame term he declares, under penalty of making ſatisfaction to the party grieved.†

If the declaration is grounded on any ſpecialty, it is uſual to annex oyer, or rather a copy of it, thereunto; (leaving out the witneſſes names,) but this is not obligatory on the plaintiff, unleſs the defendant demands it, and then it muſt be granted within two days after; though it cannot be demanded after a ſpecial imparlance, and the defendant

* Dyer. 288. Laws of N. Y. 11 ſeſſ. ch. 33. Caſ. *temp.* Hardw. 315. Bar. 163. 1 Wilſ. 226. 2 Wilſ. 142.

† Laws of N. Y. 10 ſeſſ. ch. 35. ſect. 8.

defendant has, after it is obtained, precisely the same time to plead as he had when it was demanded.*

The plaintiff must declare before the end of the next term after that in which the process is returnable, or he will be non-prossed;† but on showing special circumstances, the court will sometimes grant farther time to declare. It cannot, however, be had where the defendant is a prisoner.‡

When the defendant has employed an attorney, a copy of the declaration must be served on him; yet if the defendant's attorney resides in the country, it must be served on his agent in town, and if no agent it may be left in the office.§ If no attorney is employed, the declaration need only be filed in the office, and another must also be filed whether one be served or not.

When the declaration is served, or left in the office for the defendant, a copy of the rule to plead, certified by the clerk, must be also served or left, and is usually indorsed on the declaration; though, by rule of court,‖ it should seem that it need not be served until four days before the time of pleading.

When the defendant has appeared, or filed bail, or the plaintiff has moved that his appearance be entered on his undertaking, the declaration must be delivered and filed *absolutely*. But it cannot be so before appearance or bail, as the defendant till then is not in court.¶ Still, however, for the sake of expediting the cause, by rendering the times of appearing and pleading concurrent, the plaintiff may file his declaration *de bene esse*, or conditionally,

* 1 Str. 705.

† Laws of N. Y. 10 sess. ch. 36. sect. 2. Rule S. C. October Term, 1703.

‡ Pr. Reg. 327.

§ Rule S. C. October Term, 1772. January Term, 1789.

‖ October Term, 1703.

¶ Lofft. 333. 2 Term Rep. 719.

tionally, at the return of the proceſs, with the uſual rule to plead.

This practice of delivering a declaration conditionally is not much in uſe here, ſince the reaſon for it can ſeldom take place, as judgments are not commonly obtained till the ſubſequent term, though the time for pleading has expired.

You cannot declare *de bene eſſe*, after the time for appearance is expired.*

Since error is the lot of man, miſtakes cannot but frequently ariſe in the framing of declarations and other pleadings. It is therefore of importance to conſider in what caſes, and upon what terms the court will prevent one party from taking advantage of the miſtakes of the other, by ſuffering the latter to amend what is amiſs; and though this chapter is confined to declarations only, yet what is ſaid on the ſubject of amendment will apply to other proceedings.

Amendments are either at common law or by ſtatute.

Formerly all pleadings at the bar were *ore tenus*; and, even after the cauſe was at iſſue, but before the proceedings were recorded, the pleader had liberty to amend. When pleadings were reduced to writing, the ſame rule was obſerved with reſpect to them; and it was the general doctrine, at the common law, that while the pleadings continued in paper, either party might amend.

But the ancient ſtrictneſs of the law would not ſuffer the proceedings to be altered when once recorded; and, a judge, who, ſwayed by compaſſion in favour of a poor man, eraſed a record, was fined eight hundred marks.† Still however there were ſome records amendable at common law. 1. Continuances might be amended. 2. All miſtakes were amendable within the very term in which

* 1 Bur. 56. Bar. 342. 2 Term Rep. 720.
† 3 Inſt. 72.

which the judicial act recorded was done, the record being then eſtecmed in the breaſt of the court. This, ſtrictly ſpeaking, is ſtill the rule, which is adhered to; for, although the courts are become much more liberal, and will allow of amendments, *at any time whilſt the ſuit is depending, though the record be made up and the term be paſt*, yet this can only be in caſes where the proceedings may be ſuppoſed to be in paper; for when once they are plainly upon record, ſo that the court cannot help ſeeing that they are ſo, they have no authority to give leave to amend, except where allowed by the ſtatute.

No party, therefore, can withdraw a demurrer, and plead to iſſue, after other iſſues joined in the ſame cauſe have been actually tried, and verdicts found with contingent damages.

But if a demurrer be to the declaration, or plea, or avowry, where the merits do not come in queſtion, but merely the form of pleading, amendment, before judgment pronounced, will be generally permitted on payment of coſts.

Amendment by ſtatute only extends to pleadings on record, ſo that when the proceedings are plainly upon record, and are known to be ſo by the court, no amendments can be made therein, except ſuch as are warranted by the ſtatute of amendments.

By the general purport of the ſtatute of 11 ſeſſ. ch. 32. ſect. 1. " the judges may (as well after judgment, given " upon verdict, confeſſion, *nil dicit* or *non ſum informatus*, " as before, upon matter of law pleaded,) amend in any " record, proceſs, declaration, count, plea, warrant of " attorney, writ, panel, or return, all that which to " them ſeems to be the miſpriſion of the clerk, and that " of other officers, in writing a ſyllable too much or " too little."

But,

But, as the above clauſe only extends to what the judges may interpret the miſpriſion of their clerks, and other officers, many juſt cauſes might be overthrown, for want of form, and other defects not aided by this clauſe, though they might be good in ſubſtance; wherefore, for the further relief of ſuitors, the ſame ſtatute* enacts, "that after verdict, judgment ſhall be given "according to the verdict, and the ſame judgment ſhall "not be reverſed, for any miſpleading, lack of colour, "inſufficient pleading, or jeofail, any miſcontinuance, "or diſcontinuance, or miſconceiving of proceſs, miſ-"joining of the iſſue, lack of warrant of attorney, of "the party againſt whom the iſſue ſhall happen to be "tried,† or other negligence of the parties, their coun-"ſellors, or attornies; nor ſhall it be reverſed for default "in form, or lack of form, touching variance from the "regiſter, or other defaults in form, in any writ, origi-"nal or judicial, count, declaration, plaint, bill, ſuit, "or demand, or for want of any writ, original or judi-"cial, or by reaſon of any imperfect or inſufficient "return of any ſheriff, or other officer, or for want of "any warrant of attorney, or by reaſon of any manner "of default in proceſs, upon or after aid-prayer or "voucher: nor ſhall it be reverſed for any variance "in form only, between the original writ or bill, and "the declaration, plaint or demand, or for lack of any "life of any perſon, ſo he be proved to be in life; or "by reaſon that the *venire*, *habeas corpora*, or *diſtringas* "is awarded to a wrong officer upon any inſufficient "ſuggeſtion; or by reaſon that any of the ſaid jury, "which tried the iſſue, is miſnamed, either in the "chriſtian name, ſirname, or addition, in any of the writs

* Sect. 6.

† This remedies no omiſſion, but that the party's own neglect in not filing his own warrant, ſhould not after verdict prejudice the right of the party who had prevailed.

" writs or returns, ſo it be proved to be the ſame man,
" who was meant to be returned; or for that there is no
" return on any of the ſaid writs, ſo as a panel be returned
" and annexed, or for that the name of the ſheriff, or other
" officer having return, is not ſet to the return, ſo that it
" appears it was returned by them; or that the plaintiff in
" ejectment, or other perſonal action, (being an infant)
" appeared by attorney, and the verdict paſſed for him;
" nor ſhall it be reverſed for default in form, or lack of
" form, or by reaſon that there are no pledges, or but
" one pledge to proſecute, returned upon the original writ,
" or becauſe the name of the ſheriff is not returned upon
" the original writ, or for default of entering pledges
" upon any bill, or declaration, or for default of any
" *profert*, or for want of *vi et armis*, and *contra pacem*,
" or for the miſtake of any name, ſum, day, month
" or year, in any bill, declaration, or pleading, being
" right before, and to which the party might have de-
" murred ſpecially; nor for want of averment *hoc parat-*
" *us eſt verificare*, or *verificare per record*, or *prout patet*
" *per record*, or for that there is no right venue, ſo as
" the jury was tried by a proper jury of the county where
" the action was laid, nor ſhall any judgment after ver-
" dict be reverſed for want of entering, that the perſon
" againſt whom ſuch judgment is given *be in mercy*,
" or *be taken*, or one be entered for another; or *it is*
" *granted*, for *it is conſidered*; nor for that the increaſe
" of coſts, after a verdict in any action, or upon a non-
" ſuit in replevin, are not entered to be at the requeſt
" of the party for whom judgment was given, nor that
" the coſts in any judgment whatſoever are not entered
" to be by the conſent of the plaintiff; but that all ſuch
" omiſſions, variances, defects, and all other matters
" of like nature, not being againſt the right of the matter
" of the ſuit, nor whereby the iſſue, or trial are altered,

" ſhall

" ſhall be amended, where ſuch judgment is given, or " ſhall be removed by writ of error."

Another ſection* of the ſame ſtatute, extends the benefit of the whole, to judgments on confeſſion, *nil dicit*, and *non ſum informatus*.

" All writs of error, wherein there ſhall be any vari- " ance from the original record, may be amended agreeable " to ſuch record; and no judgment after verdict ſhall be " ſtayed or reverſed, for any defect or default, either in " form or ſubſtance, in any bill, writ, original or judi- " cial, or for any variance in ſuch writs from the decla- " ration, or other proceedings."†

This act extends to ſuits for debts due to the ſtate, to writs of *mandamus*, and informations in the nature of *quo warrantos*, but not to criminal proceedings, nor popular or penal actions, nor outlawries.‡

We are now to conſider the various parts of judicial proceedings, how, and where they are amendable, and what is matter of form, and what of ſubſtance. By the above ſtatute the general rule is, that the miſpriſions of the " clerks, and other officers of the court, are amend- " able in all caſes; and that the miſtakes and omiſſions " of the parties, their counſellors and attornies, are " amendable, according as they are either in form or " ſubſtance;§" and this will appear throughout the whole proceedings. And,

1. *Of the original writ or bill.* The want of an original or bill, is aided after verdict, or judgment by default, &c. by the ſtatute.‖ But a bad original is not aided; nor a good

* Sect. 8.

† Laws of N. Y. 11 ſeſſ. ch. 32. ſect. 5.

‡ Ibid. ſect. 10 and 11. *Quere*, whether this ſtatute extends to an iſſue on *nul tiel record*, where the jury aſſeſs damages for avowant in replevin after nonſuit, or between demandant and vouchee.

§ 8 Co. 150.

‖ Laws of N. Y. 11 ſeſſ. ch. 32. Hob. 130, 134, 264, 282.

good one, which does not warrant the declaration.* The court, however, are warranted by the ſtatute, in amending any defect in the original, ariſing from the miſpriſion of the clerk, in not purſuing his inſtructions, or from his neſcience in form, though not in ſubſtance.†

2. Although the court cannot amend an original writ, becauſe it iſſues out of chancery, yet they can amend *meſne proceſs*.‡ If the defendant has appeared to it,§ or accepted the declaration,‖ he cannot take advantage of any error or defect in ſuch proceſs. In general the proceſs may be amended, where there is any thing to amend by;¶ and the court will permit the plaintiff to file a new bill, for the purpoſe of making ſuch amendment,** the time of filing which will not be inquired into.†† No error can be aſſigned on meſne proceſs,‡‡ and the defendant cannot have oyer of the *capias*, ſo as to plead it in abatement.§§

3. *In the pleadings*. Here the ſtatute abovementioned‖‖ provides, that no perſon ſhall be prejudiced by the ancient terms or forms of pleaders, ſo that the matter of the action be fully ſhowed in the writ, declaration and pleadings. The deſign of this is, that if the *giſt* of the action is ſubſtantially alleged, any inſufficiency, as to form, ſhall be cured. But the omiſſion of whatever is eſſential to the *giſt* of the action, cannot be cured by verdict: theſe are ſuch ſubſtantial facts, as muſt be laid with certainty, and in proper time and place, ſo that the defendant may traverſe them diſtinctly if he pleaſes;

* 5 Co. 37. Cro. Eliz. 722. 1 Sid. 84.
† 8 Co. 159. Bar. 10, 16, 22.
‡ 3 Wilſ. 454. 2 Bla. Rep. 918.
§ 1 Str. 155. Bar. 163, 167, 415.
‖ 2 Str. 1072. Wright v. Willes, M. 21 Geo. 3.
¶ 1 Term. Rep. 782.
** 2 Str. 1151, 1162, 1271. 1 Wilſ. 104, 171. 1 Str. 583.
†† Ibid.
‡‡ 3 Wilſ. 434.
§§ 2 Wilſ. 434.
‖‖ Sect. 5.

but ſuch parts of a declaration as cannot make a ſubſtantive iſſue, ſhall be intended after verdict. As the plaintiff's action muſt have all eſſentials neceſſary to maintain it, ſo the defendant's bar muſt be eſſentially good; and, if the *giſt* of the bar be bad, it cannot be cured by a verdict for the defendant; but, if it is found for the plaintiff, he muſt have judgment, either for the badneſs, or the falſehood of the bar;* but, if it be bad only in form, a verdict will cure it;† and, if the *giſt* be traverſed, all collateral circumſtances will be admitted after verdict.‡

The declaration may be amended at any time, before or after judgment, by a right bill, the time of filing which the court will not inquire into.§

If an iſſue be on a point, that is impoſſible in the ſubſtance and nature of the thing, it is not cured by verdict, but if it be only impoſſible in manner and form, a verdict will cure it.‖

4. *Judgments.* The court will make no amendment to defeat a judgment, the ſtatute allowing amendments in affirmance only.

The judgment is amendable, from any other part of the record, when there is any thing on record to ſet it right.¶

It is a general rule, that, though the court will make amendments in favor of judgments, yet if a writ of error be brought, the defendant in error ſhall pay all the coſts of the writ of error; becauſe, till the record was amended, the plaintiff in error had ſufficient reaſon to bring the writ; but if he proceeded to reverſe the judgment,

* 2 Cro. 277. Cro. Eliz. 778.
† 2 Cro. 435.
‡ 2 Co. 44.
§ 2 Str. 1151, 1162.
‖ 4 Co. 31. Hob. 112. Moor, 869.
¶ 8 Co. 162. 2 Ro. Rep. 253, 254.

ment, on any other error, then the defendant ſhall not pay coſts for his amendments.

5. *Jury proceſs.* If there be a blank left for the county to the ſheriff, whereof the writ ſhould be awarded, yet it will be amended, becauſe it cannot be awarded to the ſheriff of any other county;* but, if there were a local plea into another county, ſo that there are two counties mentioned in the pleadings, there the blank cannot be amended.†

If the number of the qualifications of the jury be omitted, it ſeems it may be amended, by the particular number of the qualifications, in each roll, which is directed by the law in all caſes.‡

The award of the *venire* muſt be to a day in the ſame term, or in the next term, but it muſt be in term, otherwiſe it is erroneous, becauſe this is not ſuch a diſcontinuance as is aided by verdict.§

If a *venire* be of the ſame action, and between the ſame parties, all other faults will be amended, but where bad, it is incurable.

In ejectment, where the *venire* was *de placito tranſgreſſione*, omitting *ejectione firmæ*, the court held it to be ill, becauſe it was not in the ſame action.‖

Terms of amending. The general terms of amendment are upon payment of coſts, or, in *ſome caſes*, giving an imparlance.

Plaintiff, however, may amend his declaration, in matter of form, after general iſſue pleaded, and before entry, without paying coſts, or giving an imparlance; but if in matter of ſubſtance, he muſt pay coſts, or give an imparlance at defendant's election.

In

* Yelv. 169.
† Cro. Eliz. 26, 468.
‡ 1 Rol. Abr. 204.
§ Moor 402, 465.
‖ 1 Cro. 275, 278. 2 Cro. 528. Hob. 746.

In all caſes of amendment after plea pleaded, defendant has liberty to plead *de novo*, and has twenty days allowed for that purpoſe.* When the rule to plead is entered of the ſame term the amendment is made, though before ſuch amendment, it is ſufficient,† otherwiſe a new rule to plead muſt be entered.‡

Amendments muſt be made by motion in court, of which notice may be given, or a rule to ſhow cauſe obtained.

Though ſeveral parts of the foregoing relate to other proceedings beſides declarations, it was thought moſt proper to reduce the whole doctrine of amendments and jeofails under one head.

CHAPTER VII.

Of Time for Pleading and Imparlances.

THE plaintiff having declared, the defendant is allowed a certain time to prepare for his defence, and that either without or with an imparlance.

Without an imparlance, the defendant muſt plead within twenty days after ſervice of the declaration with the rule; but as this declaration is generally delivered in vacation, the defendant has till the ſubſequent term to plead.

Im-

* 1 Str. 705.
† 2 Salk. 517.
‡ 2 Bur. 660. Doug. 71. Bla. Rep. 784. Bar. 238.

Imparlance is ſaid to be, when the court gives a party leave to anſwer at another time, without the aſſent of the other party;* and, in this ſenſe, it ſignifies time to reply, rejoin, ſurrejoin, &c. But the more common ſignification is time to plead;† and it is either *general*,‡ without ſaving to the defendant any exception, and is always to another term;§ or *ſpecial*, which is ſometimes to another day in the ſame term,‖ with a ſaving of all exceptions to the writ, bill, or count, or of all exceptions whatſoever, which latter is called a *general ſpecial imparlance*. The general imparlance is of courſe where the defendant is not bound to plead the ſame term; but a ſpecial imparlance is not allowed, without leave of the court.

After a general imparlance, it is held that the defendant cannot plead in bar to the action; other pleas ſhould therefore, ſtrictly ſpeaking, be pleaded within the twenty days.

After a ſpecial imparlance, the defendant may plead in abatement,¶ though not to the juriſdiction of the court. Where the defendant pleaded a miſnomer in abatement after an imparlance, which was entered thus: "And "A. B. who was arreſted by the name of A. C. comes, "&c." the court held this to be tantamount to a ſpecial imparlance.** After a general ſpecial imparlance the defendant may not only plead in abatement of the writ, bill or count, but alſo *privilege*,†† which is a plea to the perſon of the defendant, affecting the juriſdiction of the court.‡‡ But he cannot plead a tender, and *tout temps priſt*

* Com. Dig. *tit.* Pleader, D. 1.
† 2 Mod. 62. 2 Show. 310. Barnes 346.
‡ Hardr. 365. 1 Lutw. 46. 12 Mod. 529. 3 Bla. Com. 301.
§ 6 Mod. 28.
‖ 6 Mod. 8. 10 Mod. 127.
¶ 1 Lutw. 6.
** 1 Bla. Rep. 51. 1 Wilſ. 261.
†† 1 Lutw. 46. 1 Lev. 54.
‡‡ 5 Mod. 355.

priſt after any kind of imparlance;* for, by craving time, he admits he is not ready, and ſo falſifies his plea. A tender muſt therefore be pleaded before imparlance; though, upon motion, the court will permit it to be pleaded as of the preceding term.†

If the defendant plead in abatement, after a general imparlance; to the juriſdiction of the court, after a ſpecial imparlance; or a tender after any kind of imparlance the plaintiff may demur,‡ or allege the imparlance in his replication by way of eſtoppel;§ but, if he reply to the ſpecial matter of the plea, the fault is cured.‖

It is uſual to plead within the time limited by the courſe of the court, but where the defendant has reaſonable cauſe of delay for not putting in his plea, the court will, upon motion, grant time; this however, is *ex gratia*, and uſually done upon terms, viz. pleading iſſuably, and taking ſhort notice of trial, or inquiry; and where the defendant is executor or adminiſtrator, he muſt undertake not to plead any judgment obtained againſt him, ſince his time for pleading was out;¶ for otherwiſe he might confeſs judgments in the meantime, and plead them in bar to the plaintiff's demand.

An iſſuable plea is a plea in chief to the merits,** upon which the plaintiff may take iſſue and go to trial.†† Therefore a plea in abatement is not an iſſuable plea,‡‡ nor a falſe plea for delay,§§ or other plea which does not go

* 4 Ba. Abr. 28. Sty. P. R. 465. 2 Lil. P. R. 37. 1 Sid. 365. 2 Mod. 62. 2 Salk. 622. 1 L. Ray. 254. Carth. 413, 414. 1 Lutw. 238, 239. but ſee Dyer 300.

† Barnes 343, 351, 355, 357, 359, 361, 362.

‡ Sty. P. R. 465. Green v. Simmiſter, H. 27 Geo. 3.

§ 1 Lutw. 23.

‖ 1 Vent. 236.

¶ 8 Mod. 308. and ſee 1 Bulſt. 122, 123.

** Barnes 263.

†† 2 Bur. 782.

‡‡ 1 Bur. 59. Bar. 263.

§§ 1 Bla. Rep. 376.

go to the merits.* But a plea of tender has been deemed an iſſuable plea,† and alſo a plea of the ſtatute of limitations,‡ or that a bail-bond was taken for eaſe and favor.§ As to *demurrers*, there is a diſtinction between a real and fair demurrer, and a demurrer without good cauſe.‖ The former is an iſſuable plea, and within the meaning of the rule:¶ the latter is not, but only an evaſion of it.** *Short notice of trial*, in country cauſes, muſt be given at leaſt four days before the opening of the circuit court, one day incluſive and the other excluſive.†† In town cauſes two days notice ſeems to be ſufficient;‡‡ but it is uſual to give as much more, as time will admit. The defendant, however, is not precluded by theſe terms, from demurring to the replication, if there be good cauſe.§§

Where the defendant is under a rule to plead iſſuably, and pleads a plea, which is not iſſuable, the plaintiff may conſider it as a mere nullity, and move for judgment:‖‖ and where ſeveral pleas are pleaded, one of which is not iſſuable, it will vitiate all the others.¶¶ But where it is doubtful, whether the plea be iſſuable or not, the better way is to move the court to ſet it aſide.***

* Valle v. Gardiner, H. 24 Geo. 3. Gillett and Ridley, C. B.
† 1 Bur. 59. Barnes 263.
‡ 3 Term Rep. 124. 2 Term Rep. 390, *contra*.
§ 1 Bur. 605.
‖ 3 Bur. 1788, 1789.
¶ 2 Str. 1185.
** Say. Rep. 88.
†† 3 Term Rep. 660.
‡‡ Pr. Reg. 390.
§§ 2 Str. 1185.
‖‖ Valle v. Gardiner, H. 24 Geo. 3.
¶¶ 3 Term Rep. 305.
*** 1 Bur. 59. 2 Term Rep. 390.

CHAPTER

CHAPTER VIII.

Of paying Money into Court.

IF the defendant has actually tendered the money, or if the diſpute be only about the *quantum* of the debt due, and the defendant acknowleges *ſome* money is owing, this ſum muſt be paid into court at this ſtage of the proceedings, before plea pleaded. If on a tender, it is done without a rule, and without coſts; but in the latter caſe there muſt be a rule with coſts.

On a tender, the defendant might always have done this, but, as in ſome caſes, he might have never had it in his power to tender, or, if he had, could not prove it; and, as in others, the opportunity was omitted, this practice was introduced, to give the defendant an opportunity of ſatisfying the debt, for which the action was commenced, and to ſave himſelf from farther coſts.

Though, in general, this ſhould be done before plea, yet the courts have permitted the payment of money into court, after iſſue joined, where the plaintiff has not loſt a trial, and upon agreeing to take ſhort notice of trial, if the plaintiff will proceed.*

As to the actions, in which money may be paid into court, it may be obſerved, that it may be done, wherever the damages are actually aſcertained, or capable of being ſo by calculation; without leaving any thing to the diſcretion of the jury.† Thus, it may be paid into court on actions on the caſe; upon *indebitatus aſſumpſit*, where there is a *quantum meruit*;‡ debt for rent,§ replevin, where the defendant avows for rent in arrear;‖ in covenant for payment of rent, or where the ſum is aſcertained;¶ trover for

* Str. 1276. † 2 Bur. 1220. ‡ Str. 576.
§ Salk. 596. ‖ Salk. 596. ¶ Salk. 299.

for monies numbered or in a bag,* or for a ſpecific chattel of an aſcertained quantity and quality, and unattended with any circumſtances that can enhance the damages above the true value, yet the real and aſcertained value muſt be the ſole meaſure of damages; but, in trover, the court muſt be moved on a ſpecial affidavit of the fact. In debt on bond, with condition to be void on payment of a leſſer ſum, the defendant may, at any time pending the action, bring into court all the principal and intereſt due, together with the coſts, which ſhall be taken to be a full ſatisfaction for the bond, and the court ſhall diſcharge the defendant.† Where the bond has been taken to ſecure the payment of money by inſtalments, on action brought for the penalty on non-payment of one, the court have given leave to pay the money in arrear and coſts, ſuffering the plaintiff to ſign a judgment, as a collateral ſecurity, though not to iſſue execution until the other payments become due;‡ but there are contradictory authorities on this head.§

Money cannot be paid into court in an action for conſequential damages: treſpaſs for the meſne profits in ejectment; debt upon bond conditioned to a ſheriff for the good behaviour of his deputy; upon a bond for the performance of a collateral agreement; upon a counter bond; covenant for not doing repairs; debt for goods ſold; treſpaſs for taking goods; replevin, except for rent.

If there are ſeveral counts, the defendant may pay in on ſome, and plead to others,‖ but not demur¶ to the latter.

* 6 Bur. 1864.
† Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 6.
‡ 2 Str. 957.
§ Str. 515. Bul. N. P. 168. Co. Lit. 47, b. but ſee 1 Wilſ. 80. 2 Str. 814. 3 Bur. 1374.
‖ 2 Bar. 232.
¶ 1 Bar. 48.

In order to pay money into court, a motion muſt be made, and a rule thereupon is granted, that defendant have leave to bring into court the ſum he means to pay in, aſcertaining it; and that if the plaintiff accept it as a full ſatisfaction, together with the coſts thitherto incurred, then all further proceedings to be ſtayed; but if he does not accept it in full, then ſo much to be ſtruck out of his declaration; and if, upon the trial, more is found due to him than is paid in, he ſhall recover coſts; if not, that he ſhall pay coſts to the defendant.

The defendant muſt then pay the money to the clerk, and ſerve a certified copy of his rule on the plaintiff, who proceeds afterwards at his peril; but, if he acquieſce, he muſt give notice to the defendant's attorney of the time of taxing, and the judge, upon the taxation, will mark the amount. The plaintiff, however, if he proceeds, may take the money out of court (by producing to the clerk the certified copy of the rule ſerved on him) in part of his demand, and go to trial for the reſidue, but at the hazard of a nonſuit with coſts, if he recovers no more.

If the plaintiff proceed on the rule, and the coſts are not paid when taxed, he muſt give notice of trial, and take a verdict for ſix-pence, which carries coſts.*

There may happen a caſe in which money may be paid into court without coſts; as, where plaintiff kept out of the way to prevent a tender, the court will order it without coſts.†

On a plea of tender, the clerk marks a receipt for the ſum paid in on the margin of the plea, a copy whereof muſt be ſerved with the plea. If the plaintiff takes iſſue on the tender only, he muſt not take the money out of court, and, if ſuch iſſue be found againſt him, he will be barred of his action; but if he has pleaded the general iſſue,

* 2 Str. 1220.
† 1 Bur. 571.

iſſue, he may take the money out of court, and judgment is thereon given for the defendant to go quit as to the plea of tender, and he proceeds on ſuch general iſſue for the remainder.*

CHAPTER IX.

Of Pleas.

A Plea is the defendant's anſwer to the plaintiff's declaration, ſhowing cauſe why he ſhould not ſucceed in the action, either for want of form, or ſubſtance.

Before we diſcuſs the nature and kinds of pleas, it will be proper to ſay a few words on the ſubject of *defence*. This, in its true legal ſenſe, ſignifies, not a juſtification, protection, or guard, which is now the popular acceptation of the word, but merely an oppoſing or denial of the truth, or validity of the complaint. A general defence, or denial, is not prudent in every ſituation, ſince thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court is allowed. An ordinary full defence is, "that the defendant comes "and defends the wrong and injury when, &c." This is uſed in caſe, annuity, conſpiracy, covenant, debt, and detinue. So, in ejectment and treſpaſs; but in theſe laſt caſes, inſtead of *wrong*, you ſay *force*. Formerly defence was held ſo eſſential, that no plea was admiſſible without it,† and even now, if inſiſted upon, this is law;‡ yet by

* L. Ray. 774.

† Roll. 736. Yelv. 210. Lutw. 89, 1592. 3 Leon. 382. Salk. 217. 2 L. Ray. 1052.

‡ L. Ray. 117.

by ſaying the defendant *comes* only, it is ſufficient, for that ſhows his appearance.* The full defence, from the words *when*, &c. meaning when and where the court ſhall conſider, implies that the defendant is ready to ſubmit to the juriſdiction and judgment of the court, and that he is ready to appear and defend himſelf againſt the plaintiff's charge, at ſuch time and place as the court ſhall think proper. But the &c. alſo implies, in addition to the above, "and the damages, and whatſoever elſe "he ought to defend." By *damages* it is admitted, that the plaintiff is able to ſue for damages; and, by the remainder, the juriſdiction of the court is eſtabliſhed. It is to be noted, that where the defendant pleads in abatement, it is proper to make only what is called a *half* defence, uſing the words, "comes and defends the wrong," without any more; and then he only makes himſelf a party, without any admiſſion.

After theſe few obſervations on defence, the next point to be conſidered is what plea it is proper to put in to the declaration; and this will be beſt known by conſidering the various natures and ſpecies of pleas. They are commonly divided into thoſe of *abatement* and thoſe of *bar*.

Abatement ſignifies a plea, by which the defendant prays that the plaintiff's ſuit may abate, on account of ſome inſufficiency of the matter, or an uncertainty of the allegation, a variance in the proceedings, and for many other cauſes, which will be afterwards more particularly ſhown.

The order of pleas in abatement is, 1. to the juriſdiction of the court; 2. to the perſon; 3. to the count or declaration; 4. to the writ, bill, or plaint; and, 5. to the action of the writ, &c. If this order be infringed, the defendant will loſe the advantage of what he had an anterior right to; for, by this order, each ſubſequent plea

* Lutw. 9. Old Ent. 5, 13, 30.

plea admits the former: or when he pleads to the perſon of the plaintiff, by that he acknowleges the juriſdiction of the court;* for it would be nugatory to plead any thing in that court, under whoſe juriſdiction it never was cognizable. When he pleads to the count, he allows that the plaintiff is able to come into that court to implead him; but, in pleading to the count, he does not admit the writ to be good: yet, if the count be vicious, the writ is conſequently deſtroyed; for, though the writ may in itſelf be good, it is not properly purſued, if the count be bad. When he pleads to the writ, he then admits the form of the count, becauſe the writ precedes the count. But, if the count is in any ſubſtance variant, the defendant may ſhow it in arreſt of judgment. If a man pleads to the *action* of the writ, he allows the ſufficiency of both writ and count.

1. Pleas to the *juriſdiction* are, where the defendant denies the authority of the court to take cognizance of the action; as in ſuits where the federal court is the proper excluſive tribunal, which is the only caſe where this plea can be made in the ſupreme court, as it has general juriſdiction throughout the ſtate in all other inſtances; for, though cauſes ought not to be brought in it under a certain value, yet, if they are, it only affects the plaintiff as to coſts. This plea muſt be in proper perſon, for pleading by attorney implies leave of the court, which acknowleges its juriſdiction. It muſt likewiſe be with a half defence. The concluſion is, "judgment "whether the court will take cognizance."

2. Plea to the *perſon* ariſes from the incapacity of the plaintiff to commence or continue his ſuit, or from the privilege of the defendant to be ſued in that court, or in that manner. As to the perſon of the plaintiff, outlawry is one diſability, which may be pleaded in abatement:

* Co. Lit. 303. Hob. 71. Latch. 178. 5 Mod. 146.

ment:* and, where the action is joint, the outlawry of one of the plaintiffs abates the action of both.† But the outlawry ſhould be completed and recorded, for the plea muſt ſtate, "as appears by the record."‡ This diſability is only pleadable when the plaintiff ſues in his own right; ſo if he ſues in that of another, who is ſufficiently able, he ſtands preciſely in the ſituation of that other.§ The plaintiff ſhall not be diſabled, in a writ of error, to reverſe an outlawry, by plea of the ſame outlawry, or of any other;‖ for, if one was a bar to another, he could not reverſe any at all, though erroneous. In ſome caſes, outlawry may be pleaded in bar, as well as in abatement; as that the plaintiff was outlawed for felony,¶ becauſe all his property is forfeited to the ſtate. Though the plaintiff replies *nul tiel record* to this plea, and, before the day given the defendant to bring in the record, removes it by writ of error, ſo that the defendant muſt fail, notwithſtanding the iſſue is of fact, there ſhall be judgment *reſpondeas ouſter*; for the plea was true at the time of pleading it.** It muſt in the plea be averred, that the plaintiff is the ſame perſon, or ſaid that the aforeſaid plaintiff was outlawed.†† Another ground is the plaintiff's *alienage*, in a real or mixed action; or being an alien enemy in a perſonal action, or *quare clauſum fregit*: but in the latter caſe, it muſt be averred that he is ſo, and that he was born at ſuch a place, under the allegiance of ſuch a prince, who is an enemy to the people of the United States. This may alſo be pleaded in bar to the action,‡‡ but againſt an alien *friend* it muſt be in

* Lutw. 1513.
† Co. Lit. 128. Dyer 222.
‡ 3 Lev. 29.
§ Doct. Plac. 390. Co. Lit. 128.
‖ Co. Lit. 128. Doct. Plac. 396.
¶ Co. Lit. 123. Doct. Plac. 395.
** Owen 22.
†† Lutw. 40.
‡‡ Co. Lit. 129. 7 Co. 1.

In abatement:* and an alien, whether friend or enemy, can maintain an action as an executor or adminiſtrator.† Being attainted of high treaſon, or felony,‡ is alſo a plea to the perſon of the plaintiff; though, if the cauſe of action is forfeited by the attainder, it may be pleaded in bar.§ It may alſo be pleaded to the plaintiff, that ſhe is *feme covert*,‖ or that ſhe is the wife of the defendant,¶ and in action by *baron and feme*, it may be pleaded ſhe was not covert when the writ iſſued,** or that they never were married.†† But it is no plea if the huſband be baniſhed, or hath abjured the realm.‡‡ The action is alſo abateable if another who ought to join is not named, as a joint-tenant,§§ tenant in common,‖‖ *baron* and *feme*, joint contractors,¶¶ joint obligors,*** joint partners,††† or executors;‡‡‡ but this muſt be pleaded in abatement, and not in bar,§§§ and cannot be given in evidence.‖‖‖ If ſeveral join when one only ought to ſue, it may be pleaded in abatement,¶¶¶ and the like, if there is no ſuch perſon as the plaintiff *in rerum naturæ*, nor any of

* Co. Lit. 130.
† Molloy. 370. Cro. Eliz. 683. Moor 431.
‡ Co. Lit. 132.
§ Bro. Vade Mecum 252.
‖ Co. Lit. 132.
¶ 1 Brownl. Ent. 63.
** Thel. Dig. lib. 11. cap. 2. ſect. 8.
†† Show. 50.
‡‡ Co. Lit. 132.
§§ Co. Lit. 189.
‖‖ Co. Lit. 198.
¶¶ Thel. Dig. lib. 11. cap. 47. ſect. 2.
*** 1 Sid. 238, 240. 1 Vent. 34.
††† Show. 189. Lutw. 1493. 2 Lev. 188, 228. Salk. 444, *contra*.
‡‡‡ Aſt. Ent. 11.
§§§ Show. 189. 3 Lev. 190. Carth. 170.
‖‖‖ 1 Salk. 290. 2 Lev. 113. 4 Mod. 181.
¶¶¶ Cro. Eliz. 143. 1 Leo. 315.

of them,* or that one of the defendants is not ſo;† but it muſt be pleaded, that no ſuch perſon *ever was in rerum naturæ*.‡ This plea of the plaintiff's incapacity muſt omit the "&c." in the defence, for the reaſon given above, and concludes with, "praying judgment whether "he ſhall be anſwered;" but if it is, whether he ought to anſwer, it will be iil.§ In theſe pleas muſt alſo be laid a venue.

If the defendant is privileged, it may be pleaded in abatement; though, in general, where this may be done, the courts will interpoſe in a ſummary way, and direct the proceedings to be ſtayed. A plea that the defendant was attending the court as a ſuitor, or as a witneſs, and during that time was ſued, abates the action. The privilege of officers or attornies of the court, may likewiſe be pleaded in this manner, where the privilege is allowable; but this is not the caſe in real actions.‖ So may alſo be pleaded, as to the perſon of the defendant, that ſhe was under coverture,¶ or was jointly concerned with others.**

3 and 4. Pleas to the *count and writ* are for miſtakes in the name, or the addition, or other want of form, or for a variance between the writ and count, or between either of them and the ſpecialty.

As to the miſtake of the name, or a *miſnomer*, if the chriſtian name be wholly miſtaken, it is fatal; for there is a repugnancy that a man ſhould be baptiſed by two ſingle names: though he may be chriſtened with what are commonly intended ſeveral names, yet the law conſiders

* Bro. Abr. *tit.* Brief, 25.
† Bend. 196.
‡ Bro. *tit.* Brief, 25, 70.
§ 5 Mod. 144.
‖ 1 Saund. 67.
¶ Lutw. 23.
** Lutw. 596.

conſiders them as one and inſeparable, in a pleading.* A miſtake in the letter of a ſirname is amendable.† If two names are in original derivation the ſame, and are taken promiſcuouſly the ſame in common uſe, though they differ in ſound, yet there is no variance; as Piers Griffith brought an *audita querela*, and outlawry pleaded by the name of Peter Griffith, was allowed.‡ But there is a ſubſtantial variance in ſound, and original and common uſe, that is not amendable; as if a man declare againſt Agnes, and the real name is Ann.§ The names of corporations muſt be exactly as their charter gives them. The defendant muſt not only plead that he was baptiſed by ſuch a name, but that he was known by it‖ at the time of the writ. and he muſt add the place where he was baptiſed.¶ He muſt not ſay, "comes the aforeſaid W. "D." for by the aforeſaid, he admits that his name is ſtated right.** If the defendant's name is explained by a wrong *alias*, he may plead this in abatement. One defendant ſhall not plead the *miſnomer* of another.†† This muſt be pleaded *in propria perſona*.‡‡

It is bad if the defendant's addition is inſerted wrong; but this is only neceſſary where the action is by original.

The count and the writ may be pleaded to for inſufficiency, as that the action is not proper, being *caſe*, when it ought to have been *account*;§§ or that no cauſe of action is incurred, as ſuit brought before cauſe of action,‖‖ or for a variance between the count and the writ,¶¶ or,

* Cro. Jac. 558, 640. Owen 107. Dyer 279.
† 1 Bulſ. 216.
‡ Cro. Jac. 425. 2 Roll. Abr. 136.
§ Cro. Jac. 435.
‖ Skin. 620.
¶ 1 Salk. 6.
** Lutw. 10. 1 Show. 394.
†† Lutw. 36.
‡‡ Ibid. 11.
§§ Reg. Plac. 283.
‖‖ 2 Lev. 197. Bend. pl. 93. Hob. 199, 245.
¶¶ Reg. Plac. 277.

in ſhort, for any defect in words, form or ſubſtance; as for razure, or interlineation, omiſſion of words, material addition, want of certainty or repugnancy, want of venue, want of teſte, bad return, &c. It is to be obſerved, that you cannot plead in abatement to the writ without oyer, and this muſt be underſtood of the original, and not of meſne proceſs, of which you cannot have oyer. Pleas to the writ or count may be with a full defence, and conclude, (if by original) to the writ; or declaration, by praying, "judgment of the writ or declaration, and "that the ſame may be quaſhed:" but by bill, it muſt be, "judgment of the bill" only, and not of the declaration.

5. Pleas to the *action of the writ* are, where the plaintiff has commenced a wrong action, or where it is determined by ſomething happening ſince the commencement, or another action is depending for the ſame cauſe, or where the action is *covenant*, and there is no deed to ſupport it, or the plaintiff is dead. If the plaintiff was dead before the action commenced, it is clearly abateable; but, where the plaintiff dies pending the ſuit, there are ſome diſtinctions. The rule is, that whenever the death of any party happens pending the writ, and yet the plea is in the ſame condition, as if ſuch party were living, there ſuch death makes no alteration. In actions merely perſonal, ariſing *ex delicto*, for wrongs actually done or committed by the defendant, as treſpaſs, battery, and ſlander, the rule is, that *actio perſonalis moritur cum perſona*; and it ſhall never be revived by or againſt the executors. But in actions ariſing *ex contractu*, by breach of promiſe, and the like, where the right deſcends to the repreſentatives of the plaintiff, and thoſe of the defendant have aſſets ſufficient to anſwer the demand, though the ſuits did formerly, in all inſtances abate, by the death of the parties, yet now they ſhall be revived by or againſt the

the repreſentatives. Upon this principle it is enacted,* "that actions which might ſurvive, ſhall not abate by "reaſon of the death of either of the parties, after inter-"locutory judgment;" and it is further enacted,† "that "if there be two or more plaintiffs or defendants, and "one or more of them ſhould die, if the cauſe of action "ſurvives to the ſurviving plaintiff or plaintiffs, or "againſt the ſurviving defendant or defendants, the writ "or action ſhall not be thereby abated; but ſuch death "being ſuggeſted upon the record, the action ſhall pro-"ceed at the ſuit of the ſurviving plaintiff or plaintiffs, "againſt the ſurviving defendant or defendants."

In whatever ſtage of the cauſe, therefore, one of the plaintiffs or defendants ſhould happen to die, whether after the writ ſued out, and before declaration, or after iſſue joined, and before trial, or after verdict, ſuch death ſhould be ſuggeſted in the declaration, or on the roll, after the entry of the iſſue, or the *poſtea*, as the caſe may be.

As to another action pending, wherever it appears on the record that the plaintiff hath iſſued two writs againſt the ſame defendant for the ſame thing, the firſt not being determined, the ſecond writ ſhall abate.‡ But it muſt plainly appear to be for the ſame thing.§ It is not neceſſary, that both ſhould be pending at the time of pleading; for if there was a writ in being at the time of ſuing out the ſecond, it is plain that the ſecond was vexatious and ill *ab initio*.

On abatement of ſuits, all writs and proceſs muſt begin *de novo*; and one great reaſon for the abatement of writs is, that the party proſecuted may not be twice charged for the ſame debt, or other cauſe, or where the plaintiff hath

* Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 9.
† Ibid. ſect. 10.
‡ Doct. Plac. 10, 11.
§ Ibid.

hath another action depending for the ſame matter, &c.* The nature of a plea in abatement is in order to intitle the plaintiff to a better writ,† the meaning of which poſition is, that where a man pleads in abatement, he ſhall explain the matter he pleads in ſo particular a manner, that the plaintiff may be inſtructed, by that plea, what ſort of a writ to ſue out, ſo as to avoid ſubjecting himſelf to be overturned by a ſecond plea in abatement.

As, however, theſe pleas do not enter into the merits, but are merely productive of delay, the law has very properly allowed them within reſtrictive bounds. Therefore, by ſtatute, 11 ſeſſ. ch. 46. ſect. 31. no dilatory plea ſhall be received in any court of record, unleſs the party offering it do, by affidavit, prove the truth thereof, or ſhow ſome probable matter to the court to induce them to believe it to be true. If the plea is not accompanied with this affidavit, the plaintiff may obtain judgment, for it is no plea. But the affidavit may be made by the attorney.‡ There needs no affidavit with a plea to the juriſdiction, nor in treſpaſs, with a plea of taking in another place.

Pleas in abatement muſt be pleaded in four days, and they cannot be pleaded after a general imparlance.

When iſſue is joined on a plea in abatement, if it be found againſt the defendant, the judgment is final; but if the plaintiff demurs to it, the judgment is only *reſpondeas ouſter*; and after that he muſt plead in bar. Wherever, therefore, there is an error, which can be taken advantage of by a plea in abatement, it is preferable to do it ſo, than by way of demurrer.

If the plea is well founded, and the plaintiff is dubious of riſking the coſts, he may confeſs the plea, and enter judgment

* 3 Lev. 304.
† 2 Mod. 65. 10 Mod. 208. Yelv. 112. 2 L. Ray. 1178, 1541.
‡ Bar. 344.

judgment *nil capiat per breve*, in which caſe he ſhall not pay coſts.*

If judgment is given againſt the plaintiff, the cauſe of abatement muſt be removed by ſuing out a new writ, and proceeding *de novo*, or by amending his declaration, to which if allowed, the defendant muſt put in.

A plea to the action, which anſwers the merits of the complaint, by either confeſſing or denying it.

A direct confeſſion of the whole complaint is not very uſual, for then the defendant would probably end the matter ſooner, or not plead at all, but ſuffer judgment to go by default. Yet, ſometimes after tender and refuſal of a debt, if the creditor haraſſes his debtor with an action, it then becomes neceſſary for the defendant to acknowlege the debt, and plead the tender, adding that he has been at all times ready, and is ſtill ready to diſcharge it: for a tender by the debtor, and a refuſal by the creditor, will, in all caſes, carry the coſts,† and, in ſome caſes, even the debt itſelf.‡

Tender is defined to be the offering of money, or any other thing, in ſatisfaction, or circumſpectly to endeavour at the performance of a thing previous to the bringing any action; as a tender of rent is to offer it at the time and place when and where it ought to be paid; and it is an act done to ſave the penalty of a bond. It may be made of money in bags or untold, for it is the receiver's buſineſs to tell it; and it muſt be by offering the bags to the plaintiff, and not holding them under the arm.§

By ſome ſtatutes, (particularly that of 11 ſeſſ. ch. 36. ſect. 10. in caſes of an irregular diſtreſs,) tender of amends to the party grieved is a bar to all actions, if made prior to the bringing thereof.

In

* 1 Bar. 92. Salk. 194.
† 1 Vent. 21.
‡ Co. Lit. 209.
§ Noy 73.

In debt, where the damages are but neceſſary, the defendant, in pleading a tender, "muſt pray judgment "of the damages;" but in *aſſumpſit*, the damages are principal, and he muſt plead, "that he hath always been "ready, and that he hath the money in court, and prays "judgment whether the plaintiff is intitled to have fur-"ther damages.*"

If a tender, at the day, of corn, or any periſhable commodity, be pleaded, with a refuſal, there is no neceſſity to allege, "ſtill ready:"† but wherever the debt or duty ariſes at the time of the contract, and is not diſcharged by a tender and refuſal, it is not enough for the party who pleads a tender and refuſal, that he is ſtill ready, but he muſt plead at all times ready.‡ Every requiſite, which is in a particular caſe neceſſary to the validity of a tender, muſt be ſhown to have been complied with.§ Tender of ſtock muſt be at the laſt part of the day it can be accepted, and the uſual hour muſt be ſet forth.‖

A right to damages, on account of the non-payment of a debt, or non-performance of a duty, may, after being taken away by a tender and refuſal, be revived again, by a demand ſubſequent to the tender and refuſal.¶

By ſtatute, 11 ſeſſ. cap. 46. ſect. 30. the defendant may, to a treſpaſs *quare clauſum fregit*, diſclaim title to the land, and plead that the treſpaſs was by negligence, or involuntary, and tender of amends before action brought; upon ſome of which the plaintiff ſhall be forced to join iſſue; and if judgment be againſt him, he ſhall be barred,

Although

* Salk. 622. 3 Salk. 344.
† 9 Rep. 70. 1 Inſt. 107.
‡ 12 Mod. 152. Carth. 413.
§ Salk. 624.
‖ Str. 777, 832.
¶ 5 Bac. 12. Brownl. 71.

Although it is not common to confeſs the whole action by plea, yet frequently the defendant confeſſes one part of the complaint, (by a *cognovit actionem* in reſpect thereof) and traverſes or denies the reſt, in order to avoid the expence of carrying that part to a formal trial, which he has no ground to litigate. A ſpecies of this ſort of confeſſion is the payment of money into court, of which we have treated in the 8th chapter. At the time of ſerving the rule the defendant muſt accompany it with his plea, ſtating an exception as to the ſum paid in.

To this head may alſo be referred the practice of what is called a *ſet off*, whereby the defendant acknowleges the juſtice of the plaintiff's demand, on the one hand; but, on the other, ſets up a demand of his own to counterbalance that of the plaintiff, either in the whole or in part; as if the plaintiff ſues for 100l. due on a note, the defendant may ſet off 90l. due to himſelf for merchandiſes ſold to the plaintiff; and in caſe he pleads ſuch ſet off, muſt pay the remaining balance into court. This depends on the ſtatute, 11 ſeſſ. cap. 46. ſect. 1. which enacts, "that where two or more perſons dealing toge-
"ther, are indebted to each other upon bonds, bills, bar-
"gains, contracts, promiſes, accounts, or the like, if
"one ſues the other, the defendant may plead payment
"of all, or any part of the demand, giving notice in
"writing, with the plea, of what he will inſiſt upon at
"the trial for his diſcharge, and give any bond, bill, re-
"ceipt, account, bargain, or contract, ſo given notice
"of, in evidence; and if ſuch ſuit be brought for a bond,
"bill, or contract for the recovery of a penalty to en-
"force the payment of money only, or ſuch bond, &c.
"ſhall be given in evidence for the defendant, the ſum
"*bona fide* due ſhall be deemed the real debt. If it appears
"that the debt is ſatisfied, the jury ſhall find for the de-
"fendant, and judgment is to be entered, that the plain-
"tiff take nothing by his writ, bill, or plaint; and, un-
"leſs

" leſs the plaintiff proſecutes as executor or adminiſtra-
" tor, he ſhall pay coſts; and, if it ſhall appear that any
" part of the debt is paid, ſo much ſhall be diſcounted,
" and the plaintiff ſhall have judgment for the reſidue
" with coſts. But, if it appears to the jury that the plain-
" tiff is overpaid, they ſhall find a verdict for the de-
" fendant, and certify to the court how much the plain-
" tiff is indebted to the defendant, for which the latter
" ſhall have judgment and execution, unleſs the plain-
" tiff proſecutes as executor or adminiſtrator, in which
" caſe it ſhall be deemed a debt of record, and the de-
" fendant may recover it by an action of debt, or *ſcire*
" *facias*."

This ſection of the above ſtatute, is ſomething analagous to the Britiſh ſtatutes, which permit mutual debts to be ſet off, on notice, on the general iſſue; and, it is conceived, that in whatever caſes, determined under thoſe ſtatutes, the principles apply to the act of this ſtate, thoſe determinations may, with propriety, be conſidered as law here. It has been held that the defendant, having pleaded the general iſſue, may withdraw it, for the purpoſe of repleading it with notice of ſet off:* from this principle we may infer, that the court will permit the general iſſue to be withdrawn, and payment to be pleaded with the like notice; though the general rule is, that no ſpecial plea ſhall be pleaded in the room of the general iſſue. By a like analogy, it may be laid down, in conformity to the Britiſh caſes, that a debt barred by the ſtatute of limitations cannot be ſet off;† nor a debt due to a man in right of his wife, in an action againſt him on his own bond,‡ neither can the plaintiff ſet off in replevin where the avowant juſtifies under a diſtreſs for rent; ſuch diſtreſs not being an action contemplated by the ſtatute.

* 2 Str. 1267.
† 2 Str. 1271.
‡ Bul. N. P. 175.

tute, but merely a remedy without ſuit.* The act of the legiſlature of this ſtate is much more extenſive in its operation, than thoſe of England for the ſame purpoſe, as may be ſeen by compariſon.

Pleas that totally deny the cauſe of complaint, are either the *general iſſue*, or a *ſpecial plea* in bar, and both muſt be adapted to the peculiar action in which they are uſed.

I. The *general iſſue*, or general plea, is what traverſes, thwarts, and denies at once the whole declaration, without offering ſpecial matter to evade it. As in treſpaſs, either *vi et armis*, or on the caſe, *non culpabilis*, not guilty; in debt upon contract, *nil debet*, he owes nothing; in debt on bond, *non eſt factum*, it is not his deed; in aſſumpſit, *non aſſumpſit*, he made no ſuch promiſe. Theſe pleas are called general iſſues, becauſe, by importing an abſolute and general denial of what is alleged in the declaration, they amount at once to an iſſue, or a fact affirmed on one ſide, and totally denied on the other.

Formerly the general iſſue was ſeldom pleaded, except when the party meant wholly to deny the charge alleged againſt him. But when he meant to diſtinguiſh away, or palliate the charge, it was uſual to ſet forth the particular facts in a ſpecial plea, which was originally intended to apprize the court, and the adverſe party, of the nature and circumſtances of the defence, and to keep the law and the fact diſtinct. It was an invariable rule, that every defence, which could not be thus ſpecially pleaded, might be given in evidence upon the general iſſue at the trial. But the ſcience of ſpecial pleading having been frequently perverted to the purpoſes of chicane and delay, the legiſlature have ordained,† "that it ſhall be lawful for the defendant, or tenant

* Bul. N. P. 177.

† Laws of N. Y. 12 ſeſſ. ch. 28. ſect. 2.

" ant in any action, except in the caſe of mutual deal-
" ings, to plead the general iſſue, and give any ſpecial
" matter in evidence, which, if pleaded, would be a
" bar to ſuch action, giving notice, with his plea, of
" the ſame matters."

It is to be obſerved, that pleas, which amount to the general iſſue are not to be allowed, but the general iſſue muſt be entered.* After ſpecial iſſue joined the party cannot waive it, and plead the general iſſue, without motion in court.†

As to the different ſpecies of the general iſſue, and what are adapted to the various caſes:

1. *Not guilty* is a general anſwer in an action of treſpaſs, whereby the defendant abſolutely denies the fact of which he is charged; and it may be pleaded without notice: 1. when the thing ſuppoſed to be done for matter of fact is not true; or, 2. when the matter as it is, is not a treſpaſs, but ſome other offence, and ſome other action, but not treſpaſs, is given for it; or, 3. when the lands and goods for which the action is brought, are the defendant's, and not the plaintiff's.‡ It is likewiſe good upon all ſtatutes, which prohibit the doing of a thing under a penalty, becauſe a *tort* is ſuppoſed:§ but, in action of non-feaſance, not guilty is no plea, for they are two negatives, which cannot make an iſſue.‖

2. *Non eſt factum*, which may be pleaded generally, where the deed is eraſed, or any addition or alteration made, or the ſeal broken; and in all caſes where the deed itſelf is void;¶ but where it is merely voidable, or made void by a ſtatute,** it muſt either be ſpecially pleaded, or notice thereof given with the general iſſue.

3. *Non*

* Reg. Plac. 99, 14. † 1 Keb. 225.
‡ 5 Co. 85. Co. Lit. 282, 283.
§ 2 Inſt. 651. 2 Rol. 683. 3 Cro. 621, 257. Reg. Plac. 191.
‖ 1 Cro. 569. ¶ 5 Co. 119. ** Ibid.

3. *Non aſſumpſit* is the proper plea to a declaration on an aſſumpſit, and this may be pleaded generally to the declaration, though it conſiſts of ſeveral counts;* and an executor may plead *non aſſumpſit* generally, for it ſhall be referred to the teſtator;† but to an entire undertaking the defendant cannot plead *non aſſumpſit* as to part, and payment as to the other part.‡

The ſtatute above recited, allowing the ſpecial matter to be given in evidence under the general iſſue, if with a notice of ſuch ſpecial matter, has conſiderably ſimplified the ſcience of pleading, but it is ſtill neceſſary to conſider the nature of ſpecial pleas, in order to determine in what caſes there is a neceſſity of accompanying the general iſſue, with a notice of the ſpecial matter; which, in general, may be ſaid is requiſite, where ſuch ſpecial plea was formerly required.

II. *Special pleas* in bar are thoſe, wherein you oppoſe ſome ſpecial matter to the plaintiff's demand, which tends to overthrow the facts, or deſtroy the right of action founded on them, and are various, according to the circumſtances of the defendant's caſe; as, in perſonal actions, an accord, arbitration, conditions performed, nonage of the defendant, or ſome other fact, which precludes the plaintiff from his action. A *juſtification* is, likewiſe, a ſpecial plea in bar; as, in actions of aſſault and battery, *ſon aſſault demeſne*, meaning that it was the plaintiff's own original aſſault; and again, in treſpaſs, that the defendant did the thing complained of in right of ſome office, which warranted him ſo to do; or, in an action of ſlander, that the plaintiff is really what the defendant ſaid he was; or, in ejectment, where the defendant pleads *liberum tenementum*, &c.

Alſo

* 1 Sid. 333. Cro. Car. 219. 2 Cro. 544.
† 1 Lev. 184. 1 Sid. 292.
‡ Mar. 100.

Alſo a man may plead the ſtatute of limitations. It has been the policy of the legiſlature to limit, in many caſes, the period in which actions ſhall be brought. The natural preſumption is, that a debt or claim, which has remained due or dormant for a conſiderable number of years, without any demand on the part of the plaintiff, is actually ſatisfied. Accordingly, by ſtatute, 11 ſeſſ. ch. 43. it is ordained, that "after the firſt of January, "1800, no ſuit ſhall be brought by the people of this "ſtate for lands, but within forty years after their title "accrued."*

"No perſon ſhall, before the firſt of January, 1800, "ſue any writ of right, or make any preſcription, title, "or claim, to or for any lands of the poſſeſſion of his an-"ceſtor, but within ſixty years; or have any poſſeſſory "action, upon the poſſeſſion of any anceſtor, but with-"in fifty years; nor any action of his own ſeiſin or "poſſeſſion, but within thirty years next after the *teſte* "of his original writ: nor ſhall he make any avowry, "or cognizance, for any rent, ſuit or ſervice, but with-"in fifty years."†

A claim or entry to prevent the ſtatute, muſt be upon the land, unleſs there ſhall be ſome ſpecial reaſon to the contrary.‡

"After the firſt of January, 1800, no real action to be "maintained, nor avowry or cognizance made, but on "a ſeiſin within twenty-five years; ſaving to the plain-"tiff the time he or ſhe may have been under age, in-"ſane, covert, or in priſon."§

"All perſons not proving poſſeſſion, or ſeiſin, within "the times above limited, to be barred for ever."‖

"Writs

* Sect. 1.
† Sect. 2—5.
‡ Salk. 205. 2 Str. 1086.
§ Laws of N. Y. 11 ſeſſ. ch. 43. ſect. 6.
‖ Ibid. ſect. 7.

" Writs of *formedon* and *ſcire facias* upon fines, ſhall " be brought within twenty years after the title firſt de- " ſcended."*

" No entry ſhall be made into lands, but within twen- " ty years after the title accrued; and no entry or claim " ſhall be good, unleſs a ſuit is brought within a year " after."†

Limitation of perſonal Actions. " All actions of treſpaſs " *quare clauſum fregit*, all actions of treſpaſs, detinue, ac- " tions of trover and replevin, for taking away of goods " and chattels, all actions of account, and upon the caſe, " (other than ſuch *actions*‡ as concern the trade of " merchandiſe, between merchant and merchant, their " factors or ſervants) all actions of debt, grounded " upon any lending or contract without ſpecialty, all ac- " tions of debt for arrearages of rent, all ſuits or ac- " tions in the admiralty for ſeamen's wages, and all ac- " tions of aſſault, menace, battery, wounding, and im- " priſonment, ſhall be commenced and ſued within the " time and limitation after expreſſed, viz. actions upon " the caſe, other than for ſlander, actions of account, treſ- " paſs, debt, detinue, and replevin for goods or chattels, " and treſpaſs *quare clauſum fregit*, and ſuits and actions " for

* Laws of N. Y. ch. 43. ſect. 8.

† Ibid. ſect. 9.

‡ The Engliſh ſtatute of 21 Jac. ch. 16. from which the above act is apparently copied, ſays, " All actions of account, " and upon the caſe, (other than ſuch *accounts*, as concern the " trade," &c.) Upon the conſtruction of the Britiſh act, the exception has been held to extend only to actions of account, not to an action on the caſe concerning merchants accounts; but the ſtatute of New-York, excepting by the word " actions," and not " accounts," it becomes a doubt whether it can be pleaded to an action on the caſe, relative to merchants accounts; for the grammatical conſtruction of the ſtatute imports, that the limitation does not extend to tranſactions of that nature. But ſee 2 Saund. 125. the reaſoning, in the caſe there cited, ſeems to apply generally againſt enlarging the exception.

" for ſeamen's wages, within ſix years next after the " cauſe of ſuch actions or ſuits, and not after: aſſault, " menace, battery, wounding, and impriſonment, with- " in four years after the cauſe of ſuch actions, and not af- " ter; and caſe for words within two years after the " words ſpoken, and not after."*

" Infants, *feme coverts*, perſons inſane, or in priſon, " and their heirs may bring ſuch writs of *formedon*, or " *ſcire facias*, or make entries into lands after the time " limited, ſo as they do it within ten years after their diſ- " ability is removed, and they may bring perſonal actions " within the time before limited, after ſuch diſability is " removed."†

" If the *defendant*,‡ in any perſonal action, is out of " the ſtate, a ſuit may be brought againſt him within the " time before limited, after his return to the ſtate."§

" In all caſes, if judgment be obtained by plaintiff, and " it is afterwards *reverſed* on error, or *arreſted* upon mo- " tion; or if defendant is *outlawed*, and the outlawry is " afterwards reverſed, the plaintiff or his repreſentative " muſt commence a new action within a year from that " time."‖

" All actions, ſuits, bills, indictments, or informations " for any forfeiture on a penal ſtatute, where the for- " feiture is limited to the ſtate only, ſhall be brought " within two years after the offence committed. But " where the forfeiture ſhall be given to any perſon, who " ſhall proſecute for the ſame, or to the people, and to " any other who ſhall proſecute in that behalf, the ac- " tion, &c. ſhall be brought within one year after the " offence

* Laws of N. Y. 11 ſeſſ. ch. 43. ſect. 10.

† Ibid. ſect. 11.

‡ If the plaintiff ſhould be out of the ſtate, the act has made no proviſion to ſave his right.

§ Laws of N. Y. 11 ſeſſ. ch. 43. ſect. 10.

‖ Ibid. ſect. 12.

" offence committed; and in default of ſuch purſuit, it " may be brought for the people within two years after " that year ended. Where forfeiture or action is given " to the party grieved, it muſt be ſued for or upon with- " in three years after the offence or cauſe of action " accrued."*

" The period between the 14th of October, 1775, and " 21ſt of March, 1783, is not to be computed as part of " the time of limitation."†

If in any ſuit, the injury or cauſe of action took its riſe earlier than the period thus expreſſly limited by law, the ſtatute may be pleaded in bar; as, upon an *aſſumpſit*, the defendant may plead *non aſſumpſit infra ſex annos*.

An *eſtoppel* is likewiſe a ſpecial plea in bar, which happens where a man hath done ſome act, or executed ſome deed, which eſtops or precludes him from averring any thing to the contrary: as, if a tenant for years, (who has no freehold,) levy a fine to another perſon, though this is void as to ſtrangers, yet it ſhall work as an eſtoppel to the cognizor; for if he afterwards brings an action to recover theſe lands, and his fine is pleaded againſt him, he ſhall thereby be eſtopped from ſaying, that he had no freehold at the time, and therefore was incapable of levying it.

In actions, where damages only are to be recovered, arbitrament, or accord, is a good plea, though the action be grounded on a deed or record, but the ſatisfaction ought not to be of any thing, whereof the plaintiff had property;‡ and, in all the following caſes, concord with ſatisfaction is a good plea: 1. *vi et armis*, or where a *tort* is ſuppoſed to be; 2. ejectment; 3. detinue for a perſonal thing; 4. debt upon leaſe for years; 5. promiſe

* Laws of N. Y. 11 ſeſſ. ch. 43. ſect. 13.
† Ibid. 15.
‡ 6 Co. 44. Dyer 75, 356. Yelv. 124. 3 Cro. 356.

miſe to build a houſe; 6. action of covenant: but when a certain duty accrues by the covenant at the time of doing it, accord with ſatisfaction is no plea;* though it is where no certain duty accrues, until the ſubſequent act or wrong. The ſafeſt way of pleading an accord, is to plead it by way of ſatisfaction, and not of accord only, and you need ſay no more than that the defendant hath paid the plaintiff five ſhillings, in full ſatisfaction of the ſame action, which five ſhillings the plaintiff received, &c. and ſo judgment of the action.†

Performance of the condition of a bond for the payment of money could, by the common law, be pleaded only where the defendant paid the money on the very day, and at the very place mentioned therein;‡ but, by ſtatute, 11 ſeſſ. ch. 46. ſect. 5. this payment may be pleaded in bar, if made at any time or place before action brought. In action on a ſingle bill, or for a ſingle ſum in a bill penal, payment could not be pleaded at all; but the ſame clauſe of the act allows the defendant, if he hath paid the money due on ſuch bills, in an action of debt thereon, or in debt, or *ſcire facias*, on a judgment, to plead the ſame in bar.

If the defendant pleads a juſtification by authority, to ſupport it there muſt be a good authority, and it muſt be well purſued.

The general requiſites of ſpecial pleas are, that they anſwer the whole declaration---that they are certain---not argumentative---not amounting to the general iſſue---and not containing duplicity.

1ſt. As to the firſt requiſite therefore,§ if a defendant be charged with taking three hundred ſheep, and he juſtify as to part only of that number, without anſwering at all

* 6 Co. 44.
† 9 Co. 80.
‡ 1 Co. 113. Dyer 51. 5 Co. 43.
§ 1 Cro. 434. 2 Mod. 259.

all concerning the reſidue, this would amount to what is called a *diſcontinuance*, and judgment would be entered generally againſt him. But, as declarations, for obvious reaſons, enhance and over-rate the charge, the common courſe is for the defendant to plead a juſtification as to what he has actually committed, and *not guilty* to anſwer the reſidue, which mode of defence may be thrown into ſeparate pleas, or otherwiſe joined in one to ſave expence. I ſhall here obſerve, in regard to pleas anſwering the declaration, that, in tranſitory actions, the defendant cannot vary from the place alleged by the plaintiff.

2d. Pleas, as well as declarations, muſt be *certain*, not vague or too general, and muſt contain every eſſential allegation, with * the place or *venue* of ſuch points on which iſſue may be joined, in order to their being tried. The degree of ſuch certainty may be particularly eſtimated from the end of it, which, in declarations, is, that the defendant may be able to anſwer them, and the court to give judgment; and, in pleas, that they amount to a full and complete bar. But certainty to a *common intent* is ſufficient; as if one claim as heir, † it ſhall ſuffice, without ſaying that the anceſtor is dead, or had no ſon, for neceſſary circumſtances ſhall be intended; and it would be abſurd to ſearch for poſſible facts, which do not appear, to defeat the more obvious and reaſonable conſtruction. Another rule is, that matter of *inducement*, or conveyance to the principal matter, need not be ſo certainly or fully expreſſed, as the very ſubſtance of the plea. As to what matters are requiſite to be ſpecially ſtated and averred, it is difficult to give many other general rules. This, however, may be remarked, that the points on which the merits of the caſe antecedently depend, are neceſſary to be alleged; but matters ſubſequent, which go in defeazance or avoidance of the plea, need not be noticed,

* 2 Term Rep. 30 † Dal. 67. 1 Lev. 190.

as, if true, they come more properly from the other party. Thus it is laid down, that if an act of the legiſlature make writing neceſſary,* (which was not ſo before to a common law matter,) you need not plead on record the thing to be in writing, though you muſt give it in evidence. But where a thing is originally introduced by ſtatute, and required to be in writing, you muſt plead it with all the circumſtances preſcribed by the act; as in the caſe of deviſes.

3d. It is requiſite that pleadings ſhould be *direct* and *poſitive*, not argumentative, or only implying an anſwer to the declaration. Thus, in the derivation of a title, if it be ſtated, "that by a certain indenture *it is witneſſed*, that "A. aſſigned a term to B."† which fact is the very ſubſtance of the plea, this is vitious pleading.

4th. It is neceſſary that the plea do *not amount to the general iſſue*, for there the latter ſhould have been relied on to avoid prolixity, which is alſo more ſafe, eaſy and convenient to the defendant, leaving the *onus probandi* to the plaintiff.

5th. The laſt requiſite to a plea in bar is, that it be not *double*. Duplicity is where ſeveral matters are alleged in the ſame plea, each of which ſeparately would be a ſufficient bar, or at leaſt purports ſo to be. By ſtatute, 12 ſeſſ. ch. 28. ſect. 1. the defendant, or tenant, in any action, or the plaintiff in replevin, with leave of the court, may plead as many ſeveral matters as he ſhall think neceſſary for his defence; and the practice on the ſtatute has been, without any motion, to allege leave of the court in the plea, and plead as many ſeveral matters as were thought proper. If the plaintiff's attorney eſteemed any of them exceptionable, he applied to a judge for a ſummons, to ſhow cauſe why ſome of the pleas ſhould not be ſtruck out; and if the defendant's attorney did not thereupon ſatisfy the judge that they were all neceſſary, he

* 2 Salk. 519. † 2 Saund. 319.

he would order the defendant to ſtrike out ſome at his election. Though it has been the practice to plead double, without actually making any motion for leave, yet it has never been ſanctioned by any judicial determination; and it was intimated by the court, in January term, 1793, in a caſe where this was not the direct point, that, ſhould it come before them, they might probably eſteem this motion neceſſary before plea, as is the practice in England upon a ſimilar ſtatute. It may further be obſerved, that, by rule of July term, 1786, it is ordered, "that any defendant, who ſhall think it neceſſary for his "defence to plead ſeveral matters, purſuant to the ſta-"tute, and that in the vacation, when he cannot obtain "the leave of the court, he may apply to one of the "judges, at his chamber, for ſuch leave, upon giving "notice to the plaintiff or his attorney, of the ſeveral "matters which ſuch defendant ſhall intend to plead, "and that if the judge ſhall give ſuch leave, that the ſame "be entered in the minutes of the ſucceeding term, un-"leſs cauſe be then ſhown to the contrary."

Special pleas are uſually in the affirmative, ſometimes in the negative: but they always advance ſome new fact not mentioned in the declaration, and then they muſt be averred to be true in the common form, "and this he is "ready to verify." This is not neceſſary in the general iſſue, that always containing a total denial of the facts before advanced by the other party, and, therefore, putting him upon the proof of them.

When the defendant has fixed upon the proper plea, he muſt next file a copy in the office, and ſerve another on the plaintiff's attorney, and all ſpecial pleas muſt be ſigned by counſel. It is alſo uſual to inſert the warrant of attorney at the foot of the plea, though ſtrictly it ought to be filed the term of appearance, according to the ſtatute, but the practice is not in conformity to the act.

CHAPTER

CHAPTER X.

Of Replication, Rejoinder, and ſubſequent Pleadings to the Iſſue, and of Plea puis le darrein continuance.

WHEN the plea is put in, and it does not amount to an iſſue or a total contradiction of the declaration, but only evades it, the plaintiff may plead again, and *reply* to the defendant's plea, either traverſing it, that is, totally denying it; or he may allege new matter in contradiction thereunto, or he may confeſs and avoid the plea, by ſome new matter or diſtinction conſiſtent with the declaration, for if it differs or varies from the count, and does not make good the ſame, it is called a *departure in pleading*, which is not allowable.* Great care muſt be taken, that the replication maintains the cauſe of action.† If it neither confeſſes, nor avoids, nor traverſes the matter of the bar, it is naught, and the defendant may demur to it, ſhewing this for cauſe.‡ If the plaintiff replies to a plea in bar, which is not good, the replication prevents him from taking advantage of the defect.§ The replication is neceſſary to all bars pleaded in the affirmative, but where they are pleaded in the negative, there is no occaſion for the replication. The concluſion of the replication, if it be in the affirmative, muſt be, "and this he is ready to verify;" but if in the negative, "and this he prays may be inquired of by the "country,"

* Co. Lit. 31, 304, 305. Plow. 7, 8.
† 1 Co. 120.
‡ New Book of Ent. 14.
§ Pract. Reg. 294.

" country," for wherever there is a negative and an affirmative, an iſſue muſt be taken.

The plaintiff may reply to the act of limitation, the exceptions of the act,* but this replication muſt conclude with an averment.† He may likewiſe plead an action commenced within the time, but he muſt ſhow all the continuances.‡ He may reply generally, " that the " cauſe of action accrued within ſix years," and, if the defendant pleads, that neither the cauſes of action, nor any of them accrued within ſix years, it is a good replication, that the cauſes of action, or ſome of them did accrue.§

Though a departure in pleading is not admiſſible, yet, in many actions the plaintiff, who has alleged in his declaration a general wrong, may, in his replication, after an evaſive plea by the defendant, reduce that general wrong to a more particular certainty, by aſſigning the injury afreſh, with all its ſpecific circumſtances, in ſuch manner as clearly to aſcertain and identify it, conſiſtently with his general complaint, which is called a *new* or *novel* aſſignment; as where the plaintiff declares, in treſpaſs *quare clauſum fregit*, for cutting down graſs in ſuch a place, the defendant pleads, and ſays that the place where, &c. are ten acres of, &c. and are his own freehold, by which he entered, &c. as into his own freehold, &c. Then the plaintiff ſays the cloſe and place where, &c. are twenty acres of, &c. lying in the townſhip of, &c. called and known by the name of, &c. other than the ſaid acres mentioned in the defendant's plea; and for that the defendant hath not anſwered to the treſpaſs in the twenty acres newly aſſigned, the plaintiff " prays " judgment, and his damages *occaſione tranſgreſſionis*." To this new aſſignment the defendant may plead, if he has any thing to allege in bar.

To

* Lut. 243. 2 Saund. 120. 1 Sid. 453.
† 4 Mod. 376. Carth. 337.
‡ Salk. 420. § Lut. 1607.

To the replication the defendant may rejoin, or put in an anſwer called a *rejoinder*. The plaintiff may anſwer the rejoinder by a *ſurrejoinder*, upon which the defendant may *rebut*, and the plaintiff anſwer him by a *ſurrebutter*.

The whole of this proceſs, from the plea to the iſſue, is denominated the *pleadings*, in the ſeveral ſtages of which it muſt be carefully obſerved not to depart, or vary from the title or defence on which the party has once inſiſted.

The obſervation which has been made relative to duplicity in a plea, is applicable to all the other parts of a pleading. Yet it is frequently adviſeable to plead in ſuch a manner as to avoid any implied admiſſion of a fact, which cannot, with propriety or ſafety, be poſitively affirmed or denied. This may be done by what is called a *proteſtation*, whereby the party interpoſes an oblique allegation or denial of ſome fact, proteſting that ſuch a matter does, or does not exiſt, and, at the ſame time, avoiding a direct affirmation or denial; thus, if an award be ſet forth by the plaintiff, and he can aſſign a breach in one part of it, [viz. the non-payment of a ſum of money] and yet is afraid to admit the performance of the reſt of the award, or to aver in general a non-performance of any part, leſt ſomething ſhould appear to have been performed, he may ſave to himſelf any advantage he might make of the general non-performance, by alleging that by proteſtation, and plead only the non-payment of the money.

In any ſtage of the pleadings, when either ſide advances or affirms any new matter, he uſually, as was ſaid, avers it to be true, "and this he is ready to verify." On the other hand, when either ſide traverſes, or denies facts pleaded by his antagoniſt, he uſually tenders an iſſue, as it is called, the language of which is different, according to the party by whom the iſſue is tendered;

for.

for, if the traverſe or denial comes from the defendant, the iſſue is tendered in this manner; "and of this he "puts himſelf upon the country," thereby ſubmitting himſelf to the judgment of his peers; but if the traverſe lies upon the plaintiff, he tenders the iſſue, or prays the judgment of the peers againſt the defendant, in another form, thus: "and this he prays may be inquired of by "the country."

But if either ſide pleads a ſpecial negative plea, not traverſing or denying any thing that was before alleged, but diſcloſing ſome new negative matter; as where the ſuit is on a bond conditioned to perform an award, and the defendant pleads negatively, that no award was made, he tenders no iſſue upon this plea, becauſe it does not yet appear, whether the fact will be diſputed, the plaintiff not having yet aſſerted the exiſtence of any award; but when the plaintiff replies and ſets forth an actual ſpecific award, if then the defendant traverſes the replication, and denies the making of any ſuch award, he then, and not before, tenders an iſſue to the plaintiff. For where, in the courſe of the pleading, they come to a point, which is affirmed on one ſide and denied on the other, they are then ſaid to be at iſſue, all their debates being at laſt contracted to a ſingle point, which muſt now be determined in favor of one of the parties.

Of all theſe pleadings a copy muſt be filed, and another ſerved, and neither party muſt neglect to do it in proper time; if the defendant does, judgment will be ſigned againſt him; if the plaintiff does, he will be non-proſſed.

Though the defendant can regularly have but one plea, yet if any new matter happens pending the writ, he may plead it after a former plea pleaded, provided it be before the next continuance after ſuch matter has happened, which is called a plea *puis le darrein continuance*, becauſe ſuch matter being new, it was not in his power to plead it when the former plea was pleaded; but this cannot

not be done after a continuance has paſſed, becauſe, by ſuffering his former plea to continue, he has waived the new matter;* but there are two caſes where a man may plead, though it be not after the laſt continuance, viz. on outlawry, and the death of the plaintiff; and if the attorney will traverſe the latter, he cannot ſay the plaintiff comes by his attorney, but the attorney muſt come by his name. "J. S. comes for his principal, and ſays, "&c." There can be but one plea *puis le darrein continuance*,† and it is no good plea to ſay, after the laſt continuance, ſuch a thing happened, but it muſt ſtate the preciſe day.‡ The plea *puis le darrein continuance*, put in at the circuit court, muſt be certified as part of the record, and cannot be then tried; for the judge has no power to try any iſſues but ſuch as are joined in the ſupreme court.§

CHAPTER XI.

Of Diſcontinuing.

IF after the commencement of a ſuit the plaintiff ſhould think the action not maintainable, either for want of merits, or from having miſtaken the form of the action, or the parties to the ſuit; or ſhould, for any other cauſe, wiſh to proceed no farther therein, he may diſcontinue, after which he may begin *de novo*.

Should plaintiff neither diſcontinue, nor proceed, judgment of non pros will be obtained againſt him; and, if

* Salk. 178. L. Ray. 693.
† Salk. 178.
‡ 5 Mod. 12. Yelv. 141.
§ 2 Mod. 307. Laws of N. Y. 9 ſeſſ. ch. 41.

if he bring a ſecond action, for the ſame cauſe, without having diſcontinued, the firſt defendant may plead *autre action pendant*, and it will be then too late to diſcontinue.*

In all caſes, where the plaintiff diſcontinues, it is upon payment of coſts.†

Executors and adminiſtrators pay coſts on diſcontinuing,‡ where they have knowingly brought their action wrong;§ but otherwiſe they do not pay coſts. Where an adminiſtrator plaintiff in ejectment, after the record was ſent down, diſcovered the defendant's title good againſt him, he had leave to diſcontinue without coſts, on agreeing not to bring another action without leave.‖ Diſcontinuance may be either,

1. By *rule of courſe*, which plaintiff may obtain at any time, either before or after declaration, until iſſue or demurrer joined. This rule being obtained in the uſual mode, by inſerting it in your docquet, get a certified copy from the clerk, and, at the ſame time, give notice of taxing the coſts: if the oppoſite party, or his attorney, does not attend at the time appointed, the judge will tax them *ex parte*, which coſts muſt be paid forthwith, as the rule is conditional, and of no avail, unleſs they are paid.

2. By *ſpecial motion*. After iſſue or demurrer joined, until verdict or writ of inquiry executed, plaintiff cannot diſcontinue without a ſpecial motion.¶

In replevin the avowant cannot have a rule to diſcontinue; for, though he is an actor in the law, yet it is the plaintiff's ſuit.**

Plaintiff may diſcontinue, upon motion, after a ſpecial verdict, which is not complete and final; but never after

* L. Ray. 1014.
† Laws of N. Y. 10 ſeſſ. ch. 14. ſect. 10.
‡ 4 Bur. 1451, 1534. Bar. 169.
§ 1 Bla. Rep. 451.
‖ 4 Bur. 1928.
¶ Cro. Jac. 35. Bar. 171.
** 1 Sid. 112.

a general verdict;* though even after a ſpecial verdict, he cannot diſcontinue, if it is for the purpoſe of adducing freſh proof, to contradict the verdict.†

Plaintiff is not allowed to diſcontinue after argument on demurrer, if the merits of the caſe came in queſtion;‡ but otherwiſe, if only the form of pleading.

3. *With the conſent of defendant.* This is neceſſary where there is a verdict, or a writ of inquiry has been executed,§ and the reaſons ſeem to be, that if the plaintiff will not then enter up the judgment, the defendant may.

CHAPTER XII.

Of Steps preparatory to the Trial.

WHEN the cauſe is at iſſue, as mentioned in the tenth chapter, and it is not diſcontinued, the plaintiff's attorney muſt proceed to bring it to trial; for which purpoſe there are ſeveral previous ſteps neceſſary. He muſt give the court, and the defendant's attorney, notice of the time of trial; prepare his iſſue roll, ſummon the jury, and ſubpœna his witneſſes. He muſt alſo, if the cauſe is to be tried at a circuit court, make up and paſs the tranſcript of the record, or *niſi prius* roll, as a warrant to the court to try the cauſe. On ſpecial occaſions

* 1 Salk. 178. 1 Nelſ. 663.
† 2 Bla. Rep. 815.
‡ 1 Bar. 111. 2 L. Ray. 856.
§ Carth. 87.

ſions it may likewiſe be neceſſary to have a ſtruck jury, a jury of view, or to have the witneſſes previouſly examined. Of all theſe in their order, &c.

1. *Of notice of trial and the proceedings attendant thereon.* By ſtatute, 11 ſeſſ. ch. 46. ſect. 14. "no cauſe whatever "ſhall be tried before any judge of any court of record, "where the defendant reſides above forty miles from "the place where the court is held in which ſuch cauſe "ſhall be tried, unleſs notice of trial in writing has "been given at leaſt fourteen days before ſuch intended "trial."

By rule of court,* if the defendant reſides within forty miles from where the court ſits, eight days notice of trial muſt be given, excluſive of the day it is ſerved. But, if the cauſe has been ſuſpended after iſſue joined for above four terms, there muſt be a term's notice of trial, (unleſs the delay was occaſioned by the defendant) and ſuch notice muſt be given before the fifth, or other ſubſequent term.† An intervening notice of trial, however, or ſtriking a jury, or a motion by plaintiff's attorney, is a ſufficient proceeding to make the common notice only neceſſary.

Where the defendant's attorney cannot be found, the notice may be ſerved on the defendant himſelf; and, where neither can be found, ſervice will do in the office.

Notice of trial muſt alſo, by ſtatute, 9 ſeſſ. ch. 41. ſect. 10. be given to the judge or judges before whom the cauſe is to be tried, at the time of giving it to the defendant's attorney. This is for the purpoſe of appriſing the court of the cauſe, that they may be better enabled to determine the number of jurors to be ſummoned, and is analogous to the Engliſh practice of ſetting it down in the chief juſtice's book for trial. This ſtatute is *generally* obeyed by leaving a copy of the notice in the clerk's office,

* October T. 1703.
† Str. 1164. Doug. 71.

office, directed to the judge or judges, together with a note of the iſſue, ſpecifying the time of joining; the counts in the declaration; and the heads of the ſubſequent pleadings, as concisely as poſſible.* From this the clerk muſt draw up the liſt of cauſes to be tried; deliver a copy to each of the judges, and affix up another in his office.†

After giving this notice, it will ſometimes happen that circumſtances render it neceſſary to delay the trial, in which caſe the plaintiff's attorney may countermand it. This muſt be in writing, and, where fourteen days notice of trial is requiſite, the countermand muſt be delivered ſix days before the time of trial;‡ but, on an eight days notice of trial, two days is ſufficient, excluſive of the day of delivery.

If after giving notice of trial the plaintiff does not proceed to trial, or countermand the notice of trial, he is liable to pay coſts to the defendant, who, in order to recover them, muſt make an affidavit of his attendance, and neceſſary expences, and give notice of motion. At the time mentioned therein move the court for a rule, for the plaintiff to pay the coſts, which being granted, give notice of taxing, and the judge will mark the *quantum* of the coſts on the rule; if they are not paid, proceed by attachment. But the court will not ſtay the trial until paid, as the defendant has this remedy.

If the defendant wiſhes to put off the trial on account of the abſence of a material witneſs, or the like, he muſt apply to the court, on an affidavit of the facts, and obtain a rule to ſhow cauſe, a certified copy whereof is to be ſerved on the plaintiff's attorney. It is laid down, that the affidavit, to put off the trial for want of a witneſs, muſt ſhow ſuch witneſs to be abſent, and material, and that

* Rule S. C. April T. 1763.
† Ibid.
‡ Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 15.

that the defendant cannot ſafely go to trial without his evidence; that he has hopes and expectations of procuring the preſence of ſuch witneſs within a reaſonable time, (ſpecifying it) and that there has been no neglect to procure his teſtimony.*

2. *Struck jury.* In particular caſes it may be prudent for the plaintiff or defendant to have the cauſe tried by a ſtruck jury, which is in conſequence of the ſtatute of 9 ſeſſ. ch. 41. ſect. 19. by which the court is empowered, on motion of either party, to grant a ſtruck jury. The rule is that the ſheriff of the proper county bring into the clerk's office, at a certain day, a book of the perſons qualified to ſerve as jurors,† with their places of abode and addition; and, at the return thereof, the party applying muſt give notice to the oppoſite party, and to the clerk, or his deputy, of the time and place of ſtriking ſuch jury, generally at the clerk's office. At the time and place appointed, the clerk, or his deputy, attends with the book, and, in the preſence of the parties, copies out of it a liſt of forty-eight names, from which the attorney, for the party applying, firſt ſtrikes out one, and the oppoſite party another, and ſo alternately until each has ſtruck out twelve. If the oppoſite party does not attend, the clerk muſt ſtrike out for him, and the remaining twenty-four are to be returned to try the iſſue. The clerk then makes out a fair liſt of ſuch twenty-four, with their places of abode and addition, and certifies the ſame, under his hand, to be the ſtruck jurors, for the trial of the cauſe. This liſt is delivered to the ſheriff, who annexes it to the *venire facias*, and returns it, as the panel of the jury to try the cauſe. Upon the trial, the jury are not balloted for as in common caſes; the jury being called as they ſtand upon the panel, and the firſt twelve who appear and are not challenged, or

are

* 4 Bur. 1514.

† Rule S. C. April T. 1765.

are found duly qualified and indifferent, are the jury. The perſon applying for a ſtruck jury muſt bear the fees of ſtriking it, and has no allowance for the ſame on taxation.* By a ſubſequent act,† if the clerk of the court is intereſted in the cauſe, or related to either of the parties, or if it ſhall appear probable to the court, that he is not indifferent between them, the court are to nominate two perſons to ſtrike the jury.

3. *View.* Formerly there could not have been a view in perſonal actions, but upon withdrawing of a juror, after they were ſworn, and with conſent of the parties, by a rule of court. Now, by the act of 9 ſeſſ. ch. 41. ſect. 18. "In any actions where it ſhall appear to the court pro-"per, that the jurors ſhould have a view of the place in "queſtion, in order the better to underſtand the evidence, "ſuch court may order ſpecial writs of *diſtringas* or *ha-"beas corpora juratorum*, to iſſue, by which the ſheriff ſhall "be commanded to have ſix out of the firſt twelve of the "jurors named in the panel to ſuch writs, or ſome greater "number, at the place in queſtion, ſome convenient "time before the trial, who then ſhall have the matters "in queſtion ſhown to them, by two perſons in the writs "named, to be appointed by the court; and the ſheriff "ſhall, by a ſpecial return upon the ſame, certify that "the view hath been had according to the command of "the writ; and, in ſuch caſe, if there is not a ſtruck jury, "and the parties, or their agents, or attornies, on both "ſides, ſhall not agree, by writing under their hands, on "the jurors who are to have the view, the names of "all returned for the trial, in ſuch caſe, ſhall be written "on ſeveral diſtinct pieces of paper or parchment, and "rolled up, and put into a box, in the preſence of, and "by direction of one of the judges of the court; and then "the names of ſo many as ſhall be neceſſary to go upon "the

* Laws of N. Y. 9 ſeſſ. ch. 41. ſect. 19.
† Ibid. 16 ſeſſ. ch. 51.

" the view, but not leſs than ſix, ſhall be drawn out,
" one after another, in the preſence of ſuch judge, and
" the names of the jurors ſo mutually agreed upon, or
" ballotted as aforeſaid, with their places of abode and
" additions, ſhall be firſt written on the panel annexed to
" the *habeas corpora* or *diſtringas*; and the names, &c.
" of the reſidue, ſhall be next written in the ſame order
" as they may ſtand in the panel to a *venire*. And when
" ſuch cauſe is brought on to be tried, ſuch of the jurors
" as have had the view, and do appear, ſhall be firſt
" ſworn, before any drawing, and then ſo many more
" ſhall be drawn to be added to the viewers, who appear,
" as ſhall, after all defaults and challenges allowed, make
" up twelve. And further, that in all caſes where any
" of the jurors ſhall have had a view, by virtue of any
" writ original or judicial, ſuch of the jurors as ſhall have
" had the view, and do appear, and are not challenged,
" or are found unexceptionable, ſhall be firſt ſworn, and
" only ſo many drawn as will make up twelve."

As the having a view is not by the ſtatute made a matter of courſe, the court have thought it their duty to prevent its being obtained for the purpoſe of delay, and therefore every rule for a view is underſtood to be upon condition, " in caſe no view ſhall be had, or if a view
" ſhould be had by any of the jurors whomſoever,
" (though not ſix of the firſt twelve) yet the trial ſhall
" proceed, and no objection be made on account there-
" of, or for want of a proper return."

In order to obtain this rule, move the court, and ſerve a certified copy thereof, on the oppoſite party, having firſt applied to him for the name of his ſhower. Leave another with the ſheriff, and he will ſummon the jury, and attend with them at the place, which is only ſhown, no evidence being given till the trial. From the words of the ſtatute, inſtead of inſerting the *niſi prius* clauſe in the *venire*, there muſt be a *diſtringas* where there is a view.

4. *Examin-*

4. *Examining witneſſes previous to the trial.* If any material witneſs be going abroad, and is not likely to return before the trial, or if he is *reſident* abroad, the court, on motion grounded on an affidavit of the facts, will grant leave for him to be examined, the other party being at liberty to croſs examine him. In the firſt caſe, namely, where the witneſs is in the ſtate, and is going abroad, the rule is, that he be examined before a judge. When it is obtained and ſerved, if no cauſe is ſhown, move to make the rule abſolute which will be done, if the other party conſents, but it cannot be granted without; though, if he does not conſent, the court will aſſiſt the party applying, by putting off the trial.* If the rule is made abſolute, draw interrogatories, file a copy with the judge, give another to the oppoſite party, with notice of the time of examining. The other party will alſo file croſs interrogatories. At the time appointed take the witneſſes to the judge, and the anſwers muſt be wrote down under his inſpection and controul. In vacation the application may be made to a judge. The interrogatories muſt be ſigned by counſel. Theſe depoſitions are taken conditionally, that is, to be read if the defendant is abſent at the time of the trial. An examination is frequently taken without interrogatories, though with them is moſt regular. This motion cannot be made before filing a declaration.

In the latter caſe, where the witneſs *reſides* abroad, the ſtatute [12 ſeſſ. ch. 28. ſect. 4.] provides, "that the court "(on affidavit, or proof being made of ſuch witneſs being "material, and reſiding out of the ſtate, and upon mo-"tion made, by either party, in open court, and upon "ſuch terms, as the court ſhall think proper) may award, "under the ſeal of the ſame court, a commiſſion to ſuch "perſons as the court ſhall think fit, authoriſing them, or "any two or more of them, to examine ſuch witneſſes on "oath, upon interrogatories annexed to ſuch commiſſion, "and

* Doug. 403.

" and to reduce ſuch examinations into writing, and to
" return the ſame with all convenient ſpeed; and the
" name of every witneſs to be examined, ſhall be inſerted in
" the commiſſion, and the interrogatories ſhall be drawn,
" and ſigned by the parties, or their counſel, and be
" approved by the court, or one of the judges, and ſhall
" be annexed to the commiſſion, and each party ſhall
" be at liberty, with the approbation of the court, or
" judge, to inſert ſuch queſtions therein, as they may
" deem proper and neceſſary. And the commiſ-
" ſioners, or any two or more of them, ſhall examine
" the witneſſes named in the commiſſion, or ſuch as they
" can meet with, on oath; and cauſe the examination of
" each witneſs to be reduced to writing, and ſigned by
" the ſame witneſs, and the commiſſioners ſhall alſo ſign
" the ſame; and all ſuch examinations, and all ſuch ex-
" hibits produced to the commiſſioners, and proved by
" any witneſs, ſhall be annexed to the commiſſion, and
" returned to the court, cloſed up and under the ſeal
" of two or more of the ſaid commiſſioners; and if it is
" not convenient for either of the ſaid commiſſioners to
" carry the ſame to one of the judges of the ſaid court,
" then one of the ſaid commiſſioners ſhall deliver the
" ſame to the agent of the party on whoſe behalf ſuch
" witneſſes ſhall be examined; and ſuch agent, or, in
" caſe of his death, the perſon into whoſe hands the
" ſame ſhall come, ſhall deliver the ſame to one of the
" judges of the court, and make oath on affidavit before
" him, that he received the ſame from the hands of one
" of the commiſſioners, (or, if ſuch agent ſhall be dead,
" then ſuch affidavit ſhall ſet forth what manner the
" ſame came to the hands of the perſon who ſhall deli-
" ver the ſame,) and that the ſame has not been opened
" or altered ſince he received it; and ſuch judge ſhall
" then open the ſame, and indorſe upon the commiſſion,
" as the caſe may be, either received by the hands of

" one of the commiſſioners, or upon the oath of the " perſon who delivers the ſame, as appears by his affi- " davit, and ſubſcribe his name to the ſaid indorſement, " and ſhall then depoſit the ſaid commiſſion, and return " and affidavit in the clerk's office; and every ſuch depo- " ſition ſhall be allowed and read, and deemed good " evidence: and all parties concerned ſhall be intitled to " take copies of ſuch depoſitions, at their own coſts " and charges, when depoſited. And in caſe ſuch com- " miſſion ſhall not be returned within ſuch reaſonable " time, as the court ſhall from time to time allow for " that purpoſe, then the court may proceed, as if no " commiſſion had been awarded or iſſued."

5. *Record.* The next ſtep will be to prepare the neceſſary record. Where the trial is at bar, the iſſue roll is only neceſſary, but where the trial is at the circuit court, a tranſcript thereof muſt be made, called the *niſi prius* roll.

The *iſſue roll* contains the pleadings with proper notice of the intervening times, &c. and may conſiſt of the caption, warrants of attorney, the memorandum, the declaration, the imparlance, plea, replication, &c. award of the *venire*, and continuances, though all theſe are not always neceſſary.

The roll commences with ſtating the term in which the iſſue was joined, and then muſt be entered the warrants of attorney, which are copied from that of the plaintiff at the end of the declaration, and that of the defendant at the end of his plea.

The memorandum comes next, and of it there are four kinds, ariſing from the time of joining the iſſue, as it is, 1. of the ſame term in which the declaration was filed; 2. within any of the three ſubſequent terms; 3. above four terms, or a year after; or, 4. ariſing from the cauſe of action, accruing within the very term of declaring. The different manner in which it is neceſſary to draw

draw the memorandum for theſe ſeveral variances, will be more fully elucidated by the following ſpecimen.

1. "Be it remembered, that on the third Tueſday of "October, *in this ſame term*, before," &c.

2. "Be it remembered, that heretofore, to wit, *in the* "*term of April laſt paſt*, before," &c.

3. "Be it remembered, that at another time, to wit, *in* "*the term of October, in the year of our Lord* 1791," &c.

4. "Be it remembered, that on *Saturday the eleventh day* "*of Auguſt, in this ſame term*," &c.

If the plea is delivered of a different term from the caption of the declaration, an imparlance muſt be entered on the roll to the term in which the plea is pleaded, ſtating that the defendant had leave to imparle to the firſt day of that term. But this imparlance is unneceſſary, where the plea and declaration are of the ſame term. All the pleadings ſubſequent to the plea, muſt likewiſe be entered with an imparlance, though it is often the practice to enter the imparlance to the plea down to the term of joining iſſue, and then enter the replication, &c. without any imparlance, but the former mode is the moſt accurate.

After the pleadings are entered, the *venire*, or proceſs to ſummon the jury, is awarded on the roll; and if the cauſe ſhould not be tried the term in which the *venire* is returnable, or at the preceding circuit, this proceſs muſt be continued on the roll, from term to term, down to the term of trial, by a ſuggeſtion that the ſheriff had not ſent any of the preceding writs.

This completes the iſſue roll for trial, if the cauſe is to be tried at bar; and for this purpoſe it muſt be produced in court at the time of the trial. But if the cauſe is to be tried at the circuit, then the *niſi prius* roll muſt be prepared, which is in conſequence of the ſtatute of 9 ſeſſ. ch. 41. ſect. 3. enacting, "that when any iſſue "is tried at any of the circuit courts, the tenor, or

tranſcript

" tranſcript of the record thereof, with a reſpite of the " jury, or an award of proceſs, for their appearance to " the ſupreme court at the next term, unleſs the juſtices " of the ſupreme court, ſome or one of them, at the " day and place appointed for holding the ſaid circuit " court, at which ſuch iſſue is or ought to be tried, " ſhall ſooner come, ſhall be made and ſent under the " ſeal of the ſupreme court, to ſuch of the juſtices of " the ſame court, as may hold the ſaid circuit court " in the county where ſuch iſſue is or ought to be tried; " and a ſimilar clauſe ſhall be inſerted in the proceſs, " for the appearance of the jury, at the ſaid circuit " court; and if one party demand, and have ſuch tenor " or tranſcript of the record as aforeſaid, to deliver to " ſuch juſtice or juſtices, before whom ſuch iſſue is to " be tried, another tenor or tranſcript of the ſame re- " cord ſhall be made and delivered to the other party, " if he require the ſame."

The *niſi prius* record commences with what is termed a *placita*, or general ſtyle of all the records in the ſupreme court, from which this is ſuppoſed to be an extract. This *placita* muſt be of the term in which iſſue was joined. Then, omitting the warrants of attorney, tranſcribe the whole of the iſſue roll, down to the award of the firſt *venire*. If you proceed by a *venire* with a *niſi prius* clauſe, which is the moſt common method, and the cauſe is not tried the circuit after the term in which iſſue is joined, you need not enter all the continuances, but ſay generally, that the proceſs was continued to the time of trial. If you proceed by *diſtringas*, a ſecond *placita* of the term before the trial muſt be added, after the end of the award of the firſt *venire*, to ſupply the want of continuances, and after that the *jurata*, award of the *diſtringas* and *ſciendum*. Prepare a label to this record, ſtating the names of the parties, nature of the action, and time of court ſitting. Annex

it

it to the record, make a precipe, and carry them with the iſſue roll, to the clerk's office; where file the iſſue roll, and get the *niſi prius* roll ſealed, which is done by winding a bit of tape round it, and ſealing the end, leaving out the label.

6. *Jury proceſs.* The *venire* is a writ iſſued by the clerk, under ſeal of the court, directed to the ſheriff of the county where the venue is laid, commanding him, that he cauſe to come before the court, at the return thereof, twelve free and lawful men of the body of his county, each of whom ſhall have in his own name, or right, or in truſt for him, or in his wife's right, a freehold in lands, meſſuages or tenements, or of rents in fee, or for life, of the value of ſixty pounds, free from all repriſes, debts, demands, and incumbrances whatſoever,* and who are in no wiſe of kin, either to the plaintiff or defendant, to make a certain jury of the country, between the parties in the action, becauſe the parties, between whom the contention is, have put themſelves upon that jury. If the cauſe is tried at the circuit court, this writ may be either with a *niſi prius* clauſe, or without. In the latter caſe a *diſtringas* iſſues; but in the firſt, the *venire* is the only proceſs. The *niſi prius* clauſe recites to the effect directed in the laſt recited act, after the mention of the return day, "unleſs the "juſtices of the ſupreme court, ſome or one of them, "at the day and place appointed for holding the circuit "court, at which the iſſue is to be tried, ſhall ſooner "come."

The *venire* on a trial at bar, muſt be teſted on the firſt day of the preceding term, returnable the firſt day of the term in which the cauſe is tried. This writ with a *niſi prius* clauſe, muſt be teſted the laſt day of the term before the trial, returnable the firſt day of the ſubſequent term. But, if a *diſtringas* is uſed, the *venire* muſt

* Laws of N. Y. 9 ſeſſ. ch. 41. ſect. 9.

muſt be teſted the firſt, and returnable the laſt day of the preceding term.

The *venire* ſhould regularly be left with the ſheriff ſix days before the trial, ſince, by the ſtatute, each juror muſt be ſummoned that time, and either party, upon demand, has a right to a certified copy of the panel, five days before the trial, to be delivered to him, his attorney or agent.

The jury proceſs muſt be directed to, and returned by the coroner, if the ſheriff is intereſted; but, if the coroner is intereſted, it muſt be directed to two eliſors, upon a proper ſuggeſtion on the roll.

If a *diſtringas* is taken out, which muſt always be done where there is a jury of view, and the cauſe is to be tried at the circuit, the *niſi prius* clauſe muſt be inſerted in that. This writ generally iſſues upon a ſuppoſed default of the jurors on the *venire*, and, on that account, the ſheriff is commanded to diſtrain them, ſo that he may have them at the return, to make the jury between the parties.

7. *Subpœnaing witneſſes.* In order to compel the appearance of witneſſes at the trial, either party may iſſue a writ for that purpoſe, commanding them to attend, at the time and place thereof, under a certain pain, uſually 100l. to teſtify the truth according to their knowlege.

Make out a precipe, engroſs the writ, and iſſue it in the uſual manner. You may put four witneſſes in the writ, but not more. If iſſued in vacation, teſte it the laſt day of term; but, if in term, the firſt. In order to ſerve the witneſſes, make out tickets of the *ſubpœna*, containing its ſubſtance, directed to each. Serve one perſonally on each witneſs,* giving him at the ſame time, one ſhilling. If, in the country, tender his reaſonable expences.† The witneſs muſt have reaſonable notice,

* Str. 1054.

† 2 Str. 1150. Laws of N. Y. 1 ſeſſ. ch. 17. ſect. 7.

notice.* The penalty on the witneſs for neglect, is 20l. beſides damages to the party grieved.†

If the witneſs has in his cuſtody any deeds or papers, which are neceſſary to be produced on the trial, inſert what is called a *duces tecum* in the ſubpœna: the practice is ſometimes to give a notice to the witneſs to produce, but the former is moſt ſecure.

If the witneſs is a priſoner, he muſt be brought up to the court by a writ of *habeas corpus ad teſtificandum*, the name of which ſufficiently explains the intent. Having prepared this writ, make an affidavit that the witneſs is material, and that you cannot proceed to trial without his teſtimony; take them to the judge, who will allow the writ; thereupon get it ſealed, and leave it with the jailer, who will bring the priſoner into court at the time; but you muſt tender reaſonable charges to the jailer.

All theſe previous ſteps being taken to prepare the cauſe for trial, the next and laſt is to draw the briefs for counſel. Theſe muſt contain a ſhort ſketch or ſtate of the ſuit, ſetting forth the ſubſtance and nature of the pleadings; the proofs, whether written or unwritten; the matter in conteſt as it emerges from the pleadings; and the objections expected from the other ſide. Thus much till the trial. By way, however, of concluſion to this chapter, I will juſt add a few words as to trials at bar. Where the venue is laid in any other county than where the court ſits, this is ſeldom granted, as the ſtatute directs it only to be done in caſes of great difficulty, or which require great examination.‡ But, "all iſſues "joined in the ſupreme court, and triable by a jury of "any county where the court ſits, may be tried, either "at the circuit or at bar."§ The motion for a trial at bar, in the firſt caſe, cannot be made till iſſue joined.

* Str. 510. † Laws of N. Y. 11 ſeſſ. ch. 17. ſect. 7.
‡ Laws of N. Y. 9 ſeſſ. ch. 41. ſect. 1.
§ Ibid. 12 ſeſſ. ch. 28. ſect. 3.

CHAPTER

CHAPTER XIII.

Of Trial by Jury.

HAVING, in the preceding chapters, explained the neceſſary proceedings to be taken for bringing a cauſe to trial, thoſe at the trial itſelf will properly be our next conſideration.

If the cauſe is to be tried at the circuit, the plaintiff's attorney delivers the record to the clerk of the circuit the *firſt* day of its meeting, and moves that it be made a *remanet:* if this is not done, the defendant may, the ſecond day, enter a *ne recipiatur*, and hinder the cauſe from being tried. If the trial is at bar, the attorney brings the iſſue roll with him to court, on the day of trial. The plaintiff, by not bringing in this record, may delay the cauſe, if he pleaſes, and be ſubject to no other loſs than that of the coſts of the day: but if the defendant is fearful of ſuch neglect in the plaintiff, and is willing to diſcharge himſelf from the action, he may undertake to bring on the trial, by ruling the plaintiff to file his iſſue, obtaining leave from the court, and giving proper notice to the plaintiff; which proceeding is called trial by *proviſo*, by reaſon of the clauſe then inſerted in the *venire* to the ſheriff, viz. "provided that if two "writs come to your hands, you will execute only one "of them." But this practice is ſcarcely ever uſed, ſince the ſtatute for amendment of the law permits a nonſuit to be obtained in this caſe, in the manner afterwards mentioned particularly.

But we will ſuppoſe all preliminary ſteps ſettled, and the cauſe called on in court. It is to be noted that the

cauſes

cauſes are to be brought on in order, according to the ſeniority of the iſſues, unleſs the court, on ſpecial reaſons, otherwiſe direct; and, if the parties ſhall not move to bring on the cauſes on the day fixed in the notices of trial, there being time to try the ſame, the cauſe of the party, ſo in default, ſhall not be tried on any other day, in preference to a junior iſſue, but ſhall be poſtponed until the court is at leiſure.* When the cauſe is brought on, the jurors are called and ſworn. To this end the ſheriff returns the *venire* or *diſtringas*, with the *panel* of jurors annexed, to the clerk in court, on which account the jurors are ſaid to be impannelled. This jury is either *ſpecial* or *common:* the manner of chooſing the former, we have ſeen in a preceding chapter.† A common jury is one returned by the ſheriff, according to the directions of the ſtatute of 9 ſeſſ. ch. 41. ſect. 10. which appoints, that the ſheriff ſhall return the ſame panel to every cauſe tried at the ſame court, containing no leſs than forty-eight, nor more than ſeventy-two jurors, unleſs the court, if they ſee cauſe, ſhall order a greater or leſſer number. Theſe jurors muſt poſſeſs the qualifications directed in the *venire*, and muſt, moreover, be above the age of twenty one, and under that of ſixty years;‡ and no perſon is obliged to ſerve in this court, as a common juror, more than once a year.§

When the jury proceſs is returned, the clerk calls the parties, plaintiff and defendant. If the defendant, or his attorney, do not appear, the crier calls him three times, and then the inqueſt will be taken by default, in which caſe the defendant loſes his challenges to the jurors; and the plaintiff's attorney gets the *capiatur*,

* Rule S. C. April Term, 1763.
† Ante p. 141.
‡ Laws of N. Y. 9 ſeſſ. ch. 41. ſect. 9.
§ Ibid. ſect. 14.

by default entered on the *venire*, or panel, and then proceeds.

Where the parties are ready for trial, the names of the perſons impannelled are written on diſtinct ſcrips of paper, prepared by the ſheriff, and rolled up, and put into a box provided by the ſheriff, from which the clerk draws out twelve; and, if any man whoſe name is drawn does not appear, or appearing is challenged, and ſet aſide, then ſo many are drawn as will make up twelve, after all cauſes of challenge allowed.*

As the jurors appear when called, they are ſworn, unleſs *challenged* by either party. Challenges are of two ſorts, either to the array, or to the polls.

A *challenge to the array* is at once an exception to the whole panel, in which the jury are arrayed, or ſet in order by the ſheriff, in his return; and it may be made upon account of partiality, or ſome default in the ſheriff, or his under officer, who arrayed the panel. Generally ſpeaking, the ſame reaſons that, before the awarding of the *venire*, were ſufficient to have it directed to the coroner or eliſors, will be alſo ſufficient to quaſh the array, when made by a perſon, or officer, of whoſe partiality there is any tolerable ground of ſuſpicion. Alſo, though there be no perſonal objection againſt the ſheriff, yet if he arrays the panel, at the nomination or under the direction of either party, this is good cauſe of challenge to the array. The array may alſo be challenged, if an alien be a party to the ſuit, and, upon a rule obtained, by his motion to the court, for a jury *de medietate linguæ*, ſuch a one be not returned by the ſheriff, purſuant to the ſtatute of 9 ſeſſ. ch. 41. ſect. 21. which enacts, "that in all manner of juries and inqueſts, "between aliens and citizens of the United States, in "any court, or before any juſtice, and whether the "ſtate be intereſted or not, the one half ſhall be citizens, "and

* Laws of N. Y. 9 ſeſſ. ch. 41. ſect. 16.

"and the other half aliens, if ſo many can be found; "and if there be not as many to be found, the remnant "to be compoſed of citizens." But where both parties are aliens, no partiality is to be preſumed to one more than another, and therefore, in this caſe, the jury are to be all denizens.*

Challenges to the polls are exceptions to particular jurors, and are reduced to three heads, *propter defectum*, *propter affectum*, and *propter delictum*.

1. *Propter defectum*, as if a juryman be an alien, this is defect of birth; if he be a ſlave or a bondman, this is defect of liberty. Under the word *man* the female is excluded *propter defectum ſexus*, except when a widow feign herſelf with child, in order to exclude the next heir, and a ſuppoſitious birth is ſuſpected to be intended, there, upon the writ *de ventre inſpiciendo*, a jury of women is to be impannelled to try the queſtion, whether with child or not.† But the principal deficiency is defect of eſtate ſufficient to qualify him to be a juror. This depends on the ſtatute of 9 ſeſſ. ch. 41. ſect. 9. by which all jurors, other than ſtrangers, upon trials *per medietatem linguæ*, ſhall have, in the counties, in his own name, or right, or in truſt for him, or in his wife's right, in the ſame county, a freehold in lands, meſſuages, or tenements, or of rents in fee, or for life, of the value of 60l. free from all repriſes, debts, demands and incumbrances whatſoever; but, in the cities of New-York, Albany or Hudſon, either a freehold, or a perſonal eſtate of the like value.

2. Jurors may be challenged *propter affectum*, for ſuſpicion of bias, or partiality. This may be either a *principal* challenge, or *to the favor*. A *principal* challenge is ſuch, where the cauſe aſſigned carries with it *prima facie* evident marks of ſuſpicion, either of malice or

* Year-book, 21 H. vi. 4.
† Cro. Eliz. 566.

or favor; as that a juror is of kin to either party within the ninth degree;* that he has been arbitrator on either ſide; that he has an intereſt in the cauſe; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the ſame cauſe; that he is the party's maſter, ſervant, counſellor, ſteward, or attorney, or of the ſame ſociety, or corporation with him; all theſe are principal cauſes of challenge, which, if true, cannot be over-ruled. Challenges to the *favor* are, where the party has no principal challenge, but objects only ſome probable circumſtances of ſuſpicion, as acquaintance and the like, the validity of which muſt be left to the determination of *triors*, whoſe office it is to decide, whether the juror be favorable or unfavorable. The triors, in caſe the firſt man called be challenged, are two indifferent perſons named by the court; and, if they try one man, and find him indifferent, he ſhall be ſworn; and then he, and the two triors, ſhall try the next, and when another is found indifferent and ſworn, the two triors ſhall be ſuperſeded, and the two firſt ſworn on the jury ſhall try the reſt.†

3. *Challenges propter delictum* are for ſome crime or miſdemeanor, that affects the juror's credit, and renders him infamous; as for a conviction of treaſon, felony, perjury, or conſpiracy; or if he hath received judgment of the pillory, or the like, or to be whipt, or ſtigmatiſed; or if he be outlawed, or convicted of forgery. A juror may himſelf be examined on oath of *voir dire*, *veritatem dicere*, with regard to ſuch cauſes of challenge, as are not to his diſhonor or diſcredit, but not with regard to any crime, or any thing, which tends to his diſgrace or diſadvantage.‡

Beſides

* Finch L. 401.
† Co. Lit. 158.
‡ Ibid. 158. b.

Beſides theſe challenges, which are exceptions to the fitneſs of jurors, and whereby they may be excluded from ſerving, there are alſo other cauſes to be made uſe of by the jurors themſelves, which are matters of exemption, whereby their ſervice is *excuſed*, and not *excluded*. As by ſtatute 9 ſeſſ. ch. 41. ſect. 26. firemen of the cities of New-York or Albany, and firemen of Brooklyn, in King's county, are not compellable to ſerve as jurors. By cuſtom, likewiſe, phyſicians, and other medical perſons, counſel, attornies, officers of the court, and the like, are ſeldom ſummoned, and would probably be excuſed if impannelled.

If by means of challenge, or other cauſe, a ſufficient number of unexceptionable jurors does not appear at the trial, either party may pray a *tales*. A *tales* is a ſupply of ſuch *men* as are ſummoned upon the firſt panel, in order to make up the deficiency. For this purpoſe a writ of *decem tales*, *octo tales*, and the like, was uſed to be iſſued to the ſheriff at common law, and muſt be ſtill ſo done at a trial at bar, if the jurors make default. But, at the circuit court, by virtue of the ſtatute, 9 ſeſſ. ch. 41. ſect. 23. the judge is empowered, at the prayer of either party, to award a *tales de circumſtantibus*,* of perſons preſent in court, to be joined to the other jurors preſent, to try the cauſe; who are liable, however, to the ſame challenges as the principal jurors. This is uſually done till the legal number of twelve be completed.

When a ſufficient number of perſons impannelled, or taleſmen appear, they are then ſeparately ſworn well and truly to try the iſſue between the parties, and a true verdict to give according to evidences, and hence they are denominated the jury, *jurata*, and jurors, *juratores*.

The jury being now ſworn and ready to hear the merits of the cauſe, the counſel on the part of the plaintiff, or

* Vide Ante. p. 12.

or he who holds the affirmative of the queſtion in iſſue, opens the nature of the action; recites the ſubſtance of the pleadings; ſhows what the iſſue is which the jurors are ſworn to try, and ſtates the evidence he propoſes to produce on the part of his client. Then he calls his witneſſes, who are firſt examined by the party producing them, and then croſs examined by the other ſide.

The nature of this work will not permit me to enter minutely into what is, and what is not legal evidence to a jury. I ſhall, therefore, only ſelect a few leading principles on this ſubject.

Evidence ſignifies that which demonſtrates, makes clear, or aſcertains the truth of the point in iſſue, either on the one ſide, or on the other; and no evidence ought to be admitted to any other point. Therefore, upon an action of debt, when the defendant denies his bond by the plea of *non eſt factum*, and the iſſue is, whether it be the defendant's deed or no, he cannot give a releaſe of this bond in evidence; for that does not deſtroy the bond, and, therefore, does not prove the iſſue, which he has choſen to rely upon, viz. that the bond has no exiſtence.

Evidence, in the trial by jury, is of two kinds, either *viva voce*, or *in ſcriptis*, i. e. *parol* or *written*.

I. With regard to *parol* teſtimony, the general rule is, that every man who believes in a Supreme Being;* is in his ſound ſenſes;† is of an age to be ſenſible of the nature of an oath;‡ and who is not by law deemed infamous,§ may be ſworn and examined as a witneſs. This general

* 1 Atk. 21. but a profeſſed *atheiſt* cannot be a witneſs. Ibid. 40, 45.

† *Idiots from their birth* are perpetually excluded from giving teſtimony; but *lunatics* may be examined in their lucid intervals. Com. Dig. *tit.* Teſtmoigne.

‡ 2 Hale P. C. 278, 284.

§ 5 Mod. 15, 16, 74, 75. 3 Lev. 426, 427. 1 L. Raym. 39, 40. 2 Wilſ. 18, 19. But no conviction or judgment can be made

general rule is liable to two exceptions, which ariſe either from the *matrimonial connexion*, or from having ſome *intereſt* in the event of the ſuit depending. 1. A *huſband and wife* cannot be evidence for or againſt each other.* But no other degree of kindred excludes a perſon's teſtimony. 2. The ſmalleſt *intereſt* in the event is a ſufficient objection to the competency of a witneſs.† It is of no importance, whether the benefit expected be direct and immediate, or only conſequential.‡ But it muſt be a preſent intereſt, not a future contingency.§ This intereſt may be aſcertained by examining the witneſs himſelf upon his *voir dire*, or by bringing other proof; but it is ſaid,‖ a party cannot have recourſe to both theſe methods.

It now remains to conſider the *credibility* of witneſſes. It has been the unanimous and rational inclination of great judges, in modern times, to confine the objection to the credit, inſtead of the competency of witneſſes, leaving the queſtion of their veracity open to ſuch obſervations as the ſuperior wiſdom and experience of the court may juſtly inforce.¶ The credibility of witneſſes depends on their *number*, *ſkill* and *integrity*.

1. Although their number corroborates and confirms the proof, yet, in general, one witneſs is ſufficient in cauſes determined by a jury. But a conviction of perjury muſt be grounded on the teſtimony of two at the leaſt, for a very

uſe of to prevent the admiſſibility of a witneſs on this account, unleſs the record be actually produced in court; [2 Hawk. 433.] and it is not ſufficient to produce the conviction alone, it muſt be followed by a judgment to conſummate the incapacity. Cowp. 3.

* 1 Inſt. 6. b. See 2 Kel. 62.

† 2 Vern. 317.

‡ L. Raym. 1007. 3 Lev. 152, 153.

§ 1 Salk. 283.

‖ 10 Mod. 193.

¶ 3 Term Rep. 32.

very obvious reaſon, namely, that otherwiſe there would only be one oath in oppoſition to another.*

2. The *ſkill* of witneſſes is certainly a moſt material conſideration in determining their credibility; and it is of importance to inquire, how they happen to know the truth of what they depoſe. "*Cuilibet credendum eſt in* "*ſuâ propriâ arte.*" is the maxim of reaſon and of law. With the ſame view, it is expedient to diſcuſs the opportunities which the witneſs had of making juſt obſervations, and his condition, circumſtances, and temper of mind, at the time to which his evidence relates. The imperfection of man will frequently render him liable to deception; and facts are too often ſeen through a jaundiced eye.† On this idea of poſſible deception, the law rejects *hearſay* evidence, always requiring the beſt proof of which the nature of the caſe is capable. Yet in ſome caſes,‡ (as in proof of ſome prevailing cuſtoms,

* 10 Mod. 194, 195.

† Lord Clarendon [Contin. 349] gives the following narrative, which may ſerve as a ſtriking inſtance of the fallibility of well-intentioned witneſſes. At the great fire of London, a ſervant of the Portugueze ambaſſador was ſeized and ill treated by the populace, a ſubſtantial citizen being ready to depoſe, that he ſaw him throw a fire ball into a houſe, which inſtantly burſt into flames. The foreigner heard the charge interpreted to him with marks of great aſtoniſhment. Then, proteſting his innocence, he ſaid, he recollected, that, in paſſing the ſtreets, he obſerved a piece of bread lying on the ground, which, according to the cuſtom of his country, he took up and walked with, till finding a ſhop window open, he depoſited it there, to prevent its being waſted. This principle is ſo ſtrong in his nation, that the king of Portugal himſelf would have acted with the ſame ſcrupulous regard to general economy. On reſorting to the place, the bread was found as deſcribed; and it was not that, but an adjacent houſe which was burning; an eaſy miſtake, the witneſs being on the other ſide of the way, and intent on having the ſuppoſed criminal ſecured; to which we may add, that the conſternation occaſioned by that portentous calamity would prevent an accurate obſervation.

‡ 3 Bla. Com. 368. Burr. Sett. Ca. 701. Cowp. 591.

cuſtoms, or of matters of common tradition and repute) the courts admit of an account of what perſons deceaſed have declared in their lifetimes; but ſuch evidence will not, in general, be received of any diſtinct facts. The courts conſtantly receive teſtimony of things ſaid in the preſence of the plaintiff or defendant, and uncontradicted, though not poſitively aſſented to, reſpectively by them: but this is inconcluſive, and may often lead to fallacy.

3. The remaining and moſt important point, affecting the credibility of witneſſes, is their *integrity*. It is impoſſible to define how many ways a man's veracity may become ſuſpected, or how many cauſes may give a wrong bias to his affections. It may be proved from various cauſes, that his wiſhes and teſtimony ſtrongly tend the ſame way: as that he ſtands in the ſame ſituation with the party for whom he is called to give evidence,* or in a near degree of relationſhip or friendſhip to him; or, on the other hand, that there ſubſiſts inveterate enmity between them. The fact ſworn to may be ſhown to be impoſſible by circumſtances, though no other perſon be preſent, and poſitive teſtimony may be thereby refuted. So the declarations of a witneſs at another time may be material, where they vary from his preſent evidence, or where they betray any fraudulent deſign for or againſt either of the parties affected by his teſtimony. Where ſuch declarations *agree* with the evidence given in court, they may be admitted to corroborate it, and to ſhow, that the witneſs always perſiſted in the ſame account.† To this head may be referred the objection, that a witneſs ſhall not, in general, be allowed to invalidate an inſtrument which himſelf has ſigned;‡ becauſe it is holding out falſe credit to the world, evinces duplicity, and would facilitate frauds. Again, the deport-

* 3 Term Rep. 33.
† 1 Mod. 283.
‡ 1 Term Rep. 300, &c. 3 Term Rep. 34, 36.

ment of witneſſes, at the time of examination. is highly important. Thus, it is uſual to remark, whether they give ready anſwers with an air of probability to ſuch occaſional queſtions as are propoſed, or perſiſt in the ſame premeditated recital and uniformity of expreſſion; whether their account is ſteady and conſiſtent, or differing in circumſtances, pronounced with apparent irreſolution, or betraying any doubt or uncertainty in their own minds. But if a witneſs can, from his own recollection, ſwear poſitively to the general fact, it is the conſtant practice to allow him to refreſh his memory as to particulars, by written memorandums made by himſelf.* Laſtly, ſometimes the credit of a witneſs is more directly attacked, where it happens, that, although he is not legally branded with infamy ſo as to be totally rejected from giving evidence, yet the vileneſs of his character renders his teſtimony ſuſpected. In ſuch caſe, general accounts may be given of his reputation, as that he is not a perſon to be believed on his oath; but it is not permitted to charge him with any particular crime, againſt which it is not to be preſumed he ſhould be prepared to make a defence.

II. The other branch of evidence is *written* or *inſtrumental teſtimony*, including ſuch legal means of authenticating conteſted facts, as do not fall under the other head of *parol* evidence. Theſe may be diſtributed into four kinds; 1. acts of the legiſlature; 2. judicial and other memorials of courts; 3. public, and, 4. private writings and inſtruments.

1. As to the firſt kind, we muſt recollect the diſtinction between public and private acts, the former of which are the general law of the land, and muſt officially be taken notice of by courts of juſtice; the latter muſt be ſpecially pleaded and alleged by the party, who would avail himſelf of their effect. The printed ſtatute book

* 3 Term Rep. 754.

book is good evidence of general ſtatutes, but not of private ones: or rather the contents are parts of the general law, which every perſon, eſpecially the judges, are ſuppoſed to know: ſo that properly they are not matters of fact to be aſcertained by any kind of evidence. But every man is not equally bound to know private acts. Of theſe therefore regular evidence muſt be given; which, in all caſes, is to be the beſt of which the nature of the thing is capable. Each private party cannot have the ſtatute roll itſelf; but he muſt adduce a copy compared with that roll, and not the copy of a copy.* Foreign laws, written or unwritten, muſt be proved as facts, if their exiſtence be controverted.†

2. *Judicial and other memorials of courts.* If a record of the ſame court be neceſſary to be produced, the record itſelf muſt be offered in evidence; if of another court, an exemplification: for records themſelves being things to which every man has a right to have recourſe, cannot be transferred from place to place. Exemplifications‡ of records are either under the ſeal of the court tranſmitting them, (to § which other tribunals ought to give credit,) or under the great ſeal of the ſtate; which latter kind of authentication is only uſed where they originally belong to the cuſtody of the chancery, or have been regularly ſent for into that court. An *affidavit* cannot, in general, be read in evidence before a jury.‖ But, if the party who made the affidavit be ſworn and give teſtimony, his own affidavit may be read againſt him, in order to diſcredit him, by ſhowing any variance or contradiction.¶ If *decrees*** of courts of equity be given in evidence, they ought to be preceded by the pleadings of the parties in the cauſe there, viz. the bill and anſwer; and

* Sty. 462. † Cowp. 174.
‡ Bul. N. P. 222. § 2 Sid. 149. 1 Keb. 21, 22.
‖ 3 Term Rep. 708, 726.
¶ Skin. 405. ** 1 Keb. 21. 2 Mod. 231.

and the proceedings muſt be between the ſame parties, or claimants reſpectively under them.* It is an eſtabliſhed practice in courts of law, that reading part of an anſwer makes the whole evidence.† Another effectual part of written evidence falling under this head, is a prior *verdict*. But its admiſſibility is ſubject to three equitable reſtrictions: 1. it is neceſſary that the former cauſe was between ſuch as were parties or privies to the cauſe in which the verdict is offered in evidence:‡ 2. the matter ſo to be proved, muſt have been really in iſſue in ſuch former cauſe:§ 3. a verdict in a criminal cauſe cannot be given in evidence in a civil ſuit; becauſe it is not between the ſame parties,‖ and might have been grounded on the party's own oath.¶

3. I proceed to *writings*, *inſtruments*, and *memorials* of a public nature, being neither acts of the legiſlature, nor of the judiciary kind. Wherever an original is either a record, or of a *public nature*, and would be evidence, if produced, an immediate ſworn copy will avail;** ſo alſo it is of things not being records, as journals of the houſes of the legiſlature, transfer books of public companies, and the like.†† A *general hiſtory* may be admitted to prove a matter relating to the nation, but not to eſtabliſh a particular right or cuſtom.‡‡ It is ſaid,§§ that

* Hardr. 22. † 3 Salk. 154.

‡ 1 Str. 68. 1 L. Raym. 730. What is hereby required is, that the verdict was ſuch as either party to the ſubſequent ſuit might have had the benefit of and have given in evidence, if in their favour; and that there was a litigant party in the prior cauſe, ſtanding in the ſame right as one of the preſent parties, and contending againſt ſuch verdict. Hardr. 472. Ca. K. B. 319.

§ Hob. 53.

‖ 12 Mod. 319. 1 Str. 68. 1 L. Raym. 730.

¶ Ca. *temp*. Hardw. 311.

** 3 Salk. 154. 12 Mod. 500. See Str. 1073.

†† Doug. 593, 594. n.

‡‡ 1 Salk. 281. Skin. 15, 624. 12 Mod. 86. T. Jon. 164.

§§ 6 Mod. 41, 81. T. Ray. 84.

that the *almanac* is part of the law of the land, of which the court muſt take judicial notice. What gives authenticity to other inſtruments, and ranks them in this claſs of evidence, is, that they have the ſanction of perſons acting in a *public truſt*, recognized by law.

4. The laſt claſs of written evidence comprehends *private writings and inſtruments*. Such muniments ſeem admiſſible,* not only to prove the principal matter contained in them, but alſo things therein recited, as againſt the party executing the inſtrument. Thus,† the recital of a leaſe in a deed of releaſe is good evidence of ſuch leaſe againſt the releaſor, and claimants under him. Here the general rule is,‡ that a copy is not evidence, but the original muſt be produced.

But, if it be poſitively proved § that the adverſe party has the deed, or that it is burnt or deſtroyed, (not relying on any looſe negative, as that it cannot be found or the like) then an atteſted copy may be produced, or parol evidence be given of its contents; and the like where a deed is taken away, ſuppreſſed,‖ or deſtroyed ¶ by the adverſe party.

When the evidence on one ſide is gone through, the counſel for the adverſe party opens his caſe; introduces his evidence to ſupport it; and oppoſes the evidence given to the jury by the other ſide: after he has cloſed his proofs, he addreſſes the jury upon his client's caſe. The party who opened then replies and ſums up the evidence; draws the neceſſary inferences, and ſo concludes.

The proof tendered to the jury is to be conſidered either as pertinent or not pertinent: 1. if it is *pertinent*,

it

* But ſee Vaugh. 74. *contra.*
† 6 Mod. 44.
‡ Comb. 337. See Atk. 541.
§ 1 Mod. 4, 266.
‖ 1 Keb. 12. 3 Keb. 2. Str. 70.
¶ L. Ray. 731.

it is legal, and whether it be more or leſs ſo, it muſt go to the jury, who are to give it its proper weight, and take cognizance of its ſufficiency; and, if the court diſallow or refuſe it, the counſel introducing ſuch evidence, may tender a *bill of exceptions* againſt ſuch ſuppoſed erroneous direction, or deciſion of the court, in which bill the fact muſt be truly ſtated: 2. ſo where evidence is *not pertinent*, *i. e.* illegal, the adverſe party may, in like manner, object againſt its introduction; and, if the court notwithſtanding, ſuffer it to be given in evidence, a bill of exceptions* may be tendered, and ought to be allowed in all actions; but it muſt be tendered *ſedente curiæ*, at the trial, and before the jury have given their verdict: it may, however, be ſealed at any time before judgment. If the verdict paſs againſt the party who prefers the bill, his way is to bring a writ of error, after judgment in the court below; and, if the court below have erred, the judgment will be reverſed.

After the plaintiff, or defendant, has gone through his evidence, and the adverſe party conceive the proof inſufficient in law to find the verdict on the iſſue joined, there may be a *demurrer to the whole evidence*, which admits the truth of every fact alleged, but denies their ſufficiency in point of law. Upon demurrer to evidence, the other muſt join therein, or waive the evidence. But, if there be not reaſonable matter to ground the demurrer upon, the court will over-rule it, and not force the other party to join in it. If allowed, the uſual courſe is to diſcharge the jury; and, when the demurrer is determined, if in favor of the plaintiff, in an action on the caſe, a writ of inquiry ſhall iſſue; but, in debt, the judgment is final. A jury may, notwithſtanding a demurrer to evidence, try the iſſue, and aſſeſs the damages conditionally. But ſpecial verdicts and caſes now ſuperſede the neceſſity of a demurrer to evidence.

When

* Laws of N. Y. 9 ſeſſ. ch. 41. ſect. 7.

When the evidence is gone through on both ſides, and the counſel have finiſhed, the judge ſums up the ſubſtance of the whole evidence; and, if any matters of law ariſe upon the evidence, gives his opinion.

The jury, after the proofs are ſummed up, unleſs the caſe be very clear, withdraw from the bar to conſider of their verdict, being attended by a conſtable, who is ſworn to keep them without meat, drink, fire, or candle, and to ſuffer no perſon to ſpeak to them, nor to ſpeak with them himſelf, unleſs it be to aſk them, whether they be agreed in their verdict, until they are agreed.

When they are unanimouſly agreed in their verdict, and returned to the bar, the clerk calls the plaintiff, who is to appear; and, on default of appearing on being called again by the crier, he is nonſuited; in which caſe the court diſcharges the jury, the action is at an end, and the defendant recovers his coſts. When the plaintiff's counſel conceives his evidence, given on the trial to ſupport his cauſe, is inſufficient, it is more adviſable to ſuffer himſelf to be nonſuited, than run the hazard of a verdict againſt him; for, after ſuch nonſuit, he may bring a new ſuit again, for the ſame cauſe of action; but, after verdict and judgment, he cannot. If the plaintiff appears, the clerk calls over the names of each juryman, and, if all do not appear, there can be no verdict; but, if they all anſwer, the clerk aſks them if they are agreed, &c. and they, by their foreman, give in their verdict, which is recorded on the minutes of the court; and, after repeating the entry of the verdict to the jury, for their unanimous confirmation, they are diſcharged. This finiſhes the trial.

Verdicts are either general or ſpecial. 1. *General*, becauſe the matter in iſſue is thereby found. By ſtatute 9 ſeſſ. ch. 41. ſect. 25. a jury ſhall, in no caſe, be compelled to give a general verdict, ſo that they find a ſpecial one; but, if they, of their own will, do give a general

general verdict, it ſhall be admitted, at their own peril. Though the jury may in all caſes, where law and fact are blended together, take upon themſelves the knowlege of the law, and find a general verdict; yet, in doubtful caſes, to avoid miſtaking the law, it is the ſafeſt way for the jury to find, 2. a *ſpecial verdict*, which is grounded on the above ſtatute, and therein they ſtate the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that, if upon the whole matter, the court ſhall be of opinion, that the plaintiff had cauſe of action, they then find for the plaintiff; if otherwiſe, for the defendant. The minutes for a ſpecial verdict ought to be prepared, and ſigned by one of the counſel for each party; and ſo be delivered to the jury, before they conſider of a verdict. But the party, at whoſe inſtance a ſpecial verdict is found, ought regularly to draw it up from the minutes, ſo ſettled and approved of at the trial of the cauſe. Minutes for a ſpecial verdict are to be approved of by the judges. If the counſel for one of the parties refuſe to ſubſcribe the minutes for a ſpecial verdict, the court cannot compel him, but may direct the jury to find one from the minutes as ſigned by one of the counſel for the other party, and order the verdict to be entered *ex parte*;* and, if a ſpecial verdict be ordered, and the counſel do not attend with the minutes of the verdict, or do not ſign them, the jury may give a general verdict.

The plaintiff and defendant ought both of them to appear in court to hear a ſpecial verdict, and the jury is to be called, and have ſuch verdict read to them by the clerk; and, upon reading it, he aſks the jury, whether they are agreed to find it ſo; if they anſwer they do, then the verdict is found, and it muſt be afterwards drawn up and entered at length on the record, according to the notes

* 2 Lil. Abr. 305.

notes found; and, after hearing arguments on both ſides, the court is to determine upon it; and, according to the opinion of the court, judgment is to be entered.

Another method of finding a ſpecies of ſpecial verdict, is when the jury find a verdict generally for the plaintiff, but ſubject nevertheleſs to the opinion of the judge, or the court, on a *ſpecial caſe* ſtated by the counſel on both ſides, with regard to a matter of law; which method has this advantage over a ſpecial verdict, that it is attended with much leſs expence, and obtains a much ſpeedier deciſion, the verdict being ſtayed in the hands of the clerk of the court till the queſtion is determined; and the verdict is then entered for the plaintiff, or defendant, as the caſe may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded from the benefit of a writ of error, if diſſatisfied with the judgment of the court upon the point of law.

All the proceedings of the trial, if at the circuit, are entered on the *niſi prius* roll, and called a *poſtea*: the ſubſtance of which is, that *poſtea*, *afterwards* the ſaid plaintiff and defendant appeared by their attornies, at the place of trial, and a jury being ſworn, found ſuch a verdict; or that the plaintiff, after the jury ſworn, made default and did not proſecute his ſuit, as the caſe may happen. If the trial is at bar, the verdict is entered on the iſſue roll at once.

CHAPTER XIV.

Of Trial by Record—Inſpection—Certificate—Witneſſes.

HITHERTO the proceſs has been treated of in caſes where the parties go to trial upon an iſſue to be tried by a jury; but it frequently happens that the point in diſpute is of a nature not capable of being determined by ſuch trial, in which caſe the plaintiff muſt have recourſe to other methods of trial; or it may happen that one of the parties, willing to admit the facts alleged by the other, is deſirous of riſking the cauſe upon the point of law.

Beſides trial by jury, there are alſo, 1. trial by record; 2. by inſpection or examination; 3. by certificate; or, 4. by witneſſes.

1. *Trial by record.* This is only uſed in one particular inſtance, viz. where a matter of record is either declared upon, or pleaded; as, in an action of debt on judgment, or plea of judgment recovered, the other party may plead or reply *nul tiel record*; to which the other party anſwers, that there is: upon this, iſſue is tendered and joined thus: "And this he prays may be inquired of by the record, "and the other doth the like." The roll is then made up as in other caſes, the trial of which iſſue is determined by producing the record in court, and inſpecting the ſame. On an iſſue joined in *nul tiel record*, the courſe is for the plaintiff to move the court, that the defendant have a day given him to bring the record into court. When the record is brought into court, another rule is of courſe drawn up for judgment *niſi cauſa* within four days. If no cauſe be ſhown, that is, if the party fail in producing the record, or if, when produced, it be adjudged

adjudged not the ſame record as the one pleaded, judgment of failure of record will be againſt him, and *vice verſa*.

Where the action ſounds in damages, plaintiff may, upon the iſſue of *nul tiel record*, as upon joinder in demurrer, give notice of executing inquiry in caſe judgment be for him.

2. *Trial by inſpection or examination.* This is where the principal, or collateral point, is ſo evidently clear, that the juſtices can, by the teſtimony of their own ſenſes, without any previous inquiry, determine it by bare inſpection or examination: as, in caſe of infancy,* a writ iſſues to the ſheriff, commanding him that he conſtrain the party to appear, that it may be aſcertained, by the view of his body, by the people's juſtices, whether he be of full age or not. Should the court, on inſpection, doubt the party's age, it may examine the truth of the fact, not only from his mother, godfather, or the like,† but from the infant himſelf, upon a *voir dire*.

In like manner, if a defendant pleads in abatement of the ſuit, that the plaintiff is *dead*, and one appears, and calls himſelf the plaintiff, which the defendant denies; in this caſe the judges determine, by inſpection and examination, whether he be the plaintiff or not.‡

Alſo, to aſcertain any circumſtances relative to a particular day paſt, it has been tried by an inſpection of the almanac by the court. Thus, upon a writ of error, it was aſſigned that judgment was given on a Sunday, and the day of giving judgment appeared, by inſpection, to be actually on a Sunday, which was held a ſufficient trial, and the judgment reverſed.§ But, in all theſe caſes, the judges, if they conceive a doubt, may order the fact to be tried by a jury.

3. *Trial*

* 9 Rep. 31.
† 2 Roll. Abr. 573.
‡ 9 Rep. 30.
§ Cro. Eliz. 227.

3. *Trial by certificate* is where the evidence of the perſon certifying is the only proper criterion of the point in diſpute. For when the fact in queſtion lies out of the cognizance of the court, the judges muſt rely on the ſolemn averment, or information of perſons in ſuch a ſtation, as affords them the moſt clear and competent knowlege of the truth. Thus, during the late war, a proclamation iſſued, offering protection and ſecurity to ſuch negroes as came within the Britiſh lines; and it was uſual for the police to give a certificate to thoſe negroes, who claimed the privilege of this proclamation, which muſt now, from the difficulty of producing other proof, be conſidered as the higheſt proof of the fact. As, therefore, ſuch evidence, if given to a jury, muſt have been concluſive, the law, to ſave trouble and avoid circuity, permits the fact, when ſpecially pleaded, to be determined upon ſuch certificate merely.

4. Another ſpecies of trial is that by *witneſſes*, without the intervention of a jury: this is but in very few inſtances, as where a widow brings a writ of dower, and the tenant pleads that the huſband is not dead, which is tried by witneſſes examined before the judges. The like method is uſed to try, whether the tenant in a real action was duly ſummoned, or the validity of a challenge to a jury.

As to trial by wager of battle,* and by wager of law,† they are both aboliſhed; except the latter in the caſe of non-ſummons in a real action.

* Laws of N. Y. 9 ſeſſ. ch. 7. ſect. 1.
† Ibid. 10 ſeſſ. ch. 5. ſect. 2.

CHAPTER

CHAPTER XV.

Of Demurrers.

A *Demurrer*,* is underſtood to admit the truth of the facts advanced by the other ſide, if there ſhall eventually appear no defect in the manner of pleading them, but never to admit any matter of law.

The form of ſuch demurrer is, by averring the pleading to be inſufficient in law, to maintain the action or defence; and therefore, praying judgment for want of ſufficient matter alleged. Demurrers are either *general* or *ſpecial*; the latter ſpecifying the cauſes of demurrer, of which the former is ſilent. This diſtinction obtained at common law;† but is become more important ſince the ſtatute,‡ by which, where the exception is to the manner or form of pleading, the party demurring muſt ſet forth the cauſes of his demurrer, or wherein he conceives the deficiency to conſiſt. By the ſame ſtatute, he that demurs ſpecially cannot take advantage of any other want of form, than what is particulariſed; but he may of any matter of ſubſtance.§ Defects of form, though they are ſpecially ſhown for cauſe of demurrer, and though they vitiate the proceedings, are now amended in common practice, on, and poſſibly without payment of coſts, by leave of court.

A defendant may not plead and demur to the ſame fact;‖ but there may be a demurrer to one part of a declaration,

* L. Ray. 18.
† Plow. 66.
‡ Laws of N. Y. 11 ſeſſ. ch. 32. ſect. 7.
§ Co. Lit. 172. 10 Co. 88.
‖ 10 Mod. 280.

declaration, and a plea to the other. Here there are two diſtinct iſſues, one in law, the other in fact; the firſt of which is to be determined by the court, the laſt by a jury. In this caſe, it lies with the court which ſhall be firſt determined; but the practice is to argue the demurrer firſt, becauſe, when the iſſue is afterwards tried, (in caſe judgment is given for the plaintiff on the demurrer,) the jury may aſſeſs damages for the whole. However, in ſuch caſe, the plaintiff may, if he chooſes, enter a *nolle proſequi* as to the iſſue, and. if the ſum recovered is uncertain, proceed to execute a writ of inquiry on the demurrer; if aſcertained, the judgment is final.

Upon iſſue to one part, and demurrer to another, if the iſſue is tried firſt, it is only found conditionally; and where the verdict is for the plaintiff, and judgment on demurrer for the defendant, the coſts are to be taxed on both ſides, the leſſer coſts to be deducted from the greater, and the balance to be paid by the party,* whoſe coſts are the ſmalleſt.

The demurrer is made up, filed, and ſerved in the ſame manner as a plea. If the party, againſt whom the demurrer is filed, mean to conteſt the matter, he muſt join in demurrer to make a complete iſſue. If he do not, the oppoſite party may lay him under a rule to do it in twenty days, or judgment.† If not complied with, judgment by *nil dicit* or nonſuit may be obtained.

When demurrer is joined, a motion is made for a *concilium*, and a day in conſequence thereof appointed. The method of proceeding to argument is for the party demurring to prepare the demurrer book. This book contains all the pleadings, with a proper caption of the term in which demurrer is joined, a memorandum, an imparlance, *dies datus*, and continuances. Theſe continuances (in caſe

* 2 Barnes 122.

† Stables and another v. Webb, S. C. April T. 1792.

cafe of a demurrer, and indeed in all inſtances where the court is to determine) ſtate that a further day is given, and ſo on from term to term, becauſe the court are not adviſed about giving judgment. A copy of the demurrer book muſt be delivered to the attorney for the oppoſite party, with the day of argument indorſed, and alſo a copy to each of the judges.

At the day appointed, the parties attend by their counſel, and the demurrer is argued. If the plaintiff, being called, make default, he is nonſuited;* if the defendant make default, the court will give judgment againſt him.† If the demurrer be well founded, judgment will be given againſt him, who joined in demurrer; but if the demurrer appear to be inſufficient, judgment will be againſt the demurrant. In all caſes of doubt and difficulty, the court uſually take time to conſider, in which caſe the continuances muſt be to the term of giving judgment.

If there are any material miſtakes in the declaration, although the defendant in ſuch caſe may demur, yet it is beſt to plead a ſham plea in bar;‡ and afterwards, if the plaintiff replies, to demur to his replication, and then, by reaſon of the defects in the declaration, the plaintiff will fail in his action. Where the plaintiff demurs to ſuch plea, though the plea be ill, yet the declaration being faulty, the plaintiff muſt likewiſe fail. For it is an invariable maxim in pleading, that whoever makes the firſt fault, ſhall have judgment againſt him.§

* Vin. *tit.* Nonſuit, 565.
† 5 Com. Dig. 124.
‡ Cro. Car. 25.
§ 2 Wilſ. 100. 3 Wilſ. 234. 3 Term Rep. 186.

CHAPTER

CHAPTER XVI.

Of New Trials and Arreſt of Judgments.

AFTER the plaintiff is intitled to his judgment, he ſhould, if the cauſe was tried at the circuit, on the firſt day of the enſuing term, produce the *poſtea*, and move for judgment, which is granted *niſi*; and, unleſs the judgment is ſuſpended or arreſted within four days after, the rule becomes abſolute. If the cauſe be tried at bar, the time is four days after that day, but if ſo many days are not left in the term, then *ſedente curiæ*; and the motion is of courſe.

1. Cauſes of ſuſpending the judgment, by granting a *new trial*, are wholly *extrinſic*, ariſing from matter foreign to or *dehors* the record. Of this ſort are want of notice of trial, or any miſbehaviour of the prevailing party towards the jury, which may have influenced their verdict;* or any groſs miſbehaviour of the jury among themſelves;† alſo, if it appear by the judge's report, certified to the court, that the jury have brought in a verdict without, or contrary to evidence, ſo that he is reaſonably diſſatisfied therewith;‡ or if they have given exorbitant damages; or if the judge himſelf has miſdirected the jury, ſo that they found an unjuſtifiable verdict;§ for theſe, and other ſimilar reaſons, it is the practice of the court to award a *new* or ſecond trial. The great maxim, which now prevails, with reſpect to the granting new trials, is that, in all caſes of moment, where juſtice has

* 11 Mod. 118, 119.

† 2 Sal. 645. Str. 642. Bunb. 51. See Comb. 14. 1 Keb. 811.

‡ Caſ. *temp.* Hardw. 23.

§ Sal. 649. See 2 Term Rep. 4, 5. 3 Wilſ. 273.

has not been done upon one trial, the injured party is intitled to another.*

If the motion is not made on the report of the judge, it muſt be grounded on an affidavit of the facts. It is a rule to ſhow cauſe, ſo that notice of the motion is optional. It will not be granted in penal actions,† if a verdict have been found for the defendant; though, even in ſuch action, a new trial may be granted where the verdict has proceeded on the miſtake of the judge.‡

2. Judgments are *arreſted* for *intrinſic* cauſes appearing on the face of the record. Of this kind are, *firſt*, where the declaration varies totally from the original writ; as, where the writ is in debt, or detinue, and the plaintiff declares in an action on the caſe, for an aſſumpſit: alſo, *ſecondly*, where the verdict materially differs from the pleadings and iſſue thereon; as, if in an action for words, it is laid in the declaration, that the defendant ſaid, "the plaintiff is a bankrupt," and the verdict finds ſpecially, that he ſaid, "the plaintiff will be a "bankrupt." *Thirdly*, if the caſe laid in the declaration is not ſufficient, in point of law, to found an action upon. It is an invariable rule, with regard to arreſts of judgment in matters of law, that whatever is alleged in this behalf, muſt be ſuch matter as would, upon demurrer, have been ſufficient to overturn the action or plea. But the rule will not hold *e converſo.*; for, if a declaration or plea omits to ſtate ſome particular circumſtance, without proving of which, at the trial, it is impoſſible to ſupport the action or defence, this omiſſion will be aided by a verdict.

If, through the miſconduct or inadvertence of the pleaders, the iſſue ſhould be joined on a fact totally immaterial, ſo that the court, upon the finding, cannot

* 4 Bur. 395.
† 3 Wilſ. 59, 60.
‡ 4 Term. Rep. 753.

know for whom judgment ought to be given, the court will, after verdict, award a *repleader*;* unleſs it appear from the whole record, that nothing material can poſſibly be pleaded in any ſhape whatever.† When a repleader is granted, the pleadings muſt begin *de novo*, at that ſtage of them, whether it be the plea, or the replication, &c. where there appears to be the firſt defect.‡

The motion muſt be made for an arreſt of judgment, if the cauſe is tried at the circuit, within the four firſt days of the ſubſequent term; but, if tried at bar, within four days from the day of trial, if ſo many there are; but, if not, then within the ſame term; though, it is ſaid, it may be done at any time before judgment actually ſigned.§ In order to ground this motion, the roll muſt be brought into court. It is a rule to ſhow cauſe, and needs no affidavit to ſupport it, as the defect ariſes out of the record; and, after judgment upon demurrer, there can be no motion in arreſt of judgment.‖ This motion may be made after motion for a new trial diſcharged,¶ though not *e converſo*, nor can both motions be made together.** If judgment is arreſted, each party pays his own coſts.†† Under the head of amendment,‡‡ I have given the ſubſtance of the ſtatute, which precludes the ſtaying of any judgment, for want of the formalities therein ſtated. The rule is, that entry of final judgment be ſtayed till the court otherwiſe order; a certified copy muſt be ſerved on the oppoſite party, who, in order to get rid of it, muſt move the court to diſcharge the ſame, and ſerve notice

* 2 Vent. 196. Str. 994.
† 4 Bur. 301, 302.
‡ Raym. 458. Salk. 579.
§ Doug. 716. Str. 845.
‖ Str. 425.
¶ Doug. 716.
** Cowp. 407.
†† Bur. 334. 2 Salk. 647.
‡‡ Ante, p. 93, 94.

notice of his motion on the other attorney. The matter then comes on for determination. If it be arreſted, ſerve a certified copy of the rule on the other attorney; if not, the coſts, judgment, &c. muſt be taxed and entered up as uſual.

Judgment may be arreſted on an inquiſition, as well as on a verdict.

CHAPTER XVII.

Of Coſts.

AT common law no coſts were allowed *eo nomine*, either to the plaintiff or defendant; but, if the plaintiff prevailed, the defendant was in *miſericordia* for his unjuſt detention of the plaintiff's right; and, if the defendant prevailed, the plaintiff was amerced *pro falſo clamore*.

The coſts, however, or *expenſa litis*, were generally conſidered as included in the damages aſſeſſed in ſuch actions where damages are given; but ſuch damages being found inadequate, and in many caſes not given at all, it was thought expedient to paſs, from time to time, ſeveral ſtatutes, which are now reduced into one, allowing coſts of ſuit to the parties, which is the origin of coſts *de incremento*.

The ſtatute of 10 ſeſſ. ch. 14. intituled, "an act to reduce "all the laws concerning coſts into one ſtatute," gives coſts in all ſuits, where the plaintiff recovers damages.*

On the conſtruction of this branch of the ſtatute it may be obſerved, 1. that few actions are exempt from coſts; for, even in real actions, and actions of debt, damages

* Sect. 1.

damages are recoverable for the unjuſt detention; and, upon demurrer, they are confeſſed, and therefore there is ſufficient authority for the court to aſſeſs the damages. 2. A ſtatute which doubles or trebles the damages, doubles or trebles the coſts alſo, becauſe they are, in fact, part of the damages. 3. Where a ſtatute gives treble damages, the jury are to give ſingle, which are afterwards to be trebled by the court; for it is the jury's part, as matter of fact, to aſcertain the damages, and it is the buſineſs of the court to ſee the law executed. 4. There are no coſts upon abatement, becauſe there are no damages given, but only a *reſpondeas ouſter* awarded.

Under the old law, from which this ſection of the ſtatute is framed, the judges made it a rule, for the better execution thereof, that the jury ſhould tax the damages apart, and the coſts apart, in order to ſhow to the court that the coſts were not conſidered in the damages; and, when it was evident that the coſts taxed by the jury were too little to anſwer the actual coſts of ſuit, the plaintiff prayed that his coſts of increaſe, to which he was intitled under the ſtatute, might be taxed and inſerted in the judgment; and it is therefore ſaid to be done *with his aſſent*, becauſe at the plaintiff's prayer.

In order to prevent the heavy expence of a law-ſuit, in actions where the demand is of ſmall value, and to preſerve thoſe actions for the ſeveral county courts, it is provided, "that if the plaintiff recover in any action, "(except actions where the ſtate is concerned, or where "freehold, inheritance, or title to lands, come in queſ-"tion, or aſſault, battery, falſe impriſonment, or ſlander, "or actions where the mayor, aldermen, or commonalty "of the cities of New-York, Albany, or Hudſon are "concerned) above 20l. and under 100l. he ſhall recover "common pleas coſts only, not exceeding 10l.* But, "if the cauſe be removed into the ſupreme court, at the "inſtance

* Laws of N. Y. 10 ſeſſ. ch. 72. ſect. 2.

"instance of the defendant, and the plaintiff recover "above 10l. he shall have full costs."*

To prevent frivolous and vexatious actions, the legislature have ordained, in several instances, that the plaintiff shall *recover no more costs than damages.*

1. In all actions of *trespass*, and *assault* and *battery*, where the judge, at the trial of the cause, shall not certify on the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold, or title to the land mentioned in the plaintiff's declaration, came in question, the plaintiff, in case the jury shall find the damages to be under 40s. shall have no more costs than damages; and, if any more costs are awarded, the judgment shall be void, and the defendant may have his action for a vexatious suit.†

This statute does not extend to damages assessed on a writ of inquiry.

If the defendant justify by any thing that brings the title of the land in question upon record, there the judge need not certify, in order to intitle the plaintiff to costs.‡ In trover, or trespass *de bonis asportatis* of goods and chattels not fixed to the freehold, no certificate is necessary.§ If trespass to the freehold, and trespass *de bonis asportatis* are joined, and the plaintiff recover in general upon both counts, he has no need of a certificate to obtain costs. The reason is, because the intention of the statute could only be to prevent a plaintiff from recovering full costs, in cases where it was possible for the judge to make the requisite certificate.

Where the assault is not the *gist* of the action, the plaintiff shall have full costs, without a certificate, as in *crim. con.* *Quere*, should he not recover 100l.

The

* Laws of N. Y. 10 sess. ch. 72. sect. 2.
† Ibid. 10 sess. ch. 14. sect. 5.
‡ 1 Salk. 193. 2 Vent. 215. 2 Jones 288. Raym. 487.
§ 3 Mod. 39. Comb. 420. Man. Rep. 1.

The ſtatute prevents the court only (without a certificate from the judge) but not the jury, at the trial, from giving more coſts than damages; if, therefore, the latter are under 40s. the jury may find more coſts than 40s. though they do not find damages above that ſum.

2. But in actions of *treſpaſs*, wherein the judge, at the trial of the cauſe, ſhall certify, on the back of the record, that the treſpaſs was *wilful and malicious*, the plaintiff ſhall have full coſts.*

Every treſpaſs is wilful where the defendant has notice, and is eſpecially warned not to come on the land; and every treſpaſs is malicious where the intent of the defendant appears plainly to harraſs, vex, and diſtreſs the plaintiff.

3. In all actions upon the caſe for ſlanderous words, if the jury, upon the trial or inquiry, find the damages under 40s. the plaintiff ſhall only have as much coſts as damages, and no increaſe.† But this extends only to words in themſelves actionable, and not merely ſo in conſequence of the ſpecial damage ſuſtained;‡ therefore, ſlander of title is not within the act.

In all caſes where the plaintiff would have recovered coſts had he prevailed, the defendant ſhall have them where he fails, after nonſuit or verdict.§ So, likewiſe, againſt plaintiffs for not declaring, or diſcontinuing, or being nonſuited, the defendant ſhall have coſts.‖ If the defendant prevails againſt the plaintiff on demurrer, or writ of error, he ſhall have coſts.¶

Where there are ſeveral defendants in treſpaſs, aſſault, falſe impriſonment or ejectment, and any one, or more, are

* Laws of N. Y. 10 ſeſſ. ch. 14. ſect. 7.
† Ibid. ſect. 6.
‡ Cro. Car. 114. Ley. 82. Palm. 230. 1 Jones 196.
§ Laws of N. Y. 10 ſeſſ. ch. 14. ſect. 2.
‖ Ibid. ſect. 10.
¶ Ibid. ſect. 11.

are acquitted by verdict, thoſe acquitted ſhall have coſts, unleſs the judge certify that there was reaſonable cauſe for making them defendants.* An avowant in replevin ſhall recover coſts.†

Coſts are, by the practice of the court, awarded to the defendant, where the plaintiff does not execute his inquiry purſuant to notice.

Where the plaintiff does not recover above 20l. in an action originally commenced in this court, he ſhall pay coſts to the defendant, unleſs it be in an action wherein the ſtate is intereſted, or where freehold, inheritance, or title to lands or tenements, ſhall come in queſtion, or in replevin, aſſault and battery, falſe impriſonment, or ſlander, or where the mayors, aldermen, or commonalties of the cities of New-York, Albany, or Hudſon, ſhall be concerned.‡

The firſt ſection of the ſtatute of coſts gives them only where the plaintiff recovers damages; and as damages are not recoverable in ſome actions, the ſtatute§ gives coſts on *ſcire facias* and prohibition. By ſtatute 11 ſeſſ. ch. 11. coſts are given on writs of mandamus, and informations in the nature of *quo warranto*.

Coſts are given to the plaintiff on writs of error, and if ſuch writs of error are quaſhed, or are for the purpoſe of merely delaying execution, the defendant is intitled to coſts.‖ On affirmance of error, after judgment on verdict, the defendant ſhall have double coſts.¶

By act of 12 ſeſſ. ch. 28. ſect. 1. if the defendant in any action, or the plaintiff in replevin, plead ſeveral matters, and, upon iſſue or demurrer joined, any or either of them be

* Laws of N. Y. 10 ſeſſ. ch. 14. ſect. 9.
† Ibid. ſect. 3.
‡ Ibid. ſect. 2.
§ Ibid. ſect. 8.
‖ Ibid. ſect. 11, 12, 14.
¶ Ibid. ſect. 13.

be found againſt the party pleading the ſame, coſts ſhall be given at the diſcretion of the court, unleſs the judge certify that there was probable cauſe for ſuch plea.

By act of 10 ſeſſ. ch. 27. double coſts are allowed to ſheriffs, coroners, juſtices, mayors, recorders, aldermen, bailiffs, conſtables, marſhals, collectors, overſeers of the poor, and their deputies, and all perſons aſſiſting by their commandment, in all actions upon the caſe, treſpaſs, battery, or falſe impriſonment, brought againſt them concerning their offices, where a verdict is given againſt the plaintiff, or he is nonſuited, or ſuffers a diſcontinuance.

If a verdict paſs for the defendant, he muſt get a certificate from the judge, that the action was brought againſt him for ſomething done in the execution of his office, in order to intitle him to double coſts.

Common informers upon wilful delay, or diſcontinuance, nonſuit, or verdict againſt them, ſhall pay coſts to the defendant.* But it is to be obſerved, that, in caſe they ſucceed, they are not intitled to coſts, unleſs expreſſly given by the ſtatute on which they have founded their claim.

This act extends to all penal ſtatutes, as well ſubſequent to it as prior. Yet it does not extend to actions by parties grieved;† but, where the penalty is given to a common informer, and the party grieved happens to be ſo, he ſtands in the ſame ſituation.

An infant, ſuing by *prochein ami*, or guardian, is not liable to coſts;‡ but the *prochein ami* is; and, if it appears that he be not of ſufficient ability to pay them, the court, on application, will order another.§ If the guardian refuſe to pay them on demand, he may be proceeded againſt

* Laws of N. Y. 11 ſeſſ. ch. 9. ſect. 8.
† Ibid. ſect. 10.
‡ Cro. Eliz. 33. Str. 708.
§ 1 Bar. 105.

againſt by attachment.* Yet, where an infant plaintiff was taken in execution for coſts, the court refuſed to diſcharge him on motion.† An infant defendant, defending by guardian, muſt always pay coſts, if the verdict be againſt him.‡

Paupers, being plaintiffs, by virtue of ſtatute 11 ſeſſ. ch. 46. ſect. 28. if a nonſuit, or verdict, or judgment be againſt them, ſhall not be compelled to pay coſts. If, however, a pauper be vexatious, as in not proceeding to trial purſuant to notice, or the like, the court, upon motion, will order him to be diſpaupered.

Executors or adminiſtrators, when plaintiffs, are expreſſly excepted out of the ſtatutes giving coſts to defendants.§ But if they negligently ſuffer a nonpros, or diſcontinuance, or have knowingly brought their action wrong, they are liable to coſts. If the action be ſuch, that they might have ſued in their own right, they ſhall, on failure, pay coſts.

After the judgment is obtained, and the rule for judgment is expired, the coſts are taxed by one of the judges, who is allowed an addition to his ſalary for doing it *gratis*. A copy of the bill of coſts, together with a notice of the time of taxing, muſt be ſent to the oppoſite party two days previous to ſuch time; and, if he do not attend, the judge will tax and ſign the coſts *exparte*. When taxed, the amount of theſe coſts muſt be inſerted in the judgment roll, which is next ſigned by the judge, and final judgment is then completed, as will be more fully ſhown in the next chapter.‖

* Barnes 128.
† 2 Str. 1217.
‡ Dyer 104. 2 Str. 1217.
§ Laws of N. Y. 10 ſeſſ. ch. 14. ſect. 2.
‖ *Poſt*, p. 186.

CHAPTER XVIII.

Of Judgments.

JUDGMENTS are the ſentence of the law pronounced by the court, upon the matter contained in the record, and are of ſeveral ſorts: 1. where the facts are confeſſed by the parties, and the law determined by the court, as in caſe of judgment upon *demurrer*; 2. where the law is admitted by the parties, and the facts diſputed, as in caſe of judgment on a *verdict*; 3. where both the law and the fact ariſing thereon, are expreſſly admitted, or not conteſted by the defendant, which is the caſe of judgments by *confeſſion*, or *default*; or, 4. where the plaintiff is convinced, that neither fact or law, nor both are ſufficient to ſupport his action, and therefore abandons, or withdraws his proſecution, which is the caſe in judgments upon a *nonpros*, a *nonſuit*, or *retraxit*.

Previous to treating of theſe ſeparately, it will be proper to ſhow in what manner judgment is obtained. The party intitled to a judgment, after his rule for judgment is expired, muſt draw the judgment in the eſtabliſhed form, (various precedents of which are to be found in the books of entries) and enter it on the roll, after the other proceedings, with proper continuances, if neceſſary. When this is done, two days notice of taxing coſts muſt be given to the attorney of the oppoſite party, if one be employed: at the time mentioned, the judge will tax the coſts, inſert the amount in the judgment, and ſign* his name in the margin, at the ſame time noting the day and year of ſigning. The roll then muſt be filed with the clerk, who† is to mark the day and year of ſuch

* Laws of N. Y. 10 ſeſſ. ch. 56. ſect. 2. † Ibid.

ſuch filing, from which time, and not before, the real property of the perſon, againſt whom the judgment is given, is affected. The clerk muſt keep a regular book, or docquet, of all judgments. As to the ſeveral ſpecies;

1. Judgment upon *demurrer*. If the action be for damages, you muſt execute a writ of inquiry, in the manner after mentioned. If it be in debt, the judgment is final, and you muſt move for judgment; the rule is granted *niſi*. At the expiration of four days, enter it up, and get it ſigned and filed.

2. Judgment upon *verdict*. If the cauſe be tried at the circuit, the *poſtea* ſhould be obtained from the clerk of the circuit, and be brought into court the firſt day of the ſubſequent term, and thereupon read and filed, and motion made for judgment. It is a four day rule. If the cauſe be tried at bar, the motion may be made immediately after the trial: and, in this caſe, if there be not four days in the term, the rule expires with the term. When the rule is out, enter the *poſtea* or verdict, preceding it by continuances, or a general continuance; "afterwards the "proceſs being continued between the parties aforeſaid, "&c." add the judgment; then get it ſigned and filed, and the coſts taxed, in the uſual manner.

3. Judgment by *confeſſion*. When the defendant has no real defence to the plaintiff's ſuit, in order to ſave coſts of inquiry, he ſometimes confeſſes the fact, with a ſtay of execution. If this be done after plea, he muſt give a *relicta verificatione* with it. This *relicta* and *cognovit* are ſigned by the defendant, or his attorney; and upon this a motion muſt be made for judgment, which is afterwards entered up as before directed. But it frequently happens, that a bond to the amount of the debt, and a warrant of attorney to enter up judgment thereon, are given, either to prevent an action, as a ſecurity for the plaintiff's demand; or, as is ſometimes the caſe, after the action is brought, to prevent further expence. By

ſtatute

ſtatute 11 ſeſſ. ch. 46. ſect. 24. "no judgment ſhall be "entered upon any bond, bill, covenant, or other "contract in writing, upon the confeſſion of any attor- "ney, by virtue or in conſequence of any warrant, "power, or authority whatſoever, contained, written, "or printed in the ſame inſtrument, paper, or parchment, "with the ſame bond, bill, covenant, or contract. "And every attorney, who ſhall confeſs any judgment, "ſhall, at the time of making ſuch confeſſion, produce "his warrant to the court, or judge before whom he "makes the ſame; and the ſame warrant ſhall then be "filed with the proper officer of the court." The warrant of attorney is uſually directed to any attorney of any court of record in the ſtate, or ſometimes to a particular attorney; and the mode of entering up judgment is to prepare a declaration, get the plea ſigned by an attorney, and carry them, together with a bail-piece, to a judge, if in vacation, or to court, if in term, and file them with the warrant. The proceedings are then entered on the roll, which is ſigned and filed.

If the warrant of attorney be a year and a day old, judgment cannot be entered thereon without motion in term, or a judge's order in vacation, on affidavit, that the debt, or part thereof, is due, that the warrant was duly executed, and that the defendant is ſtill alive.

If the warrant of attorney be above ten years old, the motion muſt be made in court.

If the defendant be in cuſtody on meſne proceſs, an attorney muſt be preſent in behalf of the priſoner, to ſee him execute it, and acquaint him with the contents, meaning and effect of the warrant. But this is not neceſſary, if he be in cuſtody on final proceſs.

If a *feme ſole* give a warrant of attorney, and afterwards marry, judgment cannot be entered, without leave of the court.

The

The beſt mode, in both a *cognovit actionem* and a warrant of attorney, is to take a releaſe of all errors, and an undertaking not to file a bill in equity.

4. Judgment by *default*. Where the defendant neglects to plead, or rejoin, in due time, or in any other reſpect is guilty of a default of procedure on his part, the plaintiff may obtain judgment againſt him, by reaſon of ſuch default; which judgment is either *interlocutory* or *final*: interlocutory, where the damages are not aſcertained by the judgment; but final, where they are. If the default happen in vacation, the plaintiff waits for the enſuing term, and then moves for judgment. The rule in debt is, that judgment by default be entered againſt the defendant, for want of plea; and thereupon judgment may be entered. Where the judgment is interlocutory, a *writ of inquiry* of damages muſt iſſue. But previous to this the plaintiff's attorney muſt move for a rule, "that interlocutory judgment by default be entered "againſt the defendant for want of plea, and that a writ "of inquiry of damages iſſue." Upon this, make out the writ, get it ſealed, and leave it with the ſheriff. This is a proceſs which ſtates the plaintiff's action and the judgment, and commands the ſheriff to inquire, by the oaths of twelve good and lawful men of his bailiwick, what damages the plaintiff has ſuſtained, and to return ſuch writ, with the inquiſition, into court at the return.

Notice muſt be given to the defendant's attorney, or the defendant himſelf, if none, and alſo to the ſheriff, of the time and place of executing ſuch inquiry. The ſame rule takes place with reſpect to the time of giving this notice, as in notices of trial. But the time for executing it muſt be limited to two hours, as between eight and ten, &c. If the defendant or his attorney cannot be found, this notice muſt be left in the office. It may be countermanded within the ſame time as a notice of trial.

When

When a writ of inquiry is to be executed, the plaintiff's attorney, a convenient time before the day appointed, prepares a brief, iſſues writs of ſubpœna for the requiſite witneſſes, and prepares all that is neceſſary to prove the *quantum* of the damages ſuſtained. The defendant has alſo liberty to make his defence, but only with a view to mitigate the damages.

The ſheriff having ſummoned the jury, they proceed, at the time and place appointed, to aſſeſs the damages which the plaintiff has really ſuſtained. On the execution of this writ, the ſheriff ſits as judge; but, in caſe of his abſence, the writ may be executed before his under-ſheriff. To the jurors thus impannelled, no challenge can be made; but the ſheriff may, on good cauſe ſhown, ſet one aſide.

When the jury are ſworn, the parties proceed to their proofs, the plaintiff always beginning firſt; after hearing which, the jurors are left together till they have agreed, and then the ſheriff draws up an inquiſition, which contains the finding of the jury, and to which they ſet their hands and ſeals; this being ſigned and ſealed by the ſheriff, is by him annexed to the writ, and returned therewith at the return thereof. At this time, the plaintiff's attorney moves to have the inquiſition read and filed, and a rule thereon is entered for judgment *niſi*.

If, after the writ of inquiry is returned and filed, the defendant can make out any lawful objections againſt the entry of a final judgment, for the damages found in the inquiſition, he ought legally to offer them before the four day rule is expired; for a ſecond writ of inquiry cannot be executed in the ſame cauſe, without a previous application to the court, and leave had for that purpoſe. The reaſons on which the court will ſet aſide a writ of inquiry executed, are various: as, where due notice has not been given of the time and place of executing the writ:

writ:* where the notice is uncertain;† or improperly drawn;‡ or not confined to the compaſs of two hours;§ or is given to the defendant when his attorney is known; if executed before an hour elapſed after the time noticed;‖ where the plaintiff was examined as a witneſs;¶ where the plaintiff gave no evidence to the jury; where the ſheriff refuſed legal evidence,** or admitted improper evidence;†† where the jury find no damages,‡‡ or find exceſſive damages. If the jury find any damages, though ever ſo ſmall, the common rule is not to ſet aſide the inquiſition *merely* for *ſmallneſs* of damages. Yet there are ſpecial caſes where that rule does not hold; as where the jury miſtake in point of law, or where there is a trick or contrivance in the caſe; or where the ſheriff admits improper evidence to be given by the defendant,§§ whereby the damages were leſſened: here there is as much reaſon for granting a new inquiry, &c. if the damages be too ſmall, as if they were exceſſive.‖‖

Theſe caſes, however, are ſubject to this diſtinction,¶¶ that where the plaintiff's demand is certain, as by promiſory note, or the like, the court will ſet aſide an inquiſition for too ſmall damages; but not where the damages are uncertain, as in treſpaſs, ſlander, &c. yet if in actions, wherein the court cannot come at a certain knowlege of the damage which the plaintiff has ſuſtained,

* Hale P. C. 280.
† 2 Barnes 134, 245, 247.
‡ 1 Barnes 2[illegible], 221.
§ Impey 288.
‖ Barnard. 32, 33, 214.
¶ 12 Mod. 317.
** 2 Barnes 354.
†† 12 Mod. 317.
‡‡ 1 Barnes 154, 156.
§§ 2 Barnes 344. Salk. 646.
‖‖ 2 Barnes 354, 332. Str. 425.
¶¶ 2 Barnes 367.

tained, the damages aſſeſſed by the jury be exceſſive, the court may ſtay judgment, until the plaintiff, by entering a *remittitur* as to part, reduces the damages to a reaſonable ſum.*

A new writ of inquiry is never granted at the inſtance of the plaintiff, except there has been a miſbehavior in the ſheriff, &c. or ſome other perſon, or where the plaintiff was ſurpriſed with a defence, and even then on payment of coſts; becauſe the ſuing forth the writ is his own act.†

The damages aſſeſſed upon a writ of inquiry may be increaſed or abridged by the court; for, as the court may themſelves award damages without a writ of inquiry, the inquiſition thereupon is no more than an inqueſt of office for the information of the court.

However, this power of increaſing, or abridging the damages aſſeſſed by the jury, is very ſeldom exerciſed by the court in any action, except ſometimes in an action for corporeal hurt, or aſſault, or battery, or mayhem; in which caſes, the court may as well judge of damages as the jury; becauſe there is nothing but a corporeal injury, which, of all others, is generally the moſt apparent.

This increaſing or abridging damages is generally done at the return of the writ, or view of the party;‡ and ſometimes on the oath of a ſurgeon, after due notice given to the oppoſite party, of the intended motion for that purpoſe.

5. Judgment of *nonpros.* If the plaintiff do not comply with the rules and orders of the court to be obſerved on his part, by declaring, replying, ſurrejoining, or entering the iſſue in due time, when ruled ſo to do, judgment of nonpros§ for ſuch his omiſſion, may be obtained, which

* Law of Dam. 179. † 2 Lev. 214. ‡ 1 Barnes 106.

§ It is called a judgment of *nonpros*, from the words *non proſequitur*, &c. formerly uſed in entering it up.

which is final. A nonpros for not declaring can never be obtained, unleſs bail be filed of the term in which the proceſs is returnable;* and therefore it can never be obtained where a priſoner is ſuperſeded for not declaring, &c. on entering a common appearance.†

To obtain a nonpros, the defendant's attorney muſt rule the plaintiff to declare, &c. in ſuch time as the court ſhall deem proper, uſually twenty days, or by the firſt day of the enſuing term, and ſerve a certified copy of the rule on the plaintiff's attorney. If the rule is not complied with, affidavit of the ſervice muſt be made, and a certificate got from the clerk,‡ that no declaration, &c. is filed: upon which, the term ſubſequent to the default, the motion for judgment is founded, and granted of courſe, unleſs reaſons be aſſigned on behalf of the plaintiff. On obtaining the rule, enter judgment of nonpros on a roll, and get it ſigned and filed, and tax the coſts.

6. *Judgment as in caſe of a nonſuit.* If the plaintiff have entered the iſſue, and he then neglect proceeding to trial, according to the practice of the court, the old method was for the defendant to try the cauſe by proviſo, as mentioned in a preceding chapter;§ but now, by ſtatute, [11 ſeſſ. ch. 46. ſect. 13.] it is enacted, "that "where any iſſue ſhall be joined, whether the iſſue roll "be filed or not, in any action, in any court of record, "and the plaintiff, in ſuch action, ſhall neglect to bring "ſuch iſſue on to be tried, according to the courſe and "practice of the ſaid courts reſpectively, it ſhall and "may be lawful for the judges of the ſaid courts re-"ſpectively, at any time after ſuch neglect, upon motion

* Holmes v. White, E. 11 Geo. 3.

† Impey 415. 1 Crompt. 127.

‡ *Quere*, whether this certificate is not uſeleſs, as the filing a declaration, &c. may be ſhown for cauſe againſt the making the rule for a nonpros abſolute.

§ Ante, p. 152.

" made in open court, (due notice having been given " thereof) to give the like judgment for the defendant, " in every ſuch action, as in caſes of nonſuit, unleſs " the ſaid judge or judges, ſhall, upon reaſonable terms, " allow any further time, or times, for the trial of ſuch " iſſue; and, if the plaintiff ſhall neglect to try ſuch " iſſue, within the time, or times, ſo allowed, then, in " every ſuch caſe, the ſaid judge, or judges, ſhall proceed " to give ſuch judgment as aforeſaid. And that all " judgments ſo given, ſhall be of like force and effect " as judgments upon nonſuits, and of no other force or " effect. And alſo, that the defendant ſhall, upon ſuch " judgment, be awarded his coſts, in any action where " he would upon nonſuit be intitled to the ſame."

In order to proceed regularly, move the court for a rule to ſhow cauſe why judgment ſhould not be entered as in caſe of a nonſuit; ſerve a certified copy on the plaintiff's attorney; and, if no cauſe be ſhown at the time, move the day after to make it abſolute. On the part of the plaintiff, it is neceſſary for him to ſhow ſome reaſonable excuſe why he did not proceed to trial, ſuch as the abſence of a material witneſs, &c. but, in general, undertaking peremptorily to try at the next circuit, or term, after the firſt notice only, will do; but, after two notices, the court will expect to receive a *real excuſe*. Inſolvency of the defendant ſince the action brought, is a good excuſe for not proceeding to trial.* You muſt not only ſhow the abſence of a material witneſs, but his name; that all endeavors were uſed to find him out; and that you expect him ſoon home, naming the time; and, if the court put it off, it is only from term to term.

If the rule be made abſolute, enter judgment in the uſual way.

If

* Doug. 646. Bulman v. Wardall, K. B. H. 29 Geo. 3.

If the cauſe be put off, the plaintiff muſt obtain a copy of the rule, and ſerve it on the defendant; and, if the plaintiff do not proceed to trial at the time, make an affidavit of the fact, annex to it the certified copy of the rule, and move for judgment as before, giving notice.

7. *Judgments on nonſuit at the trial* have been mentioned before. *See* p. 167.

CHAPTER XIX.

Of Executions, and entering up Satisfaction.

FINAL judgment being obtained, nothing remains but the execution of that judgment. In all perſonal actions, this is done by compelling the adverſe party to ſatisfy the debt, or damages, with the coſts of ſuit recovered or aſſeſſed, againſt him, which are obtained either by a *capias ad ſatisfaciendum*, to take his body; or a *fieri facias*, to levy his perſonal and real property.

Theſe executions muſt be ſued out *within a year and a day* after the judgment obtained; and, by rule of court,* no execution can iſſue until the roll is made up and ſigned by one of the judges, and filed. But, if it be taken out, or returned within the year, there needs no *ſcire facias* before you iſſue another execution; and it is proper to award the firſt on the roll, with the ſheriff's return thereon.† If the execution have been ſuſpended by a writ of error, or injunction, beyond the year and a day

* June Term 1727.
† Str. 100.

a day, there needs no *ſcire facias* to warrant the execution;* as is likewiſe the caſe where the judgment has been confeſſed, with ſtay of execution;† but the *ceſſat executionem* muſt be entered on the roll, or the court will take no notice of it.

1. The firſt ſpecies of execution, or that againſt the debtor's body, is a *capias ad ſatisfaciendum*. This, by the common law, could only be ſued out againſt thoſe, who are liable to be taken by *capias ad reſpondendum*, at the commencement of the action;‡ but, by ſtatute 10 ſeſſ. ch. 56. ſect. 6. "where any debt hath been, or ſhall be "recovered, or acknowleged, or damages adjudged or "awarded, it ſhall be lawful for him, who ſhall ſue for "ſuch debt or damages, to have an execution againſt "the body of ſuch debtor:" ſo that this writ lies whether the *capias ad reſpondendum* be iſſuable or not, in the firſt inſtance, except againſt heirs, deviſees, executors, or adminiſtrators, who cannot be taken unleſs they have made themſelves liable by falſe pleading. The intent of it is to impriſon the body of the debtor, till ſatisfaction be made for the debt, coſts and damages.

The writ of *capias ad ſatisfaciendum* is an execution of the higheſt nature, inaſmuch as it deprives a man of his liberty, till ſatisfaction be awarded; and, therefore, where a man is once taken in execution upon this writ, no other proceſs can be ſued out by the ſame plaintiff, againſt his lands or goods. Only, by ſtatute 10 ſeſſ. ch. 56. ſect. 11. if the debtor die while charged in execution, the plaintiff, or his repreſentatives, may, after the death of ſuch debtor, ſue out a new execution againſt his goods and chattels, lands and tenements, or any of them; but ſuch execution ſhall not affect any eſtate *bona fide* ſold for the payment of debts, or by reaſon of any other judgment.

* 2 Bac. Abr. 362.
† Ibid. 363.
‡ Rep. 12.

ment. The lands, tenements, goods, and chattels of debtors, diſcharged under the inſolvent act,* (except neceſſary wearing apparel, bedding, and tools, not exceeding the value of 20l.) are likewiſe liable to execution. The writ is directed to the ſheriff, commanding him to take the body of the defendant, and have him before the court, at a day therein named, to make the plaintiff ſatisfaction for the demand. If he do not then make ſatisfaction, he muſt remain in cuſtody till he does. This writ may be ſued out, as may all other executory proceſs, for coſts againſt a plaintiff, as well as a defendant, when judgment is had againſt him.

When a defendant is once in cuſtody upon this proceſs, he is to be kept in cloſe and ſecure cuſtody, without bail or mainpriſe; and, if he be afterwards ſeen at large, without the aſſent of the plaintiff, ſuch plaintiff may have an action of debt, bill, or plaint againſt the ſheriff for his whole debt;† and a re-taking cannot be given in evidence, but muſt be ſpecially pleaded, and an affidavit filed with the plea.‡ The reaſon of which is, that confinement is the whole of the debtor's puniſhment, and of the ſatisfaction made to the creditor. But, on an eſcape, the plaintiff may have a new *ca. ſa.* to re-take the defendant.§

2. The other ſpecies of execution is a *fieri facias* againſt the perſonal and real property of the debtor; and is grounded on the common law, and, with reſpect to lands, on ſtatute 10 ſeſſ. ch. 56. ſect. 1. which enacts, "that the lands, tenements, and real eſtate of every "debtor, ſhall be liable to be ſold upon executions; "and,‖ that in all writs iſſued againſt lands and tene-

"ments,

* Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 8.
† Ibid. ch. 56. ſect. 6 and 8.
‡ Ibid. ſect. 10.
§ Ibid. ſect. 10.
‖ Ibid. ſect. 7.

" ments, the ſheriff ſhall be commanded, that of the " goods and chattels of the debtor, in his bailiwick, he " cauſe to be made the ſum in the execution ſpecified; " and, if ſufficient cannot be found, that then he cauſe " the ſame to be made of the lands and tenements, " whereof ſuch perſon was ſeiſed on the day when the " ſame lands became liable to ſuch ſum, ſpecifying the " day particularly, or at any time afterwards, in whoſe " hands ſoever the ſame may be."

Executions againſt terretenants, heirs, or deviſees, muſt direct the levy to be only of the lands whereof the anceſtor, teſtator, or perſon died ſeiſed, at the time they became liable, or at any time afterwards, at their deaths.

With reſpect to goods, the ſame ſtatute* ordains, " that no execution ſhall bind the property of the goods " of any perſon, againſt whom it is ſued, but from the " time of delivering it to the officer, which time the " officer muſt indorſe on the writ."

In executing the *fieri facias*, or the former writ, the ſheriff may not break open any outer doors,† but muſt enter peaceably, and may then break open any inner door, belonging to the defendant, in order to take the goods.‡ He may ſell ſufficient to ſatisfy the judgment and coſts, firſt paying the landlord of the premiſes upon which the goods are found, the arrears of rent then due, not exceeding one year in the whole.§ If a part only of the debt be levied on a *fi. fa.* the plaintiff may have a *ca. ſa.* for the reſidue.

To prevent fraud and colluſion in the ſale of property, by virtue of an execution, it is provided by ſtatute,‖ " that no lands or tenements, goods or chattels, ſhall be " ſold

* Laws of N. Y. 10 ſeſſ. ch. 56. ſect. 5.
† 5 Rep. 92.
‡ Palm. 54.
§ Laws of N. Y. 11 ſeſſ. ch. 36. ſect. 12.
‖ Ibid. 13 ſeſſ. ch. 57.

" ſold by virtue of any writ of *fieri facias*, or other " execution, unleſs ſuch ſale be at public vendue, " and between the hour of nine in the morning, and " the ſetting of the ſun the ſame day; the time and " place of holding whereof, ſhall have been previouſly " advertiſed publicly, for the ſpace of ſix weeks ſucceſſive- " ly, by nailing up a printed or written notice thereof " in at leaſt three of the moſt public places within the " town where ſuch lands or tenements, *goods or chattels*, " ſhall be ſold; and alſo, by cauſing a ſimilar notice " thereof to be printed in one of the public newſpapers, " if any there be within the county where ſuch lands " and tenements, *goods and chattels*, ſhall be ſold." But ſo much of this ſtatute as relates to *advertiſements* on ſale of *goods and chattels*, has been ſince repealed.*

As a farther ſecurity againſt fraud, it is likewiſe provided,† " that it ſhall not be lawful for any ſheriff, or " other officer, to whom any ſuch execution ſhall be " directed, or any of their deputies, or any perſon for " them, or either of them, to purchaſe any goods or " chattels, lands or tenements, at any ſuch ſale; and all " purchaſes to made by them, or any of them, or for " the uſe of them, or any or either of them, ſhall be " abſolutely void."

If the ſheriff return that he has levied, but has not ſold for want of buyers, a *venditioni exponas* muſt iſſue; which is a writ iſſued, ſtyled, directed, teſted and made returnable in the ſame manner as other writs, and commands the ſheriff to ſell the property which he had formerly by commandment taken into his hands for ſatisfying the judgment.‡

When the debt is thus levied, or ſhould it be paid by the debtor, the next and laſt ſtep is to enter *ſatisfaction* of the judgment

* Laws of N. Y. 14 ſeſſ. ch. 8.
† Ibid. 13 ſeſſ. ch. 57.
‡ Reg. Judic. *fol.* 33.

judgment on the roll, and, by that means, to extinguiſh its effect. This is done by the perſon in whoſe favor the judgment is given, going before a judge of the court, and acknowleging ſatisfaction. For this purpoſe prepare a ſatisfaction piece, which the judge will ſign, after taking the acknowlegement; then file it in the office, and the clerk marks ſatisfaction on the docquet.

PART II.

PROCEEDINGS BY AND AGAINST PARTICULAR PERSONS.

CHAPTER I.

Of Proceedings by and againſt Members of the Legiſlature.

MEMBERS of the legiſlature of the United States, or of this ſtate, may be proceeded againſt in the ſame manner as other perſons, except during the times prohibited by law.

By the firſt article of the ſixth ſection of the conſtitution of the United States, "the ſenators and repreſentatives of congreſs ſhall, in all caſes, except treaſon, felony and breach of the peace, be privileged from arreſt during their attendance at the ſeſſion of their reſpective houſes, and in going to and returning from the ſame."

"All perſons may commence and proſecute ſuits againſt ſenators, or members of the aſſembly for the ſtate of New-York, or their ſervants, or other perſon intitled to privileges of either houſe of the legiſlature, at any time after the prorogation, or adjournment of

" the legiſlature, until a new one ſhall meet, or the " ſame be re-aſſembled, and, after an adjournment for " above the ſpace of fourteen days, until both houſes " ſhall meet or re-aſſemble; and the court may, after " ſuch prorogation or adjournment, proceed to give " judgment, and award execution thereupon, as ſuch " court may lawfully do againſt other perſons liable to " be arreſted and impriſoned."*

" But when any plaintiff ſhall, by reaſon of any " privilege of either houſe, be ſtayed, or prevented " from proſecuting any ſuit commenced, he ſhall not " be barred by any ſtatute of limitation, or nonſuited, " or diſmiſſed, nor his ſuit diſcontinued for want of " proſecution, but may, after the time aforeſaid, be at " liberty to proceed to judgment and execution."†

But officers of the revenue, or in any public truſt, may be proceeded againſt for a breach of ſuch truſt at any time.‡

CHAPTER II.

Of Proceedings by and againſt Attornies, and other Officers of the Court.

WHERE an attorney is plaintiff, he is intitled to ſue in his own court by attachment of privilege, and may lay the venue in one of the counties where the court ſits;§ though,

* Laws of N. Y. 11 ſeſſ. ch. 34. ſect. 1.
† Ibid. ſect. 2. ‡ Ibid. ſect. 3.
§ 2 Salk. 688. 4 Bur. 2027. 5 Term Rep. 573.

though, where he is defendant, he has not the privilege of changing the venue from the county in which the action is laid.* Where he is defendant, he muſt be ſued in his own court by bill,† and cannot be arreſted, nor holden to ſpecial bail.‡ Theſe privileges are allowed, not ſo much for the benefit of the attornies, as of their clients;§ and are, therefore, confined to attornies who practiſe,‖ or at leaſt have practiſed within a year;¶ and they are never allowed againſt the ſtate;** but actions *qui tam* are not conſidered as the people's actions.†† Neither are they allowed to attornies againſt attornies, it being a general rule, that there can be no privilege againſt privilege.‡‡ But this rule applies only to attornies of the ſame court.§§ It is alſo ſettled, that an attorney ſhall not be allowed his privilege, where he ſues or is ſued in *autre droit*, as executor or adminiſtrator,‖‖ or jointly with his wife,¶¶ or other perſon who is not privileged,*** or where there would otherwiſe be a failure or defect of juſtice, as where the attorney is in actual cuſtody.††† Where an attorney having put in bail, waives his privilege by pleading *in chief* in one action,

* *Per Cur.* H. 24 Geo. 3. 2 Str. 1049. *contra.*

† 3 Bla. Com. 289.

‡ 1 Mod. 10.

§ 2 Will. 44. 4 Bur. 2113. Doug. 366.

‖ 2 Will. 232. 4 Bur. 2115. 2 Bla. Rep. 1086. 2 Lutw. 1667. *contra.*

¶ 1 Lil. P. R. 142.

** 1 L. Raym. 27.

†† T. Raym. 275. 1 Lutw. 196. 3 Lev. 398. 1 Salk. 30. 2 Salk. 543. 3 Salk. 282. Comb. 318. 12 Mod. 74. 1 Bla. Rep. 373. Cowp. 367.

‡‡ 4 Ba. Abr. 227.

§§ 2 Str. 1141. 1 Bla. Rep. 19.

‖‖ Hob. 177. 1 Salk. 2. 1 L. Raym. 533.

¶¶ Bro. Abr. *tit.* Bill, pl. 2.

*** 2 Roll. Abr. 274. 4 Ba. Abr. 223.

††† Carth. 377. 1 Salk. 1, 2. 1 L. Raym. 135. 12 Mod. 102, 112, 535. 1 Str. 191.

action, it is conſtrued to be a waiver of privilege in all other actions.

The attachment of privilege muſt be made out upon parchment, and is ſealed by the clerk, with whom a precipe muſt be left, as on other proceſs.

The ſtatute of 10 ſeſſ. ch. 26. ſect. 2. which directs the cauſe of action to be expreſſed in the proceſs, excepts attachments of privilege. The defendant, therefore, may be held to bail on this writ, without a ſpecial *ac etiam*. But the practice is to inſert it.

The defendant's appearance and putting in bail, is effected in the uſual way, and within the time allowed in common ſuits. The time for declaring, is the ſame as on other proceſs.

In the declaration is alſo added to the plaintiff's name, "being one of the attornies of the court of the people "of the ſtate of New-York, before the people themſelves, according to the liberties and privileges of the "ſame court, from time whereof the memory of man "runneth not to the contrary, uſed and approved in "the ſame, preſent here in court, in his proper perſon, "complains," &c.

All the ſubſequent proceedings do not differ from the uſual mode.

The *bill* againſt an attorney is a complaint in writing, containing counts, expreſſive of the nature of the plaintiff's demand, deſcribing the defendant as *being preſent in court*,* and generally concludes with a *prayer of relief*; though the declaration upon the bill, is not demurrable for the want of it.† Formerly, the bill againſt an attorney could only have been filed in term time, *ſedente curia*, and not in vacation,‡ and the practice (which indeed is ſtill followed) was to pray leave to file the bill in court.

But

* 1 Saund. 28, 202. 2 Saund 415.
† Andr. 247.
‡ 2 Salk. 544. 12 Mod. 63.

But where you do not proceed by forejudger, it may be filed in vacation as well as in term;* though if it be filed in vacation, other than to ſave the ſtatute of limitations, the plaintiff will not be allowed his coſts, if the action be ſettled before the term.

When the declaration is filed, a common rule muſt be entered on the docquet, "that the defendant plead "in twenty days, or be forejudged of his privilege;" and a copy of the declaration, with a certified copy of this rule, muſt be ſerved on the defendant. If he plead, the action proceeds as in other caſes. If he do not, at the expiration of the rule or the next term, you move for leave to enter a forejudger; then make up a forejudger roll, which, being ſigned by the judge, is to be carried to the clerk, who files it, and ſtrikes the defendant off the roll; and he may then be arreſted, or proceeded againſt as a common perſon.

The defendant, however, upon ſatisfying the debt, or undertaking to plead and defend the ſuit, may be re-admitted by rule of court, and the proceedings muſt be as if there had been no forejudger.

The plaintiff, however, on filing his declaration, need not enter this rule for a forejudger, but one to plead, as in common caſes; and if the defendant do not obey the rule, judgment may be ſigned, and execution iſſue; and this is the moſt expeditious mode.

If an attorney of the ſupreme court be arreſted by virtue of a writ of that court, he may be diſcharged upon motion; but, if the writ iſſue from an inferior court, he muſt ſue out his writ of privilege; and, upon producing it to the court, the judges muſt inſtantly order a *ſuperſedeas*. This writ of privilege, being engroſſed in due form, muſt be ſealed by the clerk, who, before he does it, will examine the roll of attornies, to ſee if the defendant be an attorney or not.

Though

* Doug. 300.

Though attornies have only been mentioned in this chapter, the ſame practice applies to the miniſterial officers of the court, who are privileged in like manner. The judges, likewiſe, have the privilege of being ſued in their own court; but, if the chief juſtice be ſued, the writ muſt be teſted by the next ſenior judge.

If a judge bring an action, the *placita* muſt be before the other judges, omitting him, or error may be aſſigned.

CHAPTER III.

Of Proceedings by and againſt Infants.

AN infant, or perſon under the age of twenty-one years, muſt ſue by his *prochein ami*, or next friend, or guardian;* unleſs where he ſues as co-executor with others; in which caſe it is holden, that the executors of full age, may appoint an attorney for themſelves and the infant, making together but one repreſentative.† Hence he cannot be an informer on a penal ſtatute,‡; for, an informer muſt commence his ſuit in proper perſon. An infant defendant muſt, in all caſes, appear and defend by guardian, even where he is ſued as co-executor with others.§ If he appear by attorney, it is error;‖ though, if an infant plaintiff appear by attorney, it is cured by the ſtatute of amendments and jeofails.¶

To

* Co. Lit. 135, b. 261, a. 390, a. 1 Str. 104.
† 2 Saund. 212.
‡ Laws of N. Y. 11 ſeſſ. ch. 9. ſect. 1. Say Rep. 51.
§ 2 Str. 784. ‖ 8 Co. 58, b. 9 Co. 30, b.
¶ Laws of N. Y. 11 ſeſſ. ch. 32. ſect. 6.

To conſtitute a *prochein ami* or guardian, the intended perſon, who is uſually ſome near relation, ſhould appear with the infant, in term, in court, or before a judge in vacation; and, upon praying to be admitted, he will be ſo accordingly. But, if they do not appear in perſon, a petition ſhould be preſented, on behalf of the infant, ſtating the nature of the action; and, if for the defendant, that he is adviſed and believes he has a good defence thereto, and praying, in reſpect of his infancy, that the perſon intended may be aſſigned him, as his *prochein ami* or guardian, to proſecute or defend the action. This petition ſhould be accompanied with an agreement, ſignifying the aſſent of the intended *prochein ami* or guardian, and an affidavit, made by ſome third perſon, that the petition and agreement were duly ſigned. On the one or other of theſe grounds, the judge will ſign the admiſſion, which is made out on parchment in the form of a bail-piece; but, if done in court, a rule is granted for this purpoſe. This admiſſion is either general, to proſecute or defend all actions whatſoever;* or ſpecial, to proſecute or defend a particular ſuit: though, it is ſaid, the latter will ſerve for other actions.†

The rule on admiſſion of a *prochein ami*, ſhould be obtained before declaration, and a copy thereof annexed to it, or the defendant is not compellable to plead;‡ and the plaintiff's attorney, if required, muſt give notice to the defendant's attorney of the place of abode of the *prochein ami*.§ There are no pledges to the declaration, and the guardian's name is inſerted inſtead of the attorney's. In like manner, the rule or order for the admiſſion of a guardian ſhould be obtained before plea, and

* 1 Str. 304.
† Ibid. 305.
‡ Styl. P. R. 264
§ 1 Wilſ. 246.

and a copy of it annexed thereto; for, if an infant defendant appear by attorney, the plaintiff may obtain an order for ſtriking out the appearance, and, that the defendant appear by guardian within a certain time, being uſually four or ſix days; or, in default thereof, that the plaintiff be at liberty to name a guardian to appear and defend for him.* A ſimilar order may be obtained, where the defendant neglects to appear at all.

CHAPTER IV.

Of Proceedings by Paupers.

FOR relief of the poor, who are not of ability to ſue for redreſs of injuries and wrongs, it is enacted by ſtatute, 11 ſeſſ. ch. 46. ſect. 28. that every poor perſon, who may have cauſe of action againſt any one, ſhall have writs, counſel, attornies, &c. neceſſary for proſecuting his claim, *gratis*.

It has been held, that, in order to come within this ſtatute, the pauper muſt not be worth 5l. (wearing apparel excepted.)

The mode of proceeding is by motion to the court in term, or a petition to one of the judges in vacation, both grounded on an affidavit, that the petitioner is not worth 5l. as above. Upon this, the court, or judge, will grant a rule or order, and aſſign a counſel and attorney. To the

* Barnes 413, 418.

the declaration annex a copy of the rule or petition and order, with a copy of the affidavit, and you pay nothing for any of the proceedings.

If a verdict, however, be recovered for above 5l. the court fees muſt be paid.

The ſtatute does not extend to *defending* in *forma pauperis*.

CHAPTER V.

Of Proceedings againſt Juſtices, Officers, and others.

THE ſtatute of 10 ſeſſ. ch. 27. made for the protection of magiſtrates and officers acting in the exerciſe of their reſpective duties, impoſes certain reſtrictions and regulations, which muſt be ſtrictly adhered to, by all perſons about to proſecute for offences committed by any of them, in their official capacities. In general, it may be obſerved, 1. that actions upon the caſe, treſpaſs, battery, or falſe impriſonment, brought againſt ſheriffs, coroners, juſtices, mayors, recorders, aldermen, bailiffs, conſtables, marſhals, collectors, or overſeers of the poor, or their deputies, or perſons doing any thing by their commandment, concerning their offices, muſt be laid in the very county where the offence was committed, and not elſewhere:* 2. that the defendants may plead the general iſſue, and give the ſpecial matter in evidence:† 3. that in actions brought againſt any per-

* Laws of N. Y. 10 ſeſſ. ch. 27. ſect. 2.
† Ibid.

ſon for taking any diſtreſs, making any ſale, or doing any thing by authority of any ſtatute, the defendant may plead not guilty, or allege that the thing was done by authority of ſuch ſtatute, and, upon trial, the whole matter may be given in evidence.*

CHAPTER VI.

Of Proceedings againſt Priſoners.

THE utmoſt degree of caution and circumſpection ſhould be obſerved in proceeding againſt priſoners, leſt by any omiſſion or neglect, they obtain their diſcharge.

It has been ſhown, in the ſecond chapter of the firſt part,† that where the ſheriff returns the defendant in cuſtody, the rule is, "that he plead in twenty days after "ſervice of a copy of a declaration and rule on the ſheriff, "or himſelf, or judgment." The neceſſary ſteps being taken on return of the writ to obtain this rule, by entering it on the docquet, the plaintiff's attorney muſt prepare his declaration, and make two copies thereof, on one of which he muſt obtain from the clerk a certified copy of the above.

The ſtatute of 11 ſeſſ. ch. 46. ſect. 27. directs, that "if any defendant be taken or charged in cuſtody, at the "ſuit of any perſon, upon any writ or proceſs, out of "any court of record, and impriſoned for want of ſure-

"ties

* Laws of N. Y. 10 ſeſſ. ch. 27. ſect. 2.

† *Ante*, p. 56.

" ties for his appearance, the plaintiff, in ſuch writ,
" may, before the end of the next term, after ſuch writ is
" returnable, declare againſt ſuch priſoner, in the court
" out of which the writ iſſued whereupon the priſoner
" was taken, or impriſoned, or charged in cuſtody;
" and ſhall cauſe a true copy thereof to be delivered to
" ſuch priſoner, or the ſheriff, jailer, or keeper of the
" priſon or jail, in whoſe cuſtody ſuch priſoner ſhall
" be and remain; to which declaration the priſoner ſhall
" appear and plead; and, if ſuch priſoner ſhall not
" appear and plead, the plaintiff ſhall have judgment,
" as if the priſoner had appeared, and refuſed to anſwer
" or plead to ſuch declaration."*

By the ſame ſtatute, " in all declarations, againſt
" any priſoner detained in priſon, by virtue of any
" writ or proceſs iſſued out of any court of record, it
" ſhall be alleged, in cuſtody of what ſheriff, or officer,
" ſuch priſoner ſhall be at the time of ſuch declaration,
" by virtue of the proceſs of the ſaid court, at the ſuit
" of the plaintiff." If the declaration, therefore, do not allege, either expreſſly, or by implication, at whoſe ſuit the defendant is in cuſtody, it will be bad on a general demurrer.†

On this ſtatute, a defendant, in the actual cuſtody of the ſheriff, or other officer, upon meſne proceſs, may be proceeded againſt by the ſame plaintiff at whoſe ſuit he was arreſted, or by a third perſon: by the former, upon the original caption; by the latter, upon a ſubſequent charge; and, by either of them, upon a recaption, by virtue of an eſcape warrant.‡

The mode of charging a defendant in the actual cuſtody of the ſheriff, at the ſuit of a third perſon, is by ſuing out proceſs, and leaving it at the ſheriff's office.

When

* Rule of S. C. October T. 1699.
† 2 L. Raym. 1362. 1 Wilſ. 119, 120.
‡ 6 Mod. 21, 254.

When the defendant is taken and detained, or charged in cuſtody of the ſheriff, &c. the ſtatute expreſſly provides, that the plaintiff may declare againſt him before the end of the next term after the proceſs is returnable; and, if it be not filed within that time, the priſoner will be diſcharged, on entering a common appearance.* In caſe of a ſurrender in diſcharge of bail after proceſs returned, and before declaration, the plaintiff muſt declare before the end of the term next after making ſuch ſurrender, and due notice thereof: ſo, if the defendant be taken on an eſcape warrant, the plaintiff muſt declare before the end of the ſecond term after ſuch taking. A priſoner removed by *habeas corpus*, muſt be declared againſt in the following term after his caption. But the plaintiff cannot declare before the return of the proceſs, upon which the defendant was taken or charged in cuſtody. The plaintiff cannot have a rule for time to declare againſt a priſoner; though there are exceptions; as, where the parties are ſworn to have been compromiſing, or an accidental miſtake, &c.

The declaration muſt be delivered perſonally to the defendant, or left for him with the ſheriff, jailer, or keeper of the jail, or priſon, in whoſe cuſtody he is confined. By the ſtatute above recited, "every ſheriff, "or other officer, upon receipt of a copy of a declara-"tion, ſhall, within *ten* days after, deliver the ſame to "the defendant, with a note of the time of the ſervice, "upon pain of being anſwerable to the defendant for all "damages occaſioned by ſuch neglect." Another copy muſt alſo be filed in the office.

If the priſoner plead, the ſuit proceeds as in other caſes; though there are ſome limits, with reſpect to time, which will appear afterwards.†

If he do not plead, the plaintiff muſt move the court the next term for judgment; but, as a ground for the rule, he

* Carth. 469. 1 Salk. 98. † *Poſt*, p. 213.

he muſt produce an affidavit of the ſervice of the declaration, ſtating the time when, and the perſon to whom the ſame was delivered; if to a jailer or turnkey, that he acknowleged the defendant was then a priſoner in his cuſtody, and that the defendant was arreſted, or charged in cuſtody, by proceſs of the court, returnable before the delivery of the declaration. If the ſheriff acknowlege the receipt of the declaration in court, there is no occaſion for an affidavit. The judgment is final or interlocutory, according to the nature of the action.

After the delivery of the declaration, the plaintiff ſhould proceed to trial, or final judgment, within two terms excluſive after ſuch declaration delivered, if, by the courſe of the court, he can ſo proceed, and ſhould cauſe the defendant to be charged in execution within three months after the judgment obtained.* It is, however, preſumed, notwithſtanding there is no exception in the ſtatute, that, if a writ† of error ſhould be brought and nonproſſed, or judgment thereon affirmed, or an injunction obtained, that the plaintiff has three months after ſuch affirmance, or the writ of error nonproſſed or diſcontinued, or injunction diſſolved, to iſſue his execution.

In caſe of a ſurrender in diſcharge of bail, after declaration, the plaintiff ſhould proceed to final judgment within two terms excluſive after ſuch ſurrender, and due notice thereof, if, by the courſe of the court, he can ſo proceed; or, in caſe of a ſurrender in diſcharge of bail after judgment, he ſhould cauſe the defendant to be charged in execution within three months after ſuch ſurrender, and due notice thereof.

To charge the defendant in execution, a *ca. ſa.* muſt be ſued out, and lodged with the ſheriff; and, when he is

* Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 12.
† 1 Wilſ. 297. 2 Wilſ. 325. 3 Bur. 1787. 4 Bur. 2060.

is thus charged, the execution has been conſidered as executed; therefore, where the plaintiff afterwards died, it was holden that his executors were not bound to revive the judgment by *ſcire facias*, or to charge the defendant in execution *de novo*.*

If the declaration be not delivered, or if the plaintiff do not proceed to trial or judgment, or cauſe the defendant to be charged in execution in due time, the defendant may be diſcharged out of cuſtody, by writ of *ſuperſedeas*,† on entering a common appearance; unleſs upon notice given to the plaintiff's attorney, good cauſe be ſhown to the contrary. The defendant may alſo be diſcharged out of cuſtody, where the action is abated, diſcontinued, or decided in his favor.

To diſcharge a priſoner for not declaring, or for not proceeding to final judgment, or execution in due time, the defendant's attorney muſt procure a certificate of the fact from the officer in whoſe cuſtody the defendant is, and an affidavit proving that the officer ſigned ſuch certificate: thereupon move the court, or apply to a judge, who will grant a ſummons to ſhow cauſe, which muſt be ſerved on the plaintiff's attorney. At the time appointed by the ſummons, the plaintiff's attorney either attends and conſents to an order, ſhows cauſe againſt it, or does not attend. In the latter caſe, an affidavit being made of the ſervice, the judge will make an order for the defendant's diſcharge. When an order is made for the defendant's diſcharge, an appearance muſt be entered with the clerk, and he will thereupon, and on production of the order, ſeal a writ of *ſuperſedeas*.

There are ſome cauſes, however, which will operate againſt a diſcharge; and among theſe are, if the venue be laid in a county where the court does not ſit, ſo that the trial can only be at the circuit, which may ſometimes

* King v. Millett, H. 22 Geo. 3.

† Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 12. not much Cause in ſt. referred to-

times render it impoſſible to proceed to trial in time.* In like manner, where the court take time to give judgment on demurrer, &c. they will not prejudice the plaintiff.†

After trial or final judgment, a writ of error and injunction are, whilſt they continue in force, good cauſes for not charging the defendant in execution.‡ A regular treaty of accommodation or agreement for a compromiſe, is, in any ſtage of the action, a good cauſe for not proceeding.§ But no treaty or agreement is ſufficient to prevent a *ſuperſedeas*, unleſs it be in writing, ſigned by the defendant or his attorney, or ſome other perſon duly authoriſed by the defendant; and it is expreſſed therein, that the proceedings are ſtayed at the defendant's requeſt.

If the defendant be ſuperſeded, or ſuperſedeable, for want of proceeding, before judgment, the plaintiff may, nevertheleſs, take, or charge him in execution at any time *after* judgment. But he cannot do ſo, if the defendant be ſuperſeded, or ſuperſedeable, for want of being charged in execution. In the latter caſe, the defendant cannot be holden to ſpecial bail in a ſecond action upon the judgment.‖ The *ſuperſedeas*, however, in the firſt action, cannot be pleaded in bar to the ſecond;¶ and, after judgment obtained in the ſecond action, the defendant is liable to be taken again in execution.**

* Barnes 383.
† Ibid.
‡ 2 Wilſ. 380.
§ 4 Bur. 2063. 3 Wilſ. 455.
‖ Cowp. 72.
¶ 1 Term Rep. 273.
** Cowp. 72.

CHAPTER

CHAPTER VII.

Of Proceedings againſt Bail.

AFTER judgment againſt the defendant, if he do not ſatisfy the debt and coſts, or render himſelf a priſoner, or the bail do it not for him, the plaintiff may proceed againſt them upon their recognizance; and this either by action of debt, or *ſcire facias*.

In either caſe, it is neceſſary, previous to any proceedings, to ſue out a *ca. ſa.* againſt the principal, as it is on his failure alone that the bail are liable. This muſt have eight days between the *teſte* and return; muſt be left with the ſheriff four days before the return; and be returned by him *non eſt inventus*: if the defendant plead no *ca. ſa.* this muſt be filed in the office before replication.

Having done this, obtain the bail-piece from the judge, if not already filed, and file it with the clerk; then enter on a roll, a memorandum of the term the declaration was of, the declaration with the recognizance of bail, and file it in the office. You may then proceed againſt the bail.

If you proceed by action of debt, ſue out proceſs, and inſert an *ac etiam*, which is only to give notice of the nature of the action, and does not hold the defendant to bail.* The ſubſequent proceedings are as in other actions, except that the venue muſt be laid in the county of New-York,† becauſe the records are kept there.

If

* *Ante*, p. 46. 47.

† Salk. 564, 600, 659.

If the proceedings are to be by *ſcire facias*, ingroſs the writ, iſſue it in the uſual manner, filing the roll at the ſame time, and leaving a precipe: it muſt be teſted on the return day of the *ca. ſa.* and be left with the ſheriff to return *nihil.* On this return, iſſue an *alias ſci. fa.* teſte it the return of the firſt, and leave it at the ſheriff's office four days before the return, for another return *nihil.* If you mean to ſummon the bail on the firſt writ, leave it with the ſheriff four days before the return for that purpoſe, and he will return a *ſcire feci.*

On the return of the firſt *ſci. fa.* if it be returned *ſcire feci*, or upon the return of the *alias*, if returned *nihil*, the plaintiff's attorney muſt enter the common rule on his docquet, viz. "that the defendant appear in four days, "and plead in twenty days, or judgment." If the bail do not appear and plead according to this rule, the plaintiff may move for judgment, and, upon obtaining the rule, enter the judgment as in other caſes.

If the bail appear, the plaintiff muſt declare on the *ſci. fa.* and proceed as in other actions, though ſome practiſers conſider the writ itſelf the declaration, and do not draw it up in form.

CHAPTER VIII.

Of Proceedings by and againſt Corporations.

CORPORATIONS can only be proceeded againſt by original; but they may ſue in their own name, by an attorney, appointed under their common ſeal, and may proceed in the uſual way by *capias*, &c.

To ſue them, you muſt obtain an original writ from the chancery, and on this make out a writ of *ſummons*, which deliver to the ſheriff, who will ſummon the corporation, by ſerving the proceſs on the mayor or other head officer.* If the defendants do not appear on the fourth day after the return of the original, by an attorney appointed under their common ſeal (for they cannot appear in perſon) the next proceſs is a *diſtringas*, which ſhould go againſt them in their public capacity;† and, under this proceſs, the ſheriff may diſtrain the lands and goods, which conſtitute the common ſtock of the corporation.‡ If they have neither lands nor goods, there is no way to compel them to appear at law, or in equity,§ but only in the legiſlature;‖ for it is a rule, that for a public concern the ſheriff cannot diſtrain any private perſon who is a member of the corporation.¶

All the reſt of the proceedings are as mentioned under the head of original. If they appear, proceedings are as in common caſes.

In ejectment, where a corporation are leſſors of the plaintiff, there need be no attorney appointed, as you may ſue on the common declaration, ſuggeſting a demiſe, without ſtating it to be by deed, or under their common ſeal;** for, by confeſſing leaſe entry and ouſter, the demiſe is admitted.††

* Sty. Rep. 367.. Prec. in Chan. 131. 1 Chan. Cas. 206.

† 1 Vent. 351.

‡ Skin. 27.

§ 1 Vern. 122. Skin. 84. 2 Vern. 395. Prec. in Chan. 129.

‖ 1 Chan. Cas. 204.

¶ 1 Vent. 351. Cowp. 85. Sty. 367, *contra;* and ſee 1 Lev. 237. Finch 83, 84.

** Carth. 390. but ſee 2 Cro. 613.

†† 12 Mod. 113.

CHAPTER

CHAPTER IX.

Of Proceedings by and againſt Executors and Adminiſtrators.

IN treating of the proceedings againſt executors and adminiſtrators, I ſhall conſider what actions they may, or may not maintain, and when; what actions will, or will not lie againſt them; and the remedy if they waſte the goods of the perſon whom they repreſent.

An executor or adminiſtrator may have an action upon a judgment, recognizance, obligation, or other ſpecialty made to his teſtator or inteſtate. So he may have covenant, upon a covenant made to his teſtator, for a perſonal thing; or upon a covenant that touches the realty, if it be broken in the life of the teſtator. So, upon any contract made with the teſtator; though it even be made for the benefit of a ſtranger, or though the obligation, &c. was for the performance of an award, or upon a ſimple contract. So the repreſentative may have replevin for goods taken in the lifetime of the teſtator; and alſo a writ of error or deceit.

But, by the common law, an executor or adminiſtrator had not an action for a wrong done to the teſtator in his lifetime; as, for treſpaſs in taking his goods, &c. nor an action founded upon a matter in the privity of the teſtator, as account. Yet, by ſtatute 10 ſeſſ. c .). ſect. 1. an executor ſhall have account, in the ſame manner as his teſtator; and an action of treſpaſs, for carrying away the goods of his teſtator;* and the executor of

* Sect. 2.

of an executor ſhall have an action of debt, account, treſpaſs, &c. as well as the teſtator.* Adminiſtrators† may have the like actions to demand as executors. Therefore now, an executor or adminiſtrator ſhall have treſpaſs or *trover* for the goods of the teſtator taken in his lifetime; and treſpaſs for taking away the graſs growing upon the land of the teſtator.‡ By the equity of this ſtatute, an executor or adminiſtrator ſhall have every action for a wrong done to the perſonal eſtate of his teſtator. He ſhall have debt upon a judgment againſt an executor or adminiſtrator, ſuggeſting a *devaſtavit*; and an action againſt the ſheriff for an eſcape of one taken for debt, if the eſcape were after judgment: but it is not aſcertained, whether he ſhall have it for an eſcape on meſne proceſs.§ The ſtatute does not give, however, to an executor or adminiſtrator, an action for a wrong to the perſon of his teſtator; as for a battery, impriſonment, &c. nor for a prejudice to his freehold, as wherefore he *entered* and carried away the graſs, for the graſs is part of the freehold.‖ But an executor or adminiſtrator ſhall have an action on the caſe, againſt an officer, for removing goods taken in execution before the teſtator, &c. (*i. e.* the landlord) was paid a year's rent.¶

The executor of an aſſignee of a bail-bond ſhall have an action, it being an intereſt veſted.**

As to the actions which lie againſt a repreſentative, ſuch will, as are founded upon every contract, debt, or covenant, made by his teſtator or inteſtate appearing by any record or ſpecialty. Debt lies againſt the executors of a ſheriff, upon a judgment, in an action againſt the

* Sect. 4. † Sect. 5.
‡ 1 Vent. 187.
§ 1 Com. Dig. 261.
‖ Ibid. 260, 261.
¶ Str. 212.
** Fort 367.

the ſheriff for an eſcape. The ancient diſtinction, as to debts not grounded on ſpecialty, was, that ſuch, wherein the defendant could not have waged his law, lay againſt the repreſentative, but *aliter* as to the others. Since, however, law wager is aboliſhed,* in perſonal actions, it is preſumed this diſtinction is now at an end, and that debt lies on every contract without ſpecialty; caſe, however, lies at all events.

An action does *not* lie for a perſonal wrong done by the teſtator or inteſtate; as treſpaſs, for a treſpaſs done by the teſtator or inteſtate, to the lands or goods of another; or to his perſon, by battery: nor does it lie againſt the executor of a jailer, &c. for an eſcape: ſo, neither waſte, nor an action on a penal ſtatute, lies againſt an executor or adminiſtrator. Debt does not lie againſt an executor upon a ſuggeſtion of a *devaſtavit* by his teſtator;† nor trover, upon a trover and converſion by his teſtator.‡

If an executor or adminiſtrator ſell, embezzle, or convert to his own uſe, the goods of his teſtator or inteſtate before debts or legacies paid, it will be a *devaſtavit*; ſo if he pay that which need not be paid, or a debt of an inferior nature, before another of a ſuperior. So, if he diſcount a debt due from the teſtator to a creditor, out of his own debt, or diſpoſe of goods at an undervalue, or accept a note, covenant, &c. in ſatisfaction of a debt, which is not paid. So, if he releaſe or acquit a bond being forfeited, or cancel or deliver it to the obligor; or if he releaſe an action to another, who took the goods of, or did a wrong to the teſtator, it will be a *devaſtavit* to the value of the goods or damages. If he confeſs or ſuffer judgment by default, it is a *devaſtavit*.

But

* Laws of N. Y. 10 ſeſſ. ch. 5. ſect. 2.
† 2 Lev. 133.
‡ Palm. 330.

But a receipt for ſo much due upon a bond, is not a *devaſtavit* for the reſidue; nor a perſonal agreement that he will not ſue for the penalty; nor a delivery into another hand, that it may not be ſued: ſo diſpoſing of the goods of the teſtator to his own uſe, is not a *devaſtavit*, if he pay debts of the teſtator to the value with his own money: ſo, if he loſe a bond due to the teſtator, for he hath a remedy for the debt in equity, but he ought to purſue it.*

By ſtatute, 10 ſeſſ. ch. 19. the executors and adminiſtrators of a rightful executor, or one *de ſon tort*, are chargeable for the *devaſtavit* of their teſtator, in the ſame manner as himſelf.

The remedy upon a *devaſtavit* was originally to get a *fieri facias* (on the judgment againſt him as executor) returned *nulla bona*; and, upon that, to iſſue a *ſcire facias* inquiry, reciting the *fieri facias*, and ſuggeſting that the goods were waſted, and commanding the ſheriff to inquire, whether the defendant had waſted any of the deceaſed's effects or not: upon the ſheriff's return of a *devaſtavit*, a *ſcire facias* iſſued againſt the defendant, "to "ſhow cauſe why the plaintiff ſhould not have judg-"ment *de bonis propriis*," to which the defendant might appear, and plead *plene adminiſtravit*; but lately the mode has been, either to bring an action ſuggeſting a *devaſtavit*, or to iſſue a *ſcire facias*, in which is contained a *fieri facias*, which was deviſed as the ſpeedier way to obtain execution on the judgment: in ſuch caſe there muſt be notice of executing it, as upon a common writ of inquiry.† But the beſt way is, in order to obtain coſts, to bring an action ſuggeſting a *devaſtavit*; and, before brought, it is neceſſary to have a *fieri facias* returned by the ſheriff *nulla bona*, as to the goods of the teſtator.

In

* 2 Vern. 299.

† Str. 235, 623. L. Raym. 1382.

In an action brought *by* an executor, he muſt name himſelf executor; and, if there be ſeveral executors, all muſt join in the action. In all actions by an executor, as executor, the writ muſt be in the *detinet* only; but, in an action on his own contract, it may be in the *debet* and *detinet*, though he is named executor. The plaintiff muſt not omit *profert in curia* of the letters teſtamentary; for it is bad on a ſpecial demurrer; but where a *tort* is to the executor himſelf, this need not be recited. If the plaintiff name himſelf executor or adminiſtrator, when the ſuit is in his own right, it will be but ſurpluſage.* If the executor of a ſurviving executor do not ſhow that the firſt executors proved the will, it is bad; though aided after judgment or verdict.† An executor cannot add a count in his own right.‡

In an action *againſt* an executor, he muſt be named executor, or ſhown to be ſuch;§ if he be executor *de ſon tort*, he ſhall be named executor generally.‖ Againſt an executor for a mere perſonal thing, the writ ſhall be in the *detinet* only:¶ ſo debt for rent in the *debet* and *detinet*, when the rent is more than the value of the land, is bad;** ſo, if an action be againſt an executor on a judgment *de bonis propriis*, it ſhall be in the *debet* and *detinet*; ſo, in debt againſt an executor upon a ſuggeſtion of a *devaſtavit*. But the plaintiff cannot have an action in the *detinet* for part, and in the *debet* and *detinet* for the reſidue. Calling defendant executor in the declaration is ſufficient, without a ſpecial averment; but it is ſaid, in debt on bond, the plaintiff muſt aver that it is not paid by the teſtator's heirs, or that it is ſtill due.††

With

* 1 Vent. 119. † Str. 631.
‡ Str. 1271. 1 Wilſ. 171.
§ 1 Saund. 112.
‖ 5 Co. 31.
¶ 1 Bulſt. 22.
** Pol. 133.
†† L. Raym. 1546.

With reſpect to the plea of *plene adminiſtravit*, which is the chief one neceſſary to mention, it is to be obſerved, that it cannot be pleaded where the defendant is ſued in the *debet* and *detinet*; otherwiſe if ſued as executor, though chargeable in another manner.* A repreſentative may plead a ſpecial *plene adminiſtravit*; viz. a judgment, ſpecialty, or retainer, and no aſſets *ultra*. As to *retainer*, if his own debt be of an equal or ſuperior degree to that demanded, he may give it in evidence, under the plea of *plene adminiſtravit*. He may plead a judgment upon a ſimple contract; ſo a judgment againſt one only, where there are ſeveral executors; ſo a judgment againſt himſelf as adminiſtrator, for he need not plead in abatement, if it were a juſt debt; ſo a ſpecialty before the day of payment; ſo a judgment confeſſed by him to a creditor upon ſuit, after the preſent action commenced. Upon this plea, the plaintiff may obtain judgment for aſſets *in future*; or, if he have ground, he may reply that the ſpecialty is burnt, or that it was for performance of covenants, which are not broken; for, if given againſt the plaintiff, his remedy is gone; and he had, therefore, better take judgment for aſſets *in futuro*.

In pleading a judgment, the defendant muſt ſhow in what court, and where obtained; and it muſt not be ſaid that he has no aſſets, beſides goods which are not ſufficient to ſatisfy the judgments, &c. but he ought to ſay, that he has not aſſets, beſides the certain ſum, which is liable to the judgment; and, in pleading a judgment, it need not be ſhown that it was for a juſt debt;† but the manner of pleading a judgment, &c. as now uſed, is to aver the ſame to be for a true and juſt debt. If the defendant plead ſeveral judgments, he may conclude each with an averment; or it may, as the preſent

* 1 Salk. 317.

† 2 Cro. 8, 35, *contra*. 2 Cro. 102.

preſent mode is, be more properly concluded with a general averment to the whole. The faireſt way in pleading a judgment, &c. is to ſhow how much is due thereon.

In an action by an adminiſtrator, it muſt be ſhown by whom adminiſtration was committed, and when; and there muſt be a *profert* of the letters of adminiſtration; but againſt an adminiſtrator, it is ſufficient to ſay adminiſtration was granted in due form of law.

In an action againſt an executor or adminiſtrator, if the defendant plead a matter in bar, which lies within his own knowlege, and is falſe, judgment ſhall be for the debt, as well as for damages and coſts *de bonis teſtatoris*; and, if none, *de bonis propriis:* ſo, in all caſes on a return of a *devaſtavit*, or on a return of goods eloined; ſo, if the wife waſted *dum ſola*, it ſhall be *de bonis propriis* of both. But where the action is merely as executor or adminiſtrator, the debt ſhall be only *de bonis teſtatoris*, and the damages *de bonis propriis*.

CHAPTER X.

Of Proceedings by and againſt Heirs and Deviſees.

IN an action by an heir, who ſues upon a grant or covenant to his anceſtor and his heirs, he muſt be named heir; otherwiſe, if he ſue in his own right, though he come to the right by deſcent; but, in the firſt caſe, he

muſt ſhow how he is heir.* An action of debt may be brought by him in the *debet* and *detinet*.

In an action againſt an heir, he muſt be named ſo; but it is ſufficient if he be named in the count, though not in the writ; and, if it be againſt the heir of an heir, the plaintiff muſt ſhow how heir ſpecially;† though otherwiſe he need not ſhow how heir.

By ſtatute 9 ſeſſ. ch. 27. "creditors may maintain "actions againſt heirs and deviſees jointly, or ſepa- "rately, for debts upon ſimple contracts or ſpecialties, "to the value of the land deſcended or divided; but "lands ſold before action brought are not liable to "execution."

If, in an action againſt the heir in place of his anceſtor, the heir be within age, he may pray that the parol may demur till his full age; or, in other words, that the plea or ſuit may ſtay till then: and, at the full age of the infant, there ſhall be a re-ſummons againſt all the co-heirs. If the demand be juſt, the ſafeſt way for the heir is to confeſs the action, and ſhow the certainty of the aſſets deſcended to him; or, if he have no aſſets, to plead *riens per deſcent*. An heir may plead a releaſe to himſelf; or a releaſe to the executor or adminiſtrator of the obligor; or a bond by the executor or adminiſtrator for the ſame debt. If the heir confeſs aſſets, he ought alſo to confeſs the action. An heir may plead that he has paid debts to more than the value of the land deſcended to him.‡

By the above ſtatute,§ the plaintiff may reply to *riens per deſcent*, that the defendant had aſſets by deſcent before original or bill; and, if upon iſſue joined, the jury find for the plaintiff, they ſhall inquire of the value of

* 1 Salk. 355.
† Cro. Car. 151.
‡ Str. 665.
§ Sect. 3.

of the lands deſcended, and judgment thereupon for the plaintiff: but, if judgment be given againſt the heir by confeſſion of the action, without confeſſing the aſſets deſcended, or upon demurrer, or *nihil dicit*, judgment ſhall be for the debt and damages without any inquiry. The heir ſhall alſo be liable for a falſe plea.

CHAPTER XI.

Of Proceedings by and againſt Huſband and Wife.

IN all actions real for the lands of the wife, the huſband and wife ought to join: ſo, in actions perſonal, for a *choſe* in action due to the wife before coverture; and in actions which ariſe during the coverture, if the wife might have an action for the ſame cauſe if ſhe ſurvive. The huſband and wife ought to join in waſte, and for a perſonal wrong done to the wife; as for a battery to her; likewiſe, in caſe, for maliciouſly indicting the wife.* They ought to join for a thing due to the wife in *auter droit*. Huſbands ſhould be joined in an action to aſſert the right and intereſt of their wives.† If the declaration allege ſeiſin in right of the wife, it ought to allege that both are ſeiſed; and, if it be for the life of the wife, it ought regularly to be averred that the wife is alive. But a declaration by the huſband and wife is not good, if it allege battery of both,

* Jon. 440.
† 2 Will. 414.

both, for the wife ought not to be joined for the battery of her huſband;* nor, in trover, if it allege that the huſband and wife were poſſeſſed of the goods.† In an action where the wife need not join, it is bad to ſay, "to their damage; but where the action ſurvives, that "is good; and in treſpaſs for battery of the wife," and "other wrongs to them did," is good.

The huſband ſhall ſue alone in caſes that are not mentioned above. In actions of ſlander for words ſpoken of the wife, by which the huſband has ſpecial damage, he may ſue alone.

But the huſband may either ſue alone, or be joined with his wife in actions for a profit incurred during the coverture; or in an action for a *tort*, which prejudices a remedy for huſband and wife; or if the cauſe of action be only commenced before coverture, and completed afterwards; or in an action of covenant for non-payment of rent, the inheritance of the wife.

Where the action is real, for the land of the wife, or for a *tort* done by the wife after marriage, or for an act of the wife before coverture, the huſband and wife muſt be joined in an action againſt them.

With reſpect to the bail, that has been before mentioned.‡

* 1 Roll. 782, l. 10.
† 1 Salk. 114.
‡ *Ante*, p. 36.

CHAPTER

CHAPTER XII.

Of Proceedings relative to the Diſcharge of Inſolvent Debtors.

THE law * has provided a remedy for an inſolvent in actual cuſtody, by virtue of an execution for a debt under a certain limited ſum, and alſo a certain limited time after his impriſonment, to get diſcharged from priſon, or to compel his creditors to allow him a ſtipulated ſum for ſupport.

If any perſon be charged in execution, for any ſum not exceeding 200l. or on which no more is due; or if he ſhall have been impriſoned on an execution one year, for a ſum not exceeding 1000l.† he may be diſcharged from cuſtody, by application to the court whence the proceſs iſſued, or to the court where he is removed by *habeas corpus*, on giving up his property. To obtain this,

Prepare the petition as directed by the act,‡ and annex to it the accounts likewiſe directed. Give a written notice, ſigned by the priſoner, to the creditor or creditors, at whoſe ſuit the priſoner ſtands charged, of preſenting the petition, at leaſt fourteen days§ before, annexing to ſuch notice a copy of the accounts.

At the time mentioned in the notice, take the petition into court, with the accounts, and an affidavit of the ſervice of notice, read them, and move for a rule‖ for the priſoner to be brought up to the court on a certain day.

Serve

* Laws of N. Y. 12 ſeſſ. ch. 24.
† Ibid. 14 ſeſſ. ch. 29.
‡ Ibid. 12 ſeſſ. ch. 24. ſect. 4.
§ Ibid.
‖ Ibid.

Serve a certified copy of this rule on the plaintiff,* his executors, adminiſtrators, or attorney, and prepare an affidavit of ſuch ſervice. If the parties do not appear,† the court will examine the affair in a ſummary way, and tender to the priſoner the oath‡ preſcribed in the act.§ They will then order the property of the priſoner to be aſſigned to the creditors, who have charged him in execution, or to ſuch other perſon as the court ſhall think fit, for the benefit of the creditors, by a ſhort indorſement‖ on the petition; and, upon this, the court will grant a rule for the priſoner's diſcharge; and a certified copy thereof delivered to the jailer, is a ſufficient warrant to the ſheriff or jailer, who muſt diſcharge him without fees.¶

If the creditors be not ſatisfied** with the priſoner's oath, they may attend, and pray time to inform themſelves; upon which the court will remand the priſoner, and appoint another day, at fartheſt within the firſt week of the following term, for the parties to appear; but all *objections*†† *as to form*, muſt be made on the day mentioned in the firſt rule.

If at the ſecond day, the creditors do not appear,‡‡ or are unable to diſcover any effects of the priſoner omitted in his account, the court will cauſe an aſſignment and diſcharge, in manner before ſhown, unleſs the creditors inſiſt on his being detained, and agree by writing, to pay ſuch ſum weekly, on every Monday, as the court ſhall direct: if one creditor, not exceeding 4s.§§ if more than one, not exceeding 2s. 6d.‖‖ a week each, in which caſe the priſoner ſhall be remanded. If any failure

* Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 4.
† Ibid.
‡ Ibid.
§ Ibid.
‖ Ibid.
¶ Ibid.
** Ibid.
†† Ibid.
‡‡ Ibid.
§§ Ibid.
‖‖ Ibid. ſect. 5.

failure * be made in payment of the weekly ſum, the priſoner may apply to the court in term, or to a judge in vacation, and, upon proving non-payment, he may be diſcharged out of cuſtody, on executing the aſſignment. Give notice of the application to the oppoſite party.

If the priſoner be charged in proceſs out of the ſupreme court, and be in the jail of any other county than where the court ſits, the rule muſt be returnable at the next circuit court,† and be ſerved on the creditors fourteen days before. This court have the like power with the ſupreme, and their proceedings being recorded, muſt be returned into that court.

After this diſcharge the *perſon*‡ of the priſoner is ever after free from the ſame demands; but the plaintiff may have execution at any future time againſt his property, except his neceſſary wearing apparel, bedding, and tools, not exceeding the value of 20l.

The aſſignees § muſt ſell and diſpoſe of the eſtate, and divide the net produce among the plaintiffs, firſt paying the ſheriff or jailer's fees; and the overplus, if any, is to be paid to the priſoner or his repreſentatives.

If the priſoner ſwear falſely, he may be puniſhed for perjury, and is liable to execution *de novo*.‖

If the creditor of any priſoner be deſirous of barring the priſoner from the benefit of the act,¶ unleſs he take it in time, he may, if ſuch priſoner remain three months charged in execution, give him notice, in writing, to exhibit his account, and make an aſſignment, which, if he do not, as ſoon as may be after the expiration of thirty days from the ſervice of ſuch notice, he ſhall be barred from any diſcharge or allowance.

In

* Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 4.
† Ibid. ſect. 6.
‡ Ibid. ſect. 8.
§ Ibid. ſect. 4.
‖ Ibid.
¶ Ibid. ſect 13.

In debts exhibited againſt the eſtate of an inſolvent, if there be mutual debts* between the creditor and inſolvent, the aſſignees may ſtate the accounts, and only pay a dividend for the balance.

If the aſſignees do not do their duty,† the priſoner or creditors may have them ſummoned before the court, who have power, if they think proper, to remove the aſſignees and appoint others

* Laws of N. Y. 12 ſeſſ. ch. 24. ſect. 11.
† Ibid. ſect. 10.

PART III.

PARTICULAR ACTIONS AND CASES.

CHAPTER I.

Account.

ACCOUNT is a writ or action, which lies againſt a bailiff or receiver, who, by reaſon of his office or buſineſs, is to render an account to another, and refuſes to do it.* But the proceedings in this action being attended with difficulty, tedioufneſs and expence, it is now ſeldom uſed; becauſe, in general, when *account* will lie, *aſſumpſit* will alſo; but, in ſome caſes, as that of one tenant receiving more than his ſhare, this action is the only remedy at law; the plaintiff, therefore, muſt reſort to it, or to a court of equity; though, by the latter mode, accounts are more commodiouſly and advantageouſly adjuſted for both parties.

By act of 10 ſeſſ. ch. 19. actions of account may be brought againſt the executors or adminiſtrators of every guardian, bailiff and receiver; and, by ſtatute 11 ſeſſ. ch. 4. one joint-tenant, or tenant in common, his executors, &c. may have account againſt the other;

* Cow. Interp.

as bailiff for receiving more than his juſt ſhare. Yet ſtill theſe matters are more cognizable in equity than at law; but if any doubt ariſe about a particular demand, it may be directed to be aſcertained by an iſſue, and verdict at law.

The proceſs in account, by the common law, was ſummons, attachment, and diſtreſs infinite;* and by ſtatute 11 ſeſſ. ch. 24. ſect. 1. "where any perſon is "liable to account, as guardian, bailiff, receiver, or "otherwiſe, to any other, and will not give account "willingly, and the party to whom ſuch account ought "to be made ſhall ſue out a writ of account; if the "defendant do not appear at the return; or, if it be "returned, that he hath nothing, then the defendant "ſhall be attached; but if it be returned *non eſt inventus*, "the proceſs may be purſued to the exigent and out-"lawry thereupon."

The proceſs muſt be governed by the rules of proceeding by original, which ſee in the chapter of outlawry.† This original muſt be iſſued by a clerk of the court of chancery, to whom a *precipe* is to be delivered, and he will make out the writ. Then a writ of ſummons muſt be iſſued and ſealed by the clerk of the court. Upon this the ſheriff ſummons the party; if he appear, a declaration muſt be filed and delivered; but, if he do not appear, the proceedings above directed by the ſtatute, muſt be taken to compel him.

There is, however, no neceſſity to ſue out an original, unleſs for the purpoſe of proceeding to outlawry; for you may declare in account on a bill, *latitat*, or *capias*, by which you muſt not, however, hold the defendant to bail. This is the moſt preferable mode, as it prevents much of that nicety which might ariſe from proſecuting the original.

The

* 2 Inſt. 380. 1 Brownl. 24.

† *Poſt*, ch. 11.

The declaration in account muſt charge the party as guardian, bailiff, or receiver of money;* and, it is good, "to compute when required," though there was no expreſs requeſt:† and ſo is the declaration againſt a receiver to compute generally, though the receipt were ſpecial.‡ But, if the writ be againſt the defendant as receiver, a declaration upon a receipt *ad merchandizandum*, for which he is chargeable as bailiff, is not good.§ Yet the defendant ſhall not take advantage of this, except upon demurrer to the declaration; for, after judgment *quod computet* by default, it is aided.‖ The declaration may charge the defendant both as bailiff and as receiver;¶ and a declaration againſt a receiver muſt ſay by whoſe hands;** but the omiſſion is aided by judgment *quod computet*,†† and the writ may be general as receiver of money; for it is ſufficient if ſet forth in the count by whoſe hands.‡‡

If the defendant have matter of defence, which, if good, precludes the neceſſity of taking any account, by ſhewing either that he is not accountable at all, or in the manner declared againſt him, he muſt, at this ſtage of the proceedings, plead it in abatement or bar. Thus, in account as guardian, it may be pleaded that the defendant never was guardian;§§ or that he was guardian at ſuch a time, and had rendered an account, with a traverſe of the time before and after:‖‖ if charged as bailiff, that he never was ſo to render an account;¶¶ but to ſay that the

* Co. Lit. 172. 2 Inſt. 379. 1 Roll. 117, l. 43. Danv. 220.
† Cro. Eliz. 83.
‡ Ibid.
§ 4 Leo. 39. 2 Lev. 126. Cro. Eliz. 83.
‖ 2 Lev. 126.
¶ F. N. B. 116.
** Co. Lit. 172. Com. Rep. 272.
†† 2 Lev. 126.
‡‡ F. N. B. 118. 2 Lev. 118.
§§ Raſt. 21.
‖‖ Ibid.
¶¶ 1 Rol. 121. Co. Ent. 46.

the plaintiff ſold him the goods, without ſaying that he never was his bailiff, is not ſufficient;* ſo it is good that he was his ſervant for ſuch a purpoſe *without that* he was bailiff in other manner;† ſo is it, that he hath accounted before the plaintiff,‡ or before auditors aſſigned.§ The defendant may plead the ſtatute of limitations, but the plaintiff may reply, that it was an account between merchants.‖ If the defendant be charged as receiver, it is a good plea that he never was ſo,¶ or by ſuch a hand,** or that the plaintiff gave him the money,†† or aſſigned it in ſatisfaction of a debt,‡‡ or that it was delivered to him for ſuch a purpoſe, which he has performed;§§ that he was within age,‖‖ or that he has accounted,¶¶ or that there was an award in diſcharge.*** But a plea that admits the defendant to be *once chargeable*, though it goes in diſcharge, is not good, becauſe that ſhall be pleaded before auditors.†††

If the defendant have made no ſuch plea, or, if made, it is determined againſt him, the firſt judgment is (for there are two judgments in this action) *quod computet*, viz. that the defendant do render an account, upon which auditors are then aſſigned by the court to take the account:‡‡‡ theſe auditors have a right to examine the plaintiff

* 1 Roll. 121, l. 10.
† Ibid. l. 17.
‡ Raſt. 17. Lutw. 58.
§ 1 Rol. 122, l. 39. Raſt. 17.
‖ Vid. Ent. 76.
¶ Raſt. 19. Lutw. 47. Co. Ent. 47.
** Cro. Eliz. 82. Lutw. 47.
†† 1 Roll. 121, l. 45
‡‡ Ibid. l. 47, 50.
§§ 1 Roll. 122, l. 10, 15, 30. 2 Lev. 31. 2 Brownl. Ent. 3.
‖‖ 1 Roll. 122, l. 50.
¶¶ Ibid. l. 35, 40. Raſt. 20.
*** Lutw. 52.
††† 1 Com. Dig. 100.
‡‡‡ Laws of N. Y. 11 ſeſſ. ch. 4. ſect. 1.

plaintiff and defendant, together with the witneſſes on oath.*

Upon this judgment a *capias ad computandum* iſſues to take the defendant, upon which he muſt give bail to appear *de die in diem* before the auditors, at every day and place aſſigned by the auditors, until the account be determined; and afterwards to appear in court; and, if he be found in arrear, that he pay or render himſelf.†

If the auditors, by their report, find the defendant in arrear to the plaintiff, he ſhall have final judgment, and execution for ſo much as is found, with coſts; but if they report a ſurpluſage to the defendant, then ſuch defendant ſhall have judgment to recover the ſame with coſts, (except againſt executors or adminiſtrators) and execution thereupon;‡ and an action lies againſt the ſheriff for an eſcape.§

Before the auditors the defendant may plead, and the plaintiff may join iſſue, or demur to the pleadings, which ſhall be certified to the court, and there tried or argued:‖ but the defendant ſhall not plead here a matter in bar of the account, though he omitted to plead it in bar;¶ for the general rule is, that a plea in bar is inadmiſſible after judgment *quod computet*.

If the defendant refuſe to account, the judgment ſhall be, that the plaintiff recover according to the value mentioned in the declaration.**

The ſtatute of limitations does not extend to this action, ſo that it is an eligible remedy in the caſes of old accounts.††

* Laws of N. Y. 11 ſeſſ. ch. 4. ſect. 3.
† Lutw. 49, 60. Cro. Eliz. 82.
‡ Laws of N. Y. 11 ſeſſ. ch. 4. ſect. 1.
§ Ibid. ‖ Lutw. 50.
¶ 1 Roll. 126, l. 7. Cro. Eliz. 830.
** Cro. Eliz. 806. Lutw. 63. Laws of N. Y. 11 ſeſſ. ch. 4. ſect. 1. †† 3 Wilſ. 117.

CHAPTER

CHAPTER II.

Arbitration and Reference.

ARBITRATION is when the parties injuring and injured, ſubmit either by agreement, or by order of the court, all matters in diſpute, relative to any perſonal chattel or wrong, to the judgment of two or more arbitrators; and, if they do not agree, it is uſual to add, that another perſon may be called in as umpire, to whoſe ſole judgment it is then referred; or, frequently, there is only one arbitrator originally appointed. Reference to arbitration is of three kinds: 1. before any ſuit; 2. pending a ſuit, by the act of the parties; 3. after iſſue joined, and before or on the trial, by order of the court.

1. *When the parties have agreed to ſubmit their difference to arbitration*, the uſual, and indeed only mode at common law, is for them to enter into mutual bonds, ſpecially conditioned for the performance of the award; and, formerly, the party in whoſe favor an award was made, had no other compulſory method of obtaining redreſs, than by putting this bond in ſuit for forfeiture of the condition; and, if there were any mal-practice or colluſion in obtaining the award, the injured party muſt have applied to equity. But a ſtatute of England, recognized by act of 14 ſeſſ. ch. 20. enacts, "that all "merchants and others, who deſire to end controverſies "(for which there is no other remedy, but by perſonal "action or ſuit in equity) may agree, that the ſubmiſ-"ſion of the ſuit to arbitration or umpirage, may be "made a rule of any court of record, and inſert ſuch "agreement in the ſubmiſſion or condition of the arbi-

"tration

"tration bond, which agreement, being ſo made and "inſerted, ſhall, upon producing an affidavit thereof, "made by one of the witneſſes thereunto, in the court "of which it is agreed to be made a rule, and reading "and filing ſuch affidavit, be entered of record in that "court, and a rule thereupon made; and after ſuch rule "made, the parties diſobeying the award ſhall be liable "to be puniſhed as for a contempt of the court; and the "court ſhall iſſue proceſs accordiugly, and it ſhall not "be ſtopped by injunction, or order of any other court, "either of law or equity, unleſs it ſhall be made appear "on oath, that the arbitratofs or umpire miſbehaved "themſelves, and that ſuch award or umpirage was pro-"cured by corruption, or other undue means: but com-"plaint thereof muſt be made before the laſt day of the "next term after ſuch award or umpirage made and "publiſhed to the parties." This ſtatute, it has been ſaid, was made to put ſubmiſſions, where no cauſe was depending, upon the ſame footing with thoſe where there was a cauſe depending, and is only declaratory of what the law was before in the latter caſe.* But there being a particular ſtatute for this purpoſe, it is neceſſary, where there is no cauſe before the court, that the agreement be made in the manner preciſely directed, to obtain a rule.

2. As to *arbitrations made pending a ſuit*, by entering into the proper bonds, the court will, by virtue of the common law, grant an attachment to compel the performance of an award for colluſion or groſs miſbehavior in the arbitrators.

When the award is made, in theſe two latter caſes, the witneſſes muſt be ſworn before a judge, and then the arbitrators agree upon a time and place for diſcuſſing the diſpute, and due notice thereof muſt be given the parties, who are to attend, with their witneſſes. After hearing

* 2 Bur. 701.

hearing the proofs and allegations on each ſide, the arbitrators muſt draw up their award within the time limited, or elſe it is void.

When an award is made, and the party will not perform it, ſuch as the not paying money, &c. at the time and place therein mentioned, and you have attended for that purpoſe ready to receive it, firſt proceed to make the ſubmiſſion a rule of court, upon an affidavit of the due execution of the bond, and move the court for this purpoſe.

Then, upon an affidavit of the due execution of the award, and that the party, in whoſe favor it is given, has performed all that on his part was required to be done by the award, move for a rule to ſhow cauſe why an attachment ſhould not iſſue for not paying the money on the award, in purſuance of the rule of court: when obtained, ſerve a certified copy thereof, and, if no cauſe be ſhown, the rule will be made abſolute.

But the party refuſing to comply with the award may except thereto, (which exception muſt be made by motion, on affidavit, before the laſt day of the term after the award was publiſhed.* This will be a rule to ſhow cauſe why the award ſhould not be ſet aſide, and muſt be ſerved on the arbitrators and oppoſite party; and upon the day appointed, the court will enter into an examination of the affair upon affidavit. In caſe manifeſt corruption,† or groſs miſbehavior of the arbitrators appear,‡ or a miſtake is evident on the face of the award, or due notice of the meeting was not given,§ the court will ſet aſide the award. They will not, however, enter into the merits of the affair, but only take into conſideration ſuch legal exceptions as appear on

* Cowp. 23.
† Str. 301.
‡ 3 P. W. 61.
§ 1 Salk. 71.

on the face of the award, and ſuch objections as go to the miſbehavior of the arbitrators.*

If no exception be taken, or, if taken, not held ſufficient, the court will make the rule for an attachment abſolute. Sue out the attachment, and leave it with the ſheriff. The proceedings are as mentioned in a ſubſequent chapter on attachment.†

3. *References by the act of the court* are in purſuance of the ſtatute for amendment of the law,‡ which enacts, "that whenever it ſhall appear probable in any cauſe, "that the trial will require the examination of a long "account, the court, after iſſue joined, are authoriſed "to refer ſuch cauſe, with or without the conſent of "parties, by rule, to be made at diſcretion, to three "referees, unleſs, on naming them, the parties agree "upon and name others, or ſhall elect that three of "the jurors returned, be ballotted for; which referees, "finally fixed upon, ſhall hear and examine the matters "in controverſy, upon pain of contempt; and an entry "ſhall be made on the record of ſuch reference, and a "day given to the parties from time to time, till the "referees ſhall make a report or be diſcharged. If the "report of the referees, or of the major part, ſhall be "confirmed by the court, and any ſum be found for the "plaintiff, judgment ſhall be entered for the ſame and "coſts, if coſts were recoverable by verdict. But, if "they report that there is nothing due to the plaintiff, "then judgment ſhall be entered that he take nothing "by his writ, bill, or plaint; and the defendant ſhall "have his taxed coſts, if he could have recovered them, "had a verdict paſſed for him. If they report a ſum "due to the defendant, he ſhall have the like judgment "againſt the plaintiff, and recover the ſum reported "with coſts, and have execution thereof, unleſs the

* 2 Bur. 701. † *Poſt*, p. 246, 247.
‡ Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 2.

" plaintiff was an executor or adminiſtrator, and then
" it ſhall be deemed a debt of record recoverable by
" action of debt or *ſcire facias*. But* the defendant
" may plead to ſuch action or *ſcire facias*, *plene admini-*
" *ſtravit*, at the time of the verdict given or report
" made, and give in evidence payments made by him,
" or judgments againſt him before that time."

The practice on this ſtatute is for one of the parties, if he be deſirous of having the cauſe referred, to ſhow, by affidavit, ſome probable reaſon, on motion of his counſel, to the court, that the determination will involve in it the adjuſtment of a long account; or, if it be apparent to the court, on the face of the proceedings, after iſſue joined, they will do it of their own accord.

In either caſe, a rule is made, " that the cauſe be
" referred, purſuant to the ſtatute in ſuch caſe made and
" provided, to three referees [naming them] and that
" they, or any two of them, report with all convenient
" ſpeed." If this be done at the circuit, the party applying for it, or the plaintiff, when it orginates with the court, muſt move the court for a rule to confirm the order of the circuit court.

A certified copy of this rule muſt be ſerved on the referees, who will thereupon appoint a day to examine the affair. The party applying, or the plaintiff, if the reference were ordered by the court, muſt then indorſe the appointment on another certified copy of the rule, and ſerve it on the oppoſite party, or his attorney. Both parties may then, by virtue of the ſtatute,† iſſue ſubpœnas for their witneſſes. The ſubpœnas are to be ſerved as in other caſes, but their form is ſpecial, reciting the reference particularly; and the witneſſes are intitled to the ſame allowance as attending a trial.

On

* Sect. 3
† Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 4.

On the day appointed, the parties attend with their witneſſes, who, and the referees, muſt be ſworn before a judge of any court, or a juſtice of the peace.* It is uſual for the applicant or plaintiff to get a magiſtrate to attend for this purpoſe. The oath of each referee is, "faithfully and fairly to hear and examine the "cauſe, and make a true and juſt report, according to "the beſt of his ſkill and underſtanding."†

The matter is then conſidered in the ſame manner as on a writ of inquiry, and, when gone through, the referees make their report, and deliver it to the prevailing party. The ſtatute‡ intitles the referees to a dollar a day for their attendance, beſides a reaſonable allowance for their expences, which muſt be paid by the prevailing party, who is allowed it in the taxation.

The prevailing party muſt then, on the firſt day of the ſubſequent term, or, if the report be delivered in term, then in the ſame term, take the report into court, pray that it be read and filed, and thereupon move for judgment *niſi*. This is a four day rule, and, if no cauſe be ſhown, final judgment may be entered. This is done by ſtating the proceedings on the record, and execution, &c. is had in the uſual manner.

* Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 4.
† Ibid.
‡ Ibid.

CHAPTER

CHAPTER III.

Attachment.

AN attachment is a judicial writ, commanding the ſheriff, or other officer or perſon to whom it is directed, to take the perſon therein mentioned, for a contempt of the court.

Contempts thus puniſhed, are either thoſe which reſiſt the power of the court or its judges, or elſe conſequentially tend to create an univerſal diſregard of their authority. The principal inſtances of either ſort uſually puniſhed by attachment are, 1. thoſe committed by inferior judges and magiſtrates, by acting unjuſtly, oppreſſively, or irregularly, in the adminiſtration of thoſe portions of juſtice intruſted to their diſtribution; or by diſobeying writs iſſued out of this court, by proceeding in a cauſe after it is ſtayed, or removed by writ of prohibition, *certiorari*, error, &c. 2. thoſe committed by ſheriffs, bailiffs, jailers, and other officers of the court, by abuſing the proceſs of the law, or deceiving the parties, by any acts of oppreſſion, extortion, colluſive behavior, or culpable neglect of duty: 3. thoſe committed by attornies, by groſs inſtances of fraud and corruption, injuſtice to their clients, or other diſhoneſt practice: 4. thoſe committed by jurymen in collateral matters relating to the diſcharge of their office, ſuch as making default when ſummoned, refuſing to be ſworn or to give any verdict, eating or drinking without the leave of the court, and eſpecially at the coſt of either party, and other miſbehaviors or irregularities of a ſimilar kind; but not in the mere exerciſe of their judicial capacities,

pacities, as by giving a falſe or erroneous verdict: 5. thoſe committed by witneſſes, by making default when ſummoned, refuſing to be ſworn or examined, or prevaricating in their evidence when ſworn: 6. thoſe committed by parties to any ſuit or proceeding before the court, as by diſobedience to any rule or order made in the progreſs of a cauſe, by non-payment of coſts awarded by the court upon motion, or by non-obſervance of awards duly made by arbitrators or umpires, after having entered into a rule for ſubmitting to ſuch determination: 7. thoſe committed by any other perſons, by reſcuing priſoners, or diſobedience to the great writ of *habeas corpus*. Some of theſe may ariſe in the face of the court, as by rude and contumelious behavior; by obſtinacy, perverſeneſs, or prevarication; by breach of the peace, or any wilful diſturbance whatever; others in the abſence of the party, as by diſobeying or treating with diſreſpect the people's writ, or the rules or proceſs of the court; by perverting ſuch writ or proceſs to the purpoſes of private malice, extortion or injuſtice; by ſpeaking or writing contemptuouſly of the court, or judges acting in their judicial capacity; and, in ſhort, by any thing that demonſtrates a groſs want of that regard and reſpect, which, when once courts of juſtice are deprived of, their authority (ſo neceſſary for the good order of the ſtate) is entirely loſt among the people.

The proceſs of attachment, for theſe and the like contempts, muſt neceſſarily be as ancient as the laws themſelves: for laws, without a competent authority to ſecure their adminiſtrators from diſobedience and contempt, would be vain and nugatory. A power, therefore, in the ſupreme court of juſtice, to ſuppreſs ſuch contempts, by an immediate attachment of the offender, reſults from the firſt principles of judicial eſtabliſhments, and muſt be inſeparably attendant upon every ſuperior tribunal.

If

If the contempt be committed in the face of the court, the offender may be inſtantly apprehended and impriſoned at the diſcretion of the juſtices, without any farther proof or examination: but in matters that ariſe at a diſtance, and of which the court cannot have ſo perfect a knowlege, unleſs by the confeſſion of the party, or teſtimony of others, if the judges, upon *affidavit*, ſee ſufficient ground to ſuppoſe that a contempt has been committed, they either make a rule for the ſuſpected party to ſhow cauſe why an attachment ſhould not iſſue againſt him,* or, in very flagrant inſtances of contempt, the attachment iſſues at once;† as it alſo does, if no ſufficient cauſe be ſhown to diſcharge the rule, and thereupon the court confirms and makes abſolute the original rule.

When the delinquent is taken, he muſt either remain in cuſtody or put in bail; but the ſheriff cannot let him to bail, though a judge at his chamber may.‡ At the return of the writ the defendant muſt appear *perſonally* in court; and, if he be apparently guilty, the court, on conſidering the nature of the offence, and other circumſtances, will either commit him immediately, or ſuffer him to enter into a recognizance to appear there *de die in diem* till the court determine the contempt; and if he neglect, the recognizance will be eſtreated.

When the party proſecuted is either confined, or has entered into a recognizance, the party complaining is, within four days,§ to exhibit interrogatories againſt him, and duly file them, or the recognizance may be diſcharged on motion; but if no motion be made, the interrogatories muſt be anſwered, though exhibited after. If either of theſe interrogatories be improper, the defendant may refuſe to anſwer, and move the court to have it ſtruck out;‖ or

* Styl. 277.
† Salk. 84. Str. 185, 564.
‡ Str. 479.
§ 6 Mod. 73.
‖ Str. 444.

or he may demur.* If the party can clear himſelf on oath, he is diſcharged; but if perjured, may be proſecuted for perjury.† If he confeſs the contempt, the court will proceed to correct him, by fine or impriſonment, or both, or by corporeal or infamous puniſhment.‡ If the contempt be of ſuch a nature, that when the fact is once acknowleged, the court can receive no farther information, by interrogatories, than it is already poſſeſſed of (as in the caſe of a reſcous) the defendant may be admitted to make ſuch ſimple acknowlegment, and receive his judgment, without anſwering to any interrogatories; but if he wilfully and obſtinately refuſe to anſwer, or anſwer in an evaſive manner, he is then guilty of a high and repeated contempt, to be puniſhed at the diſcretion of the court.

Until an attachment iſſues, the proceedings are civil, and muſt be intitled with the names of the parties: but as ſoon as it does, the proceedings are on the criminal ſide; and, from that time, the people are to be named as the proſecutor.§ But, though carried on in the ſhape of a criminal proceſs, attachments, eſpecially for non-payment of coſts or non-performance of awards, (except for actual contempt to the court) are looked upon rather as a civil execution for the benefit of the injured party;‖ and, therefore, it hath been held, that ſuch contempt, and the proceſs thereon, being properly the civil remedy of individuals, are not releaſed a by general act of pardon.¶

* 12 Mod. 499.
† 6 Mod. 73.
‡ Cro. Car. 146.
§ 3 Term Rep. 133, 253.
‖ Cowp. 13.
¶ Cowp. 13.

CHAPTER

CHAPTER IV.

Certiorari.

A *Certiorari* is a writ, which iſſues to inferior courts and juſtices of the peace, to remove the record and proceedings from before them into the ſupreme court.

In order to remove a perſonal action from any mayor's court, or court of common pleas, the demand muſt exceed 100l.*

Make out this writ in the proper form, but before the clerk will ſeal it, you muſt get it allowed by one of the judges,† or it will not be obeyed.‡ It muſt be directed to the inferior court by its proper ſtyle, and be returned by them with the record of their proceedings. When the return is obtained, move the ſupreme court that it be read and filed, and that a day be appointed to give judgment; at which time the applicant muſt make his exception, having previouſly given a ſtate thereof to the other party.

If the writ be not returned, the party may obtain a rule to return it by the firſt day of the next term, or to ſhow cauſe why an attachment ſhould not iſſue. A certified copy of this muſt be ſerved on the court below, or juſtice, and, on affidavit thereof, if no cauſe ſhown, an attachment will be granted.

A *certiorari* muſt be delivered to any mayor's court or common pleas, before interlocutory judgment ſigned, or a juror ſworn; if not, the court below may proceed without

* Laws of N. Y. 10 ſeſſ. ch. 72. ſect. 2.
† Ibid. ſect. 5.
‡ Ibid. ſect. 6.

out noticing it.* After a *procedendo*, it ſhall never again be removed.†

To remove proceedings before a juſtice, the party applying for a *certiorari* muſt, within thirty days after judgment given, make affidavit, ſatisfying the judge of the ſupreme court, before he allows the writ, that there is reaſonable cauſe for granting ſuch *certiorari*, or removing the judgment, either for error therein, or ſome unfair practice of the juſtice, which ſhall be particularly ſpecified in the affidavit; and ſuch affidavit ſhall be left with the judge of the ſupreme court who allows the writ, in order that the adverſe party may have a copy. But this is not to ſtay execution, if the party in whoſe favor judgment is given, will give ſecurity, to the ſatisfaction of the juſtice, to reſtore if it ſhould be reverſed.‡

After the *certiorari* is obtained, it muſt be ſerved on the juſtice, who is by it commanded to have the plaint, proceſs, record, and proceedings, in the court before him, at the next ſupreme court. If he neglect to do ſo, a rule muſt be obtained, at the next court, grounded upon an affidavit of the delivering the *certiorari* to the juſtice, that the juſtice make return thereto by the firſt day of the next term, or ſhow cauſe why an attachment ſhould not iſſue againſt him. A copy of this rule is to be ſerved on the juſtice, and, if he refuſe to obey, an attachment iſſues. If the juſtice intend to make return, he indorſes on the *certiorari*, "the execution of "this writ appears by the ſchedule hereunto annexed," which ſchedule contains the account of the whole proceſs had before the juſtice, ſigned and ſealed by him; and, if falſe, the party may have an action againſt the juſtice for a falſe return; but, if it be true, and the defendant in error mean to defend the proceedings

* Laws of N. Y. 10 ſeſſ. ch. 72. ſect. 3.
† Ibid. ſect. 4.
‡ Ibid. 11 ſeſſ. ch. 89. ſect. 7.

of the juſtice, he muſt enter his appearance in the court above, and move that the plaintiff in error aſſign error in the proceedings mentioned in the return made by the juſtice, or that the writ of *certiorari* be nonproſſed. A certified copy of the rule muſt be ſerved on the attorney for the plaintiff in error, and, if he neglect to comply with it, upon affidavit of ſervice thereof, judgment of nonpros will be entered.

If the plaintiff in error mean to aſſign errors, he draws up an aſſignment of error, which is either general or ſpecial, files it, and ſerves a copy on the oppoſite attorney: after this, the defendant in error muſt join in error, and, if he refuſe, a rule muſt be obtained for him to join in error; if in term, in four days; if in vacation, in twenty days; or that the plaintiff in error be heard *ex parte*. If no joinder in error be put in, or if there be, either party may move for the cauſe to be made a *concilium*, and ſet down for argument on a certain day to be appointed by the court. A copy of the rule is to be ſerved on the oppoſite party. At the day appointed for argument, the party goes to the clerk of the ſupreme court, and directs him to bring up to the court the proceedings filed, which he will do. Argument then takes place, either *ex parte*, or on hearing both parties; and the court afterwards proceed to affirm or reverſe the judgment. If the judgment be affirmed, the party procuring the *certiorari* pays the coſts of defence in the ſupreme court, recoverable by execution out of that court; but if reverſed, the applicant is intitled to coſts, recoverable in like manner.*

* Laws of N. Y. 11 ſeſſ. ch. 89. ſect. 7.

CHAPTER

CHAPTER V.

Dower.

EVERY man's wife, by law, is intitled to be endowed with the third part of all lands of which her husband, at any time during coverture, was seised.* It ought to be assigned to the widow by the heir or guardian, within forty days, called her *quarentine*, after her husband's death. If it be not, she has her remedy by writ of dower.

In case she has *part* of her dower in the same township, the process must be by *writ of right of dower*; but, if the *whole* be withholden from her, she then proceeds by writ of dower *unde nihil habet*; and, as this is the most usual mode, it is the only one here mentioned: the process thereon is by *summons*, *grand cape*, and *petit cape*.

Make out a precipe, take it to a clerk in chancery, he will make out the writ, between the teste and return of which there must be full fifteen days: then make out a writ of summons, get it sealed by the clerk of the court, and deliver it to the sheriff, who must thereupon summon the defendant, by serving a copy upon *him*, or upon the *land*: after which, and fourteen days before the return at least, he must make proclamation of the summons, at or near the most usual door of the nearest church of the town where the land lies, and, if there be none in the same town, at or near the door of the nearest church in the same county, on a Sunday after divine service, if any there be.† This proclamation must be indorsed

* Laws of N. Y. 10 sess. ch. 4. sect. 1.
† Ibid. ch. 50. sect. 31.

indorſed on the writ, with the names of the ſummoners; otherwiſe, if the defendant do not appear, an *alias* and *pluries* ſummons muſt iſſue until ſuch return be made, and not a *grand cape*.

If ſuch return be made, and the tenant do not appear on the fourth day after the return, the next proceſs is the *grand cape*, which is a writ commanding the ſheriff to ſeiſe the third part of the lands demanded, by the view of two honeſt and lawful men of the county, and to ſummon the tenant to appear on the return of the writ, and ſhow why he did not obey the former ſummons. This writ is iſſued by the clerk of the court. If the ſheriff do not return the writ, ſue out an *alias cape*. If *nulla tenementa* be returned, ſue out a *teſtatum grand cape*; but, if the ſheriff execute the writ, he will make a proper return. If the tenant do not appear at the return, final judgment goes againſt him.

The tenant may either appear on the ſummons or *grand cape*; but, in the latter caſe, if the demandant do not releaſe his defaults, he muſt ſhow that his want of appearance was owing to not being ſummoned; and, if he do not ſhow this, final judgment will be given againſt him. But the beſt way is to releaſe the defaults, and declare as if he had actually appeared on the ſummons; for, if iſſue be taken on his allegation of non-ſummons, he may, in this caſe, wage his law,* which, if he do, judgment is given in his favor, and the writ abates.

The tenant may, upon appearance, vouch the heir to warranty.

When the tenant has appeared, the demandant muſt file his count, which muſt be of the third part of ſuch a meſſuage, &c. for, if it be of three meſſuages, &c. where there are ſeveral, and three are the third part of all, it is bad;† but it may be amended.‡ If the plaintiff be

* Laws of N. Y. 10 ſeſſ. ch. 5. ſect. 2.
† 3 Lev. 169. 2 Mod. Ca. 355. ‡ Ibid.

be not named, *who was the wife of B*, in the firſt part of the writ, though afterwards the lands are called *the lands of B, formerly her huſband*, it is bad.

When the demandant has counted, the tenant may demand a view of the lands in queſtion, in caſe it may be neceſſary. But, by ſtatute 10 ſeſſ. ch. 50. ſect. 21. in dower, the tenant ſhall not have a view, if the huſband of the demandant aliened to the tenant himſelf.* So, if the huſband died ſeiſed of the land,† or if a prior writ of the demandant abated, by a plea which aroſe upon a view.‡

If the tenant demand a view, when it is not allowable, the demandant may file a counterplea,§ which prays that the view may be excluded; but, if it demand dower, it is bad.‖ So the demandant in the counterplea of the view may ſay, that the tenant entered and continued the poſſeſſion;¶ and, upon the counterplea, iſſue may be taken; but, if the tenant demur to the counterplea, and it is adjudged againſt him, it is peremptory. At the return of the view, the demandant ſhall count *de novo*.

After a view, however, the tenant cannot plead to the juriſdiction of the court, nor to the perſon of the plaintiff, nor matter apparent in the writ, nor, in fact, any thing that does not ariſe upon the view;** and a plea which the tenant ſhall not have after a view, he ſhall not have after a demand of a view.†† If the tenant plead after a view, he ſays *the tenements put in view*, &c.‡‡

But

* 2 Inſt. 481. 3 Lev. 169.
† Ibid.
‡ 2 Inſt. 480.
§ 3 Lev. 168, 220. Clift. 299. Raſt. 231.
‖ 3 Lev. 169.
¶ Aſt. Ent. 296.
** 3 Lev. 219.
†† Thel. Dig. lib. 14. ch. 4. ſect. 37.
‡‡ 3 Lev. 405.

But to ſay *put in view*, where there cannot be a view, as in ejectment, is ill.*

With reſpect to the plea in dower, the tenant may plead in *abatement*, that the demandant took a huſband pending the writ; non-tenure of all, or of part; or joint-tenancy; or he may plead in bar *tout temp priſt*, detinue of deeds, *ne unques ſeiſie*, within age, not dowable, huſband alive, *ne unques accouple* in lawful matrimony, elopement, divorce, jointure, fine and non-claim within five years, dower aſſigned, term of years, releaſe, and voucher of the heir.

Upon plea of *tout temp priſt*, the demandant may have judgment immediately, but ſhall loſe her damages and meſne profits; though, if ſhe have actually demanded her dower, prior to the action, ſhe may plead this demand, which, if proved, will intitle her to damages.

To *detinue of deeds*, the demandant may reply *non-detinet*,† or that ſhe is ready to deliver, and thereupon judgment will be given for her immediately.

To plea of *huſband alive*, replication is, that her huſband is dead, and a day is given for proof of his death, which muſt be made in court by two witneſſes;‡ and, at the ſame time, the tenant may examine his witneſſes, that the huſband is alive; and, if it appear to the court by witneſſes that the huſband is dead, the demandant ſhall have judgment immediately; ſo, if the proof be not direct, or if there be no proof of his being alive.

To *elopement*, the demandant replies, that ſhe did not elope, or that ſhe was afterwards reconciled to her huſband; and, if the iſſue be upon the reconciliation, it is ſufficient if the huſband lie ſeveral nights with his wife, though ſhe afterwards continue in adultery for there may be ſeveral elopements.§

If

* 3 Lev. 405.
† Raſt. 224.
‡ Dyer 185. *Ante*, p. 172.
§ Dyer 107, a.

If the tenant appear, and make default in pleading, &c. in the ſame term, final judgment ſhall be againſt him; but, if he make default in another term, a *petit cape* iſſues to compel him; and if, on the return, he do not ſave his default, judgment ſhall be given againſt him: ſo on a plea of huſband alive, and the tenant make default at the day, or if he make default at a trial by jury, and do not ſave it, a *petit cape* ſhall go. Upon this writ, the lands are ſeiſed.

The judgment in dower is, that the demandant recover ſeiſin of the third part of the lands demanded; but, if the dower ſo recovered be of lands whereof the huſband died ſeiſed, the demandant, by the ſtatute of 10 ſeſſ. ch. 4. ſect. 2. is farther intitled to damages, namely, the value of her dower from the time of his death to the judgment: for this purpoſe a ſuggeſtion muſt be entered on the roll, that the demandant's huſband died ſo ſeiſed, on which a writ of inquiry iſſues to inquire of the damages,* or the jury, who try the iſſue, may alſo inquire of the value of the damages, or the demandant may remit the value and damages, and have an *habere facias ſeiſinam* immediately.

In caſe judgment be by default, and the huſband died ſeiſed, a writ of inquiry ſhall go to aſſeſs the value and damages, which ſhall be allowed to the time of the inquiſition: but due notice muſt be given of executing the inquiry, as in other caſes

* 1 Lev. 38.

CHAPTER

CHAPTER VI.

Ejectment and Action for meſne Profits.

AN ejectment is a fictitious ſuit brought for the purpoſe of trying the title to land, and is generally ſubſtituted in the room of a real action.

The better to apprehend the contrivance whereby this end is effected, it is neceſſary to obſerve, that the remedy by ejectment was, in its original nature, an action commenced to recover a term of years, to repair the injury done by diſpoſſeſſion, and was formerly grounded on the actual writ of *ejectione firmæ*, on which the plaintiff could only have recovered damages; but now, by the equitable extenſion of the courts of law, he can recover the term itſelf by a writ of poſſeſſion. In order to convert this into a remedy for trying titles to the freehold, it is firſt neceſſary that the claimant take poſſeſſion of the lands, to empower him to execute a leaſe for years, that may be capable of receiving the injury of diſpoſſeſſion. When, therefore, a perſon, who has a right of entry in lands, determines to acquire that poſſeſſion, which is wrongfully withheld by the preſent tenant, he makes a formal entry on the premiſes, and being ſo in poſſeſſion of the ſoil, he there, upon the land, ſeals and delivers a *leaſe* for years to ſome third perſon or leſſee; and having thus given him *entry*, leaves him in poſſeſſion of the premiſes. This leſſee is to ſtay upon the land, till the prior tenant, or he who had the previous poſſeſſion, enter thereon afreſh, and *ouſts* him, or till ſome other perſon (either by accident, or by agreement beforehand) comes upon the land, and turns him

him out or ejects him. For this injury the leſſee is intitled to his action of ejectment againſt the tenant, or this *caſual ejector*, whichever it was that ouſted him, to recover back his term and damages. But where this action is brought againſt ſuch a caſual ejector as is before mentioned, and not againſt the very tenant in poſſeſſion, the court will not ſuffer the tenant to loſe his poſſeſſion, without an opportunity to defend it; and, therefore, require notice to be given to him, for the purpoſe of making him a defendant, if he pleaſe. In order to maintain the action, the plaintiff muſt, in caſe of any defence, make out four points, viz. *title*, *leaſe*, *entry* and *ouſter*: 1. he muſt ſhow a good *title* in his leſſor, which brings the matter of right entirely before the court; 2. then that the leſſor, being ſeiſed, by virtue of ſuch title, did make him the *leaſe* for the term; 3. that he, the leſſee or plaintiff, did *enter* or take poſſeſſion in conſequence of ſuch leaſe; and then, 4. that the defendant *ouſted* or ejected him; whereupon he ſhall have judgment to recover his term and damages; and ſhall, in conſequence, have a *writ of poſſeſſion*, which the ſheriff is to execute, by delivering him the undiſturbed and peaceable poſſeſſion of his tenement.

This is the regular method of bringing an action of ejectment, in which the title of the leſſor comes collaterally and incidentally before the court, in order to ſhow the injury done to the leſſee by this ouſter. This method muſt be ſtill continued in due form and ſtrictneſs, ſave only as to the notice to the tenant, whenever the poſſeſſion is vacant, or there is no actual occupant on the premiſes, and alſo in ſome other caſes. But, as much trouble and formality were found to attend the actual making of the *leaſe*, *entry*, and *ouſter*, a new and more eaſy method of trying titles, by writ of ejectment, where there is any actual tenant or occupier of the premiſes in diſpute, was invented, ſomewhat more than

a century ago, by the Engliſh lord chief juſtice Rolle.* This new method entirely depends upon a ſtring of legal fictions: no actual leaſe is made, no actual entry by the plaintiff, no actual ouſter by the defendant; but all are merely ideal, for the ſole purpoſe of trying the title. To this end, in the proceedings, a leaſe for a term of years is ſtated to have been made by him who claims title, to the plaintiff who brings the action; it is alſo ſtated, that the leſſee entered, and that the defendant, who is called the caſual ejector, ouſted him, for which ouſter he brings the action. As ſoon as the action is brought, and the complaint fully ſtated in the declaration, the caſual ejector, or defendant, ſends a written notice to the tenant in poſſeſſion of the lands, informing him of the action, and tranſmitting him a copy of the declaration, aſſuring him that he has no title at all to the premiſes, and ſhall make no defence, and therefore adviſing the tenant to appear in court, and defend his own title, otherwiſe the caſual ejector will ſuffer judgment to be had againſt him, and thereby he (the actual tenant) will inevitably be turned out of poſſeſſion. On the receipt of this friendly caution, if the tenant in poſſeſſion do not, within a limited time, apply to the court to be admitted defendant in the ſtead of the caſual ejector, he is ſuppoſed to have no right at all.

But, if the tenant in poſſeſſion apply to be made a defendant, it is allowed him upon this condition, that he enter into a rule of court to confeſs at the trial of the cauſe, three of the four requiſites for the maintenance of the plaintiff's action, viz. the *leaſe* of the leſſor, the *entry* of the plaintiff, and his *ouſter* by the tenant himſelf, now made defendant; which requiſites, as they are wholly fictitious, ſhould the defendant put the plaintiff to prove, he muſt, of courſe, be nonſuited for want of evidence; but, by ſuch ſtipulated confeſſion of leaſe, entry

* Style Pr. 108.

entry and ouſter, the trial will now ſtand upon the merits of the *title* only. This done, the declaration is altered, by inſerting the name of the tenant inſtead of that of the caſual ejector, and the cauſe goes on to trial againſt the new defendant; and therein the leſſor of the plaintiff is bound to make out a clear title, otherwiſe his fictitious leſſee cannot have judgment. But if the new defendant fail to appear at the trial, and to confeſs leaſe, entry and ouſter, the plaintiff muſt indeed be nonſuited; but judgment will in the end be entered againſt the caſual ejector.

Such is the modern way of obliquely bringing in queſtion the title to real property, in order to try it in this collateral manner, a method which is now univerſally adopted in almoſt every caſe. The writ of ejectment, and its nominal parties, are then "judicially to "be conſidered; as the fictitious form of an action, "really brought by the leſſor of the plaintiff, againſt "the tenant in poſſeſſion, invented, under the control "and power of the court, for the advancement of juſtice "in many reſpects, and to force the parties to go to "trial on the merits, without being entangled in the "nicety of pleadings in either ſide."

Having thus explained the origin of an ejectment, with the alteration to the modern practice, I ſhall now ſhow in what caſes it is an adequate remedy, and the method of proceeding.

Ejectment only lies of ſuch things whereof an entry can be made, but of incorporeal hereditaments it will not; nor will it lie in ſuch caſes, where the entry of him who has the right is taken away by deſcent, diſcontinuance, twenty years diſpoſſeſſion, or otherwiſe. It is, however, rendered a very eaſy and expeditious remedy to landlords, whoſe tenants are in arrear, by ſtatute 11 ſeſſ. ch. 36. which enacts, "that every land-"lord or leſſor, who hath a right by law to re-enter,

"in

" in caſe of non-payment of rent, where half a year's " rent is due, and no ſufficient diſtreſs is to be had, may " ſerve a declaration in ejectment, on his tenant, or fix " the ſame upon ſome notorious part of the premiſes, " which ſhall be valid, without any formal re-entry, " or previous demand of rent." A recovery in ſuch ejectment, ſhall be final and concluſive, both in law and equity, unleſs the rent and all coſts be paid, or tendered within ſix calender months afterwards

In treating of the proceedings, it is neceſſary to conſider whether the premiſes are tenanted, or untenanted.

In order to proceed, where there is a tenant on the premiſes, you muſt firſt draw a declaration, and, for this purpoſe, it is neceſſary to conſider what it ſhould contain, the method of laying the demiſe, and how to deſcribe the premiſes.

The declaration muſt poſſeſs the ſame requiſites as declarations in perſonal actions: the *caption* may be of April term, though the title did not accrue till April vacation, becauſe the iſſue is joined, or judgment taken, as of the next term.* The *parties* muſt be the nominal leſſee and the caſual ejector. The *nature of the action* is expreſſed by calling it a plea of treſpaſs and ejectment. The *manner*, by ſtating the demiſe, with entry and ouſter. The *time* or day of the demiſe muſt be laid after the title accrues, otherwiſe the plaintiff will be nonſuited,† and the plaintiff muſt lay the commencement of his ſuppoſed leaſe, to have been precedent to the ejectment by the defendant.‡ The *place* muſt be in the county where the lands lie, and the very townſhip muſt be ſhown.§ The *damage* is generally nominal.

As to laying the *demiſe*, the time has been juſt mentioned, the leſſors muſt be thoſe who claim the right, and

* 2 Vent. 174.
† 1 Sid. 8. 1 Bac. Abr. 171.
‡ Ibid. § Ibid.

and it is the better way, where there are ſeveral, to lay a joint demiſe from them all, and a ſeparate one from each; but if they are tenants in common, let the ſeparate one be of their ſhare only. If the claimant be a feme covert, let the demiſe be laid as from her and her huſband. If he be an infant, there muſt be two demiſes, one from himſelf, and another from his admitted guardian or next friend; and it was formerly held, that the leaſe muſt reſerve rent; though, it is now ſaid, that this reſervation is not neceſſary.* The uſual and ſafeſt way of declaring, is to lay the day of the demiſe ſubſequent to a quarter day after the title accrued, to hold *from* the quarter day, by virtue whereof the plaintiff entered, and was poſſeſſed; and being ſo poſſeſſed, the defendant afterwards, to wit, on ſuch a day (viz. the day of the demiſe) entered and expelled the plaintiff.

It is held, that the deſcription of the premiſes muſt be ſo particular, that the ſheriff may certainly know what to give poſſeſſion of to the plaintiff;† but, by a late determination, this deſcription need not be ſo exact as that of a precipe in a real action, ſince the plaintiff is to ſhow the ſheriff what he claims title to, and is to take poſſeſſion at his peril. If he uſurp more than he had duly recovered, the court will, in a ſummary way, ſet it right.‡ But it ſeems a more deſirable practice, that the particular premiſes ſhould be diſtinctly defined either by the declaration or the verdict. The premiſes may be deſcribed by the names of a meſſuage, a houſe, cottage, or room in ſuch a houſe, bed-chamber, ſtable, orchard, ſo many acres of land, meadow, paſture, wood, &c. but they have been held not to be well deſcribed, by the names of a repoſitory, of a meſſuage or tenement,

* 3 Bur.
† 2 L. Raym. 1470. 2 Str. 908.
‡ 1 Bur. 629.

tenement,* of a meſſuage and lands to the ſame belonging, of a piece of land, nor of a fiſhery, rent, or other profit, nor without ſhowing the quantity and quality of the land;† and ſo much by eſtimation is not ſufficient;‡ nor is there any occaſion to uſe the expreſſion by eſtimation, as you may declare of 5000 acres, though you can only recover five; or of the whole of an eſtate, though you are only intitled to a moiety or three parts, &c. Water muſt not be called ſo, or a rivulet, or a water courſe, but ſo many acres of land covered with water.§

Having prepared your declaration, add thereto the notice from the caſual ejector, requiring the tenant to appear the next term and defend his title.

Make two copies of this declaration and notice, one whereof muſt be ſerved on the tenant himſelf, or his wife on the premiſes; but it will not do on any other perſon; yet, if the wife refuſe to hear the notice read and go out of the way, and it be left in the ſhop, or if the tenant keep out of the way to avoid being ſerved, the court will grant a rule to ſhow cauſe why leaving a declaration at his houſe ſhould not be good ſervice.‖ A declaration delivered to a daughter or father is good, if owned by the tenant afterwards.¶

It was formerly held, that a declaration in ejectment could not be altered or amended after it was once delivered, even in the moſt trivial matters; but, it has ſince been held, that an ejectment is a mere fictitious action, and the demiſe mere matter of form, and, on application, the demiſe was ordered to be amended; but this was to ſave the plaintiff from being barred by a fine, if

* Barnes 172.
† 11 Co. 55. 1 Salk. 254. *contra.* 1 Bur. 623.
‡ Say. 82. Cro. Car. 573.
§ Yel. 143.
‖ 2 Wilſ. 263.
¶ Barnes 175, 176, 183.

if he had been obliged to bring a freſh ejectment.* Hence, as the demiſe may be altered, there can be no doubt but that other parts leſs material may alſo be amended, the action being, as has been obſerved, invented under the control of the court, for the advancement of juſtice, and merely to try the right in queſtion.† But the court have refuſed to amend where the name James was put inſtead of John. In further ſupport of the doctrine of amendment, it has been ſaid, that an ejectment is the mere creature of the court, and open to every equitable regulation, for expediting the true juſtice of the caſe.‡

After ſerving a copy of the declaration, let the perſon who ſerved it make an affidavit of ſuch ſervice, annex to it a copy of the declaration, and the next court move for the common rule, inſert it in your docquet, and file the declaration, notice and affidavit. The rule is, that the tenant appear, file common bail, enter into the common rule, and plead in twenty days, or that judgment by default be entered againſt the caſual ejector.

If no appearance and plea in time, move for judgment *niſi* for want thereof, and put it in your docquet in the ſame manner as before: it is a four day rule, and need not be ſerved: if no cauſe ſhown before the return, prepare your judgment roll againſt the caſual ejector, ſtyle it of the term you ſign judgment, inſert warrants of attorney, a memorandum of the term the declaration is of, if by bill, imparlance to the term of judgment, the judgment itſelf with a remiſſion of the damages, get it ſigned by the judge, make out writ of poſſeſſion, take them to the office, file the roll, and the clerk ſeals the writ, upon which deliver it to the ſheriff to execute.

If

* 4 Bur. 2447. 2 Bur. 1162.
† 1 Bur. 665.
‡ 2 Bla. Rep. 940.

If the tenant mean to appear, it is uſual for his attorney to give notice, that he is concerned, and thereupon the plaintiff ſends a new copy of the declaration; and, in order to appear, the tenant muſt procure himſelf to be admitted defendant, which is done by entering into the common rule and pleading.

Enter an appearance for the defendant on your docquet, draw up the conſent rule, make two copies, ſign them as defendant's attorney, and deliver them both, with a plea of the general iſſue, to the plaintiff's attorney, who will ſign the rules on behalf of the plaintiff, and return you one: file a copy of the plea in the office, and the work is completed. If the tenant only defend for part of the premiſes, give notice of what part, with the plea.

Tenants muſt give notice to their landlords, agreeable to ſtatute 11 ſeſſ. ch. 36. of their being ſerved with declarations in ejectment, under the penalty of forfeiting to them the value of three years improved rent of the premiſes, in order that they may join with them as defendants, or defend alone.

Any perſon claiming right to the premiſes in queſtion, may, with leave of the court, be made defendant with the tenant in poſſeſſion; but the court never permits ſuch perſons to defend alone, without the tenant. Great inconveniences having, however, happened by tenants refuſing to appear to ſuch ejectments, or ſuffer their landlords to take upon them the defence thereof, by the ſame ſtatute [ſect. 30.] the court may ſuffer the landlord to make himſelf defendant, by joining with the tenant in caſe he ſhall appear; but, if the tenant refuſe to appear, judgment ſhall be ſigned againſt the caſual ejector for want thereof; and, if the landlord of any part of the land deſire to appear by himſelf, and conſent to enter into the like rule that the tenant, if he had appeared, ought to have done, then the court ſhall permit ſuch landlord

ſo

ſo to do, and order a ſtay of execution upon ſuch judgment againſt the caſual ejector, until they make further order therein.

In order to make the landlord a defendant, move the court, that he be made defendant with the tenant, if the latter appear; and, if the tenant do not appear, then that he may appear by himſelf, and enter into the common rule, and defend his title. Annex a certified copy of this rule to the conſent rule and plea, and ſerve it with them.

After the tenant has given the landlord notice of the ſervice of the declaration in ejectment upon him, and the landlord is apprehenſive that the tenant will not appear, he muſt, in order to be made defendant himſelf, offer to ſuch tenant a note of indemnity againſt all coſts and charges to which he may be put by reaſon of his becoming defendant in the action, and, if the tenant refuſe to appear, the landlord, upon an affidavit of ſuch tender being made to the tenant, and a copy thereof ſerved on the oppoſite attorney, with a notice of his intent to move the court to be made defendant in the room of the caſual ejector, will be made by the court defendant in the action.

When the landlord is made defendant, the plaintiff, at the trial, muſt prove that the defendant or his tenant was in poſſeſſion.* If judgment be ſigned againſt the caſual ejector, the landlord may move to ſet it aſide, where the defendant has not given him notice.†

If the leſſor of the plaintiff be an infant, you may apply to the court to ſtay proceedings until a guardian be appointed, and a rule will be granted, though there be a real plaintiff named:‡ proceedings have likewiſe been ſtayed till the leſſor of the plaintiff, being a non-reſident, gave ſecurity for coſts.§

* 1 Wilſ. 220.
† 4 Bur. 1997.
‡ Str. 694, 932.
§ 2 Bur. 1177.

Frequently the defendant, after entering into the common rule, wiſhes to withdraw his plea and confeſs the action, in which caſe, it is a practice to enter a *retraxit* or a *relicta verificatione*, on the roll; but it is a queſtion whether the leſſor of the plaintiff can recover coſts on the rule, or is put to a new action. Sometimes, to ſave expence, the tenant will attorn, in which caſe he muſt ſign an attornment; but attornment of tenants to ſtrangers are, by ſtatute 11 ſeſſ. ch. 36. ſect. 27. void, and the poſſeſſion of the landlord not changed, except where made purſuant to a judgment, order of a court of equity, or with the conſent of the landlord.

Where the cauſe is to be tried, give the like notice, and take the like ſteps as in common caſes. If the defendant will not appear at the trial, and confeſs leaſe, entry and ouſter, according to the rule, the practice is to call the defendant and his attorney, and upon non-appearance, or refuſal to comply with the rule, to call the plaintiff, and nonſuit him; then, at the plaintiff's inſtance, the cauſe of the nonſuit is indorſed on the *poſtea* or verdict, which intitles the plaintiff to judgment againſt the caſual ejector.*

If there be ſeveral defendants for the ſame premiſes, and ſome appear and confeſs, but others do not, the practice is to proceed againſt thoſe who do appear, and to enter a verdict for the reſt; but then the cauſe of the verdict is indorſed on the *poſtea*, which, as to the defaulters, intitles the plaintiff to judgment againſt the caſual ejector.†

If the plaintiff were nonſuited for want of confeſſing leaſe, entry and ouſter, you move for judgment thereon, and enter up judgment as if no appearance had been entered for the tenant; take the record and conſent rule to the judge, and he will tax coſts thereon; make a copy, ſerve

* Salk. 259.
† L. Raym. 729.

ſerve the defendant therewith, and demand the coſts, which, if not paid to the leſſor of the plaintiff, he may, on affidavit of the facts, move for an attachment.

If a verdict be given for the defendant, or the plaintiff be nonſuited for defect of title, the defendant muſt proceed to tax his coſts on the verdict or *poſtea*, as in other actions, and ſue out a *ca. ſa.* againſt the plaintiff; and if, upon ſhowing the writ under ſeal to the leſſor of the plaintiff, and ſerving him with a copy of the rule by conſent, with a taxed bill, the leſſor of the plaintiff do not pay them, the court, on motion and affidavit of the facts, will grant an attachment againſt him: but if the plaintiff be nonſuited, he may pay the coſts to which of the defendants he pleaſes.

But if a verdict be given for the plaintiff, he may have a *ca. ſa.* or a *fi. fa.* for the coſts, and a writ of poſſeſſion, or this writ of poſſeſſion, and either of them, in one writ.

In all caſes, where the premiſes are *untenanted*, except in the caſe to which the ſtatute extends, and mentioned afterwards, the mode of recovering poſſeſſion is according to the old common law practice, by an actual leaſe, entry and ouſter, as follows: *A*, the perſon claiming title, ſigns a letter of attorney, to empower *B* to execute a leaſe, in his name, of the premiſes in queſtion, to *C*, (or the owner of the land himſelf, without giving ſuch letter of attorney, may execute the leaſe) which is done upon the premiſes, *B* and *C* being only thereon: then *B*, after having executed ſuch leaſe, leaves *C* in poſſeſſion of the premiſes, who is turned out by *D*, to whom, while on the premiſes, *E* delivers a declaration in ejectment, and then, on affidavit of the due execution of the power and leaſe, you move for the common rule.

The declaration is the ſame as other declarations in ejectment, only, inſtead of a fictitious plaintiff and defendant, *C*, the *real* leſſee, and *D*, the *real ejector*, are

are made plaintiff and defendant. The notice at the end differs from that above, being to the defendant himſelf to appear and plead. If no plea be put in within due time, move for judgment, and enter it. Any perſon claiming title to the premiſes, may appear and enter into the common rule, though, in ſome books, it is laid down otherwiſe.

But*, in all caſes between landlords and tenants,† as often as it ſhall happen that one half year's rent ſhall be in arrear, and the landlord or leſſor hath a right by law to re-enter, for non-payment thereof, the landlord ſhall and may, without any formal demand or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſes; or, in caſe the ſame cannot be legally ſerved, or no tenant be in actual poſſeſſion of the premiſes, then he may affix the ſame upon the door of any demiſed meſſuage; or, in caſe ſuch ejectment ſhall not be for the recovery of a meſſuage, then upon ſome notorious place of the lands, &c. compriſed in ſuch declaration; and ſuch affixing ſhall be deemed legal ſervice, and ſhall ſtand in the place of a formal demand and re-entry; and, in caſe judgment be againſt the caſual ejector, or a nonſuit for not confeſſing leaſe, entry and ouſter, it ſhall be made appear to the court by affidavit, or be proved on the trial, in caſe the defendant appears, "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, countervailing the "arrears then due, and that the leſſor in ejectment had "power to re-enter," then the leſſor ſhall have judgment and execution, and, if the leſſee ſuffer it without paying the rent and arrears with full coſts, and without filing a bill in equity in ſix calendar months, he ſhall be barred from all relief other than by writ of error, and

* *Ante*, p. 259.

† Laws of N. Y. 2d ed. ch. 36. ſect. 23.

and the leſſor ſhall hold the premiſes diſcharged from the leaſe. But this is not to bar the right of a mortgagee, who is not in poſſeſſion, ſo as he pay the arrears, with coſts, in ſix calendar months.

If the leſſee file a bill in equity for relief,* he muſt bring into court, in forty days after the leſſor's anſwer, ſo much as he ſhall ſwear to be due, over and above all juſt allowances, with the coſts, there to remain till hearing, or the injunction ſhall be diſſolved.

If the tenant or leſſee tender to the leſſor or landlord,† or bring into court the rent and arrears, together with the coſts, further proceedings ſhall ceaſe; and, if the leſſee be relieved in equity, he ſhall enjoy the lands according to his leaſe, without obtaining a new one.

The true conſtruction of this act is, to take from the landlord the inconvenience of his continuing always liable to an uncertainty of poſſeſſion, from its remaining in the power of the tenant to offer him a compenſation at any time, in order to found an application for relief in equity; and to limit and confine the tenant to ſix calendar months after execution granted for his doing this, or elſe that the landlord ſhall, from thenceforth, hold the demiſed premiſes diſcharged from the leaſe.‡

The declaration is prepared as above, laying your demiſe after the rent become due; and, in order to move for judgment, make affidavit of affixing, and the facts required by the ſtatute: move as before, and, if the tenant appear and plead, all the matters in the affidavit muſt be proved on the trial.§

In proceeding by ejectment, to obtain ſatisfaction of a *mortgage*, the purpoſe is either to get into the receipt of the rents and profits, or to recover poſſeſſion.

To

* Laws of N. Y. 11 ſeſſ. ch. 36. ſect. 24.
† Ibid. ſect. 25.
‡ 1 Bur. 614.
§ Ibid.

To do the firſt, an ejectment may be brought without any notice to quit, although the leaſe be made before the mortgage; but to get into poſſeſſion, proper notice muſt be given, and the plaintiff proceeds in the uſual way. If the premiſes be vacant, let a leaſe be ſealed, and the ſame mode purſued as above deſcribed.

When the writ of poſſeſſion is awarded, and the ſheriff delivers poſſeſſion to the leſſor of the plaintiff, if the defendant ouſt him, beſides the method of regaining poſſeſſion by an *alias habere facias poſſeſſionem*, in caſe the firſt was not abſolutely returned, (which the plaintiff may deſire the ſheriff not to do, and then enter that the ſheriff did not return his writ) the leſſor, upon affidavit of the fact, may have an attachment againſt the defendant for a contempt of the proceſs of the court; but if, after being put in poſſeſſion, the leſſor of the plaintiff be ouſted by a ſtranger, his remedy is by proceeding under the ſtatute for preventing forcible entries and detainers, or bringing another ejectment; but if a ſtranger obſtruct the ſheriff in the act of delivering, he is liable to an attachment.

When judgment is obtained in ejectment, the meſne profits may be recovered by an action; and, as it is conſequential to the recovery, it may be brought by the leſſor of the plaintiff in his own name, or that of the nominal leſſee. It is ſaid,* that actions for meſne profits ſhould not be favored, as they tend to create double expence, and the plaintiff ſhould be ready at the trial of the ejectment to prove his damages. This is certainly right, in point of juſtice; but I believe there has been no inſtance of it for many years paſt.

The tenant is concluded by the judgment, and cannot controvert the title, conſequently cannot controvert the plaintiff's poſſeſſion, which is part of his title. The judgment only concludes the parties as to the ſubject matter

* Barnes 87.

matter of it; beyond the time laid, it proves nothing at all.* But, if the plaintiff, in an action for the meſne profits, be content with them, from the time of the demiſe in the ejectment until recovery of poſſeſſion, the judgment is ſuch ſufficient evidence of the length of time, that he need only prove the judgment, execution of the writ of poſſeſſion, and value. If the leſſor of the plaintiff chooſe to go for meſne profits antecedent to the day of the demiſe, he muſt alſo prove his title during the antecedent period, and the occupation of the defendant; and, in this caſe, the action muſt be in his own name.

In order to prove the leſſor of the plaintiff's title, produce the copy of the judgment in ejectment, if trial at the circuit court; or the record itſelf, if at bar, together with the attorney's bill: but, if the judgment be by default, a writ of poſſeſſion executed is neceſſary; though, it is ſaid, that the latter does not ſeem requiſite, for, if the tenant be concluded by the judgment in ejectment, he is conſequently concluded from controverting the plaintiff's poſſeſſion, which is part of his title. As to the value of the meſne profits, they muſt be proved; but, in eſtimating the value, the jury are not confined to the mere rent of the premiſes, for they may give whatever damages they think proper, though the defendant may plead the ſtatute of limitations, and by that means proteſt himſelf from all but the laſt ſix years.†

* 2 Bur. 665.
† 3 Wilſ. 121. 2 Bur. 267.

CHAPTER

CHAPTER VII.

Error.

A WRIT of error is a writ demandable of right in all civil caſes,* and iſſues out of the court of chancery. It lies where any one is aggrieved by the proceedings and judgment of any court of record, and authoriſes a ſuperior court to examine ſuch record and proceedings, and thereon to affirm or reverſe the ſame according to law.†

On proceedings from an inferior court, error muſt be brought in the ſupreme court: on proceedings in the ſupreme, error lies in the court of errors; though, for error in fact evident on the face of the proceedings of the ſupreme court, error lies in the ſame.

As to the judgments and caſes on which error lies, I have juſt mentioned, that it does to the judgments of all courts of record; it likewiſe does upon all judgments by any judge or court of record, which acts according to the courſe of the common law, though newly erected by ſtatute.‡ But error does not lie upon an order of a juriſdiction newly erected, not proceeding according to the common law,§ nor upon a decree in chancery,‖ nor upon an order by juſtices of the peace,¶ nor upon an *habeas corpus* denied,** nor upon an interlocutory judgment before the final judgment. But a writ of error may be

* Laws of N. Y. 8 ſeſſ. ch. 11. ſect. 13.
† 2 Inſt. 40.
‡ 1 Salk. 263.
§ Ibid.
‖ 1 Roll. 744, l. 44.
¶ 2 Jon. 167.
** Salk. 504. 2 Mod. Ca. 29.

be ſued out before final judgment ſigned; and, if final judgment be delayed with a view that the writ of error may be ſpent, the plaintiff may be compelled to ſign his judgment; and, if he do not, the court have ordered a writ of error to iſſue at the expence of the plaintiff in the ſuit, or of his attorney, and have ſet aſide an execution iſſued by ſurpriſe.

Error does not lie upon a judgment for part, before the whole plea is determined; as, in a ſuit againſt ſeveral, if there be judgment againſt one, error does not lie until judgment againſt all the defendants:* nor, if the judgment be for part of the demand, until judgment for the whole:† yet, if the party die, ſo that nothing more is done, error lies for the plaintiff grieved by the award, or interlocutory judgment;‡ ſo, in a ſuit againſt ſeveral upon ſeveral originals, error lies upon a judgment againſt one.§

As to the perſons who may bring error, any perſons damnified thereby in a record, or who may be ſuppoſed to be injured by it, may bring a writ of error to reverſe it, whether he be a party or not; but principal and bail cannot join in a writ of error: nor can a writ of error to reverſe a judgment be brought by any perſon who was not party or privy to the record, or who was not injured by the judgment, in order to receive advantage by the reverſal thereof.‖ If the plaintiff be nonſuited at the circuit, he may bring error upon the judgment.¶

A privy may be the heir, executor or adminiſtrator,** without ſaying how heir, &c.†† or a privy in eſtate, as

* 11 Co. 39.
† 11 Co. 39. Dyer 291.
‡ 11 Co. 41, a.
§ 11 Co. 41. 2 Rol. 126.
‖ Rol. Abr. 747. Dyer 90.
¶ Rol. Abr. 744.
** F. N. B. 21.
†† 2 Cro. 160.

by the ſtatute of 10 ſeſſ. ch. 48. ſect. 7. which enacts, that where a tenant in dower, by curteſy or for life, loſes by default the reverſioner or remainder man, his heirs or ſucceſſors may have a writ of error, as well in the lifetime of the tenant as after. But it muſt be ſuch a privy as hath benefit by the reverſal, and by him in immediate remainder.* Bail cannot have error of a judgment againſt the principal, though joined with him; and a reverſal by him who ought not to have error, may be reverſed.† If judgment be againſt two, and one only bring error, it is bad, even though the other be dead, if it do not appear; though, if it do, the ſurvivor may bring error, without being executor of the deceaſed;‡ and the writ of error muſt deſcribe the ſuit by the names of all the parties, though to the damage of thoſe only who bring error;§ but if two executors join in a writ of error, and one of them will not aſſign errors, the court will give the other time to ſummon and ſever.‖ If, in an action againſt three executors, one plead *plene adminiſtravit* generally, and there be judgment againſt him, with aſſets *in futuro*, and the other two plead *plene adminiſtravit ultra*, and a verdict be againſt them, they muſt all three join in error:¶ if only one executor appeared, and judgment were againſt all, they muſt all join in error;** but if one make default, he may be ſevered.†† Error cannot be taken out in the name of the caſual ejector.‡‡

Error

* 5 Mod. 396.
† 5 Mod. 396. 2 Cro. 138.
‡ Str. 233.
§ Ibid. 682.
‖ Ibid. 783.
¶ 1 Salk. 312.
** Mod. Ca. 40.
†† 1 Wilſ. 88.
‡‡ 2 Bur. 756. Barnes 179.

Error ought to be ſued *againſt* all the parties to the recovery, or who are privy thereto; and if any one who was a party has now nothing, yet he ſhall be made defendant in error.* In error of a judgment which concerns land, there ſhall be a *fieri facias* to the terre-tenant before he can be ouſted;† and it is now alſo the courſe of the court to have it againſt the heir;‡ ſo, in error upon a judgment for the people in an action by *qui tam*, &c. there ſhall be a *ſci. facias* againſt the informer.§

All writs of error upon judgments in the ſupreme court, muſt be brought within five years after giving judgment.‖ If a writ of error be returnable before judgment, it ſhall be quaſhed;¶ yet it may be ſued out after judgment ſigned, before entry on the roll,** and may be teſted before judgment given,†† which is indeed, the uſual courſe for preventing and ſuperſeding execution.

By ſtatute 11 ſeſſ. ch. 46. ſect. 11. in all actions real, perſonal 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 the verdict; and in perſonal actions and ejectments‡‡ by original, after iſſue joined; and, after judgment, the want of fifteen days between the teſte and return of jury proceſs and execution (except a *ca. ſa.* whereon an *exigent* is to be awarded or to make bail liable) ſhall not be alleged for error.

For ſuch miſtakes or informalities as are cured by verdict or judgment, and are conſequently not error, ſee Part

* F. N. B. 18.
† Dyer. 321. Raym. 17.
‡ 3 Mod. 274.
§ Sav. 10.
‖ Laws of N. Y. 8 ſeſſ. ch. 11. ſect. 12.
¶ 2 Str. 891.
** 1 Rol. 750, l. 25.
†† Vent. 258.
‡‡ Sect. 12.

Part I. ch. 6. p. 92. &c. Generally ſpeaking, whatever might have been pleaded in abatement, or taken advantage of by demurrer, cannot be alleged for error; though this maxim is not univerſally true.

Sect. 1. *Proceedings in Error from an Inferior Court to the Supreme Court.*

TAKE a precipe to one of the clerks in chancery, and he will make out a writ of error, returnable in the ſupreme court after judgment, and teſted the day of leaving the precipe.

Carry the writ of error to the clerk of the court where the record is, and give notice of lodging it to the attorney for the defendant in error. The uſual and ſafeſt way to prevent execution is to get the writ allowed before the time of taxing coſts, and ſerve the notice at the time of taxation. If the defendant can demand bail, it is neceſſary likewiſe, in order to make the writ operate as a *ſuperſedeas*, to put in ſuch bail in the manner after mentioned; or execution may be iſſued, though a writ of reſtitution will be awarded if the judgment be reverſed. It is held that a writ of error is a *ſuperſedeas* only from allowance* and notice thereof.†

As to bail, it is enacted by ſtatute 11 ſeſſ. ch. 3. that "no execution ſhall be ſtayed or delayed upon or by "any writ of error or *ſuperſedeas* thereupon, to be ſued "for the reverſing any judgment, given in any action "*upon any ſingle bond for debt, or upon any obligation with* "*condition for the payment of money only*, or upon any "*action of debt for rent*, or *upon any contract* ſued in any "court of record in the ſtate, unleſs ſuch perſon, in "whoſe name ſuch writ ſhall be brought, with two "ſufficient

* Barnes 376.

† Barnes 376; but ſee 1 Salk. 321. 2 Mod. Ca. 130.

" ſufficient ſureties, ſuch as the court wherein ſuch " judgment given ſhall allow of, ſhall firſt, before ſuch " ſtay made, or *ſuperſedeas* awarded, be bound unto the " party for whom any ſuch judgment is given, by re- " cognizance, to be acknowleged in the ſame court, in " double the ſum adjudged to be recovered by the ſaid " former judgment to proſecute the ſaid writ of error " with effect, and alſo to ſatisfy and pay, if the judgment " be affirmed, all and ſingular the debts, damages and " coſts, to be awarded by the delay of execution. And " further, that no execution ſhall be ſtayed, in any of " the courts aforeſaid, by any writ of error, *after any* " *verdict and judgment thereupon obtained in any perſonal* " *action*, unleſs ſuch recognizance, in manner above di- " rected, be acknowleged in the court where the judg- " ment is given. And* in writs of error to be brought " *upon judgment after verdict*, in any *writ of dower*, or " in any action of *ejectment*, no execution ſhall be " ſtayed, unleſs the plaintiff in ſuch writ of error ſhall " be bound to the plaintiff in dower or ejectment, in " ſuch reaſonable ſum as the court, to which ſuch writ " of error is directed, ſhall think fit, with condition, " that if judgment ſhall be affirmed in ſuch writ of " error, or if it be diſcontinued in default of the plaintiff, " or the plaintiff be nonſuit therein, that then ſuch " plaintiff ſhall pay ſuch coſts, damages and ſums of " money as ſhall be awarded upon or after ſuch judg- " ment affirmed, diſcontinuance, or nonſuit had. But " nothing in this act ſhall extend to any writ of error " brought by any executor or adminiſtrator, nor to any " action popular, nor to an action upon any penal " ſtatute."

Bail in error, on a judgment in debt on bond, are each bound in the ſum recovered, that being double the ſum due;† but bail is not requiſite upon a judgment in an action

* Sect. 2. † 1 Wilſ. 213.

action of debt, founded upon a prior judgment;* though it be if there were no bail in the original action.† There muſt be bail on a bottomree bond‡ on a ſecond writ of error,§ and on a bond given as a collateral ſecurity for payment of money,‖ but not on a bond for performance of covenants,¶ or on an award,** nor to indemnify.†† Nor is bail neceſſary upon a judgment in an action of aſſumpſit on a bill of exchange.‡‡

In error on a judgment after verdict, upon a *ſcire facias* againſt bail, there muſt be bail.§§

A recognizance in ejectment ought to be in the value of two years rent due, and double coſts;‖‖‖ and the defendant in ejectment may give two ſufficient ſureties if he pleaſe.

On an amended writ of error, new bail muſt be given.¶¶

Where the judgment is againſt an executor or adminiſtrator *de bonis propriis*, he muſt put in bail on error, and pay coſts if judgment affirmed; but if judgment be *de bonis teſtatoris* only, he ſhall neither put in bail nor pay coſts;*** but, in an action of debt ſuggeſting a *devaſtavit*, bail muſt be put in, if error brought.†††

In order to prevent execution, bail muſt be put in within four days after delivery of the writ of error, and

* 4 Bur. 1548. 1 Bla. Rep. 506.
† Com. Rep. 556. 2 Bla. Rep. 768.
‡ Str. 476.
§ Ibid. 527.
‖ Ibid. 959. Barnes 78.
¶ Barnes 72.
** Com. Rep. 322.
†† Ibid.
‡‡ Show. 15.
§§ 2 Bla. Rep. 1227.
‖‖‖ 4 Bur. 2501. Barnes 103.
¶¶ 2 Bla. Rep. 1067.
*** 1 Lev. 245. 1 Sid. 368. 2 Keb. 295, 371. Com. Rep. 323. 2 Cro. 350.
††† H. T. 24 Geo. 3.

and before one of the judges of the court, and is done by taking the plaintiff in error, and two ſufficient perſons to him, and the judge will take the recognizance; immediate notice of which muſt be given to the attorney for the defendant in error. Exception muſt be made within twenty days, and is done by entering it on the bail-piece, and getting a rule for better bail; a certified copy of which being ſerved, the plaintiff in error muſt put in better bail, or juſtify in four days; if in term, in open court; if in vacation, conditionally at a judge's chambers, and afterwards in court the firſt day of the next term. In caſe other bail are added, they muſt be put in within two days, and juſtify within the four.

The term in the court next after that in which the writ of error is brought, the party in whoſe favor judgment was given, muſt move the court, that the oppoſite party tranſcribe the record within eight days, or that execution iſſue upon ſuch judgment; or, before the return of the writ, the defendant may direct the clerk to make out a tranſcript of the record, which being done, he will deliver the ſame over to the judge, who makes a return, annexing thereto the tranſcript. On filing this tranſcript in the ſupreme court, it becomes poſſeſſed of the cauſe, and from thenceforth to the reverſal or affirmance of the judgment, all proceedings are in this court.

As ſoon as the record is tranſcribed, the defendant's attorney, in order to compel aſſignment of errors, muſt iſſue a writ of *ſcire facias quare executionem non*, ingroſſed on parchment, which muſt be ſigned and ſealed in the uſual way. This writ cannot be taken out till the record be tranſcribed. To this the plaintiff can anſwer nothing but aſſigning errors. The *ſcire facias* being returned *nihil*, ſue out an *alias*, and on *nihil* returned to that, or *ſcire feci* returned to the firſt, enter the common rule for judgment on your docquet, which is, "that the plaintiff in error ap-

"pear

"pear and assign errors in four days, or that the writ of "error be nonprossed;" and having entered your *scire facias* on the roll, sign judgment at the expiration thereof. The first *scire facias* may be tested the last day of the preceding term, if the record be brought in on the first day of the term, and on the first day, if brought in during the term. There must be fifteen days between the teste and return; but, if two writs, the last need not lie four days before the return with the sheriff.

If the plaintiff assign errors, they will be either general or special; and he may now, by statute 10 sess. ch. 10. sect. 8. allege diminution of the record, in error from an inferior court, which could formerly have only been done in the court of errors.

If the plaintiff allege diminution, he must move for a *certiorari* to the clerk of the inferior court, to certify the process, &c. not inserted in the record; to expedite the return of which, the defendant may have a rule to return the *certiorari* in four days. Plaintiff must then get the proceedings transcribed and returned, or the defendant may plead in *nullo est erratum*, and enter on record a *non misit*, which renders the assignment of errors of no avail, and, after this, no diminution can be alleged without leave of the court.

In order to assign errors, draw assignment, which is in the nature of a declaration, and deliver a copy to the defendant, filing another with the clerk.

The defendant pleads in *nullo est erratum*, but to errors in fact takes issue thereon immediately.

The subsequent proceedings are nearly similar to argument on demurrer. After errors are assigned, the plaintiff in error must issue out a *scire facias ad audiendum errores*, and, if returned *scire feci*, or two *nihils*, he must move the court, "that the defendant join in error in twen- "ty days, or that the plaintiff be heard *ex parte*." The

error

error book muſt be delivered to the judge, and the roll carried in as uſual.*

On affirmance, the defendant takes out a *ca. ſa.* or *fi. fa.* reciting the proceedings; but, on reverſal, the plaintiff takes out a writ for coſts.

Sect. 2. *Error from the Supreme Court to the Court of Errors.*

BY article 32 of the conſtitution, a court for the correction of errors in the ſupreme court is eſtabliſhed, conſiſting of the preſident of the ſenate, the ſenators, and chancellor. This court is more fully organized by ſtatute 8 ſeſſ. ch. 11. whereby it is enacted, that any perſon who is aggrieved by a judgment of the ſupreme court, or his repreſentatives, may bring error.

The practice is very little variant from that deſcribed above. The writ is iſſued out of the court of chancery, and muſt be left with the clerk of the ſupreme court, and notice thereof given to the defendant's attorney. The ſame rules hold with reſpect to bail as in the laſt ſection. If the writ iſſue during the ſitting of the legiſlature, it is returnable without delay, at the place where the ſenate ſits; but, if during a receſs, it is returnable at the next meeting of the ſenate, whereſoever it ſhall then be. The court ſits every Monday during the ſeſſion.

It is the buſineſs of the party proſecuting to prepare the tranſcript; but if he do not, the defendant generally directs the clerk to make it out, who does it, and carries it with the writ, to a judge, who muſt, if returnable without delay, return the writ within fifteen days, or, if at a fixed return, at ſuch return.

The judge annexes the tranſcript to the writ, and indorſes a return.

* *Ante*, p. 174, 175.

You do not iſſue a *ſcire facias quare executionem non*, but on the return of the writ, move for a rule to aſſign errors, which is made returnable on the next Monday, or in ſeven days; obtain a certified copy from the clerk, and ſerve it on the plaintiff's attorney; and, if no errors be aſſigned, a nonpros will be granted, which enter up.

If errors be aſſigned, plead as before, and thereupon give ten days notice of argument to the oppoſite party, and the like notice to the clerk; make up paper books as before.

At the time appointed, attend the court, who may call upon the juſtices of the ſupreme court for their reaſons; if a majority of the ſenate ſhould not be preſent, thoſe who attend may adjourn the cauſe till another time.

Upon judgment, either of reverſal or affirmance, the tranſcript is remitted back to the ſupreme court, in which ſuch other proceedings may be had as are agreeable to juſtice, and execution ſhall go.

The court have adopted the following rules for their regulation.

I.

That the plaintiff ſhall, after the record is brought in, ſpeedily repair to the clerk, and proſecute his writ, and ſatisfy the officers all fees juſtly due to them; and further, ſhall aſſign errors within ſeven days after the bringing in ſuch writs with the records; and if he make default, the clerk ſhall, upon the defendant's requeſt, record a nonpros, and that the court award that the plaintiff ſhall loſe his writ, and that the defendant ſhall go without day, and that the record be remitted.

II.

If the plaintiff in any writ of error ſhall allege diminution, and pray a *certiorari*, the clerk ſhall enter an award thereof accordingly, and the plaintiff may, before

in

in nullo eſt erratum is pleaded, ſue forth the writ of *certiorari* in ordinary courſe, without ſpecial petition or motion to the court for the ſame; and if he ſhall not proſecute ſuch writ, and procure it to be returned within fourteen days after his plea of diminution put in, then, unleſs he ſhall ſhow ſome cauſe to the court for the enlarging of the time for the return of ſuch writ, he ſhall loſe the benefit of the ſame, and the defendant, in the writ of error, may proceed as if no ſuch *certiorari* was awarded.

III.

When a day ſhall be appointed for hearing any writ of error argued in this court, the ſame ſhall not be altered, but upon petition; and no petition ſhall, in ſuch caſe, be received unleſs two days notice thereof be given to the adverſe party, of which notice oath ſhall be made in court.

IV.

In all caſes, upon writs of error depending, when diminution ſhall be at any time alleged, and a *certiorari* prayed and awarded before *in nullo eſt erratum* pleaded, the clerk ſhall, upon requeſt to him made, give a certificate that diminution is ſo alleged, and a *certiorari* prayed and awarded thereupon.*

V.

That in caſes not already provided for, the practice of this court ſhall be ſimilar to the practice of the court of exchequer chamber in England.

All

* In the court of errors, if the plaintiff allege diminution, and pray a *certiorari*, the defendant moves the court, that the plaintiff procure a return to be made to the *certiorari* in fourteen days; at the expiration of which time, if he do not procure ſuch return, the defendant pleads *in nullo eſt erratum*, and enters a *miſit non breve*, upon which the aſſignment of errors goes for nothing.

All writs are to run in the name of the people, and are to be teſted in that of the preſident of the ſenate for the time being.

Sect. 3. *Error tam quam.*

WHEN a *fieri facias* has been brought againſt bail, and execution awarded thereon, after judgment againſt the principal affirmed on error, as they cannot have error of the principal judgment, they bring this writ of error *tam in redditione judicii* againſt the principal *quam in adjudicatione executionis* againſt the bail, which recites the judgment againſt the principal, but alleges error in the *ſecond* judgment, and in the execution thereof, to the damage of the bail. The proceſs is the ſame as on other writs of error.

Sect. 4. *Error coram nobis.*

HITHERTO we have been treating of writs of error brought in a ſupreme court, for erroneous proceedings in point of *law* in an inferior court; in which caſes the writ is directed to the chief judge of the inferior court, and is called a writ of error *coram vobis.* But there is alſo a writ of error *coram nobis*, which is when error is brought in the ſupreme court upon proceedings originally had there; this can only be brought in the ſupreme court, it being the only one which is preſumed to be held before the people themſelves.

This writ only lies upon errors in matters of *fact*, becauſe then the judgment of the court is not impeached; but the facts muſt be of a peculiar nature, and appearing upon the face of the record, ſuch as defective proceſs, &c. for error in the determination of facts can only be reverſed by a new trial.

The

The proceſs is ſimilar to that above, till aſſignment of errors. If well aſſigned, the defendant pleads and the cauſe is tried by a jury. The record is made up as in other caſes, and either party may make it up. If found for the plaintiff, he muſt move to have the cauſe ſet down for argument, and on producing the *poſtea* or verdict, the court will give judgment. If the fact be not aſſignable for error, the defendant may plead *in nullo eſt erratum*.

CHAPTER VIII.

Habeas Corpus.

THE object of the preſent chapter is to treat of the writ of *habeas corpus*, as it is uſed in civil caſes to bring the defendant into the cuſtody of the court, or, conſequentially, to remove cauſes againſt him from inferior courts.

The writ of *habeas corpus*, in *civil* caſes, is a judicial writ, iſſued by the clerk, commanding the ſheriff, or other officer to whom it is directed, to have the body of the defendant, together with the day and cauſe of his caption and detention, before the court, on a day certain, in term time, or *immediately* before a judge in vacation, to anſwer, or ſatisfy the plaintiff; or, generally, to *do* and *receive* what the court or judge ſhall conſider of him. Hence it is, according to the ſubject, a writ of *habeas corpus ad reſpondendum*, *ad ſatisfaciendum*, or *ad faciendum et recipiendum*; though the latter is more commonly called a *habeas corpus cum cauſa*. It is grantable of common right

right at all times, whether in term or vacation, without motion in court.*

The writ of *habeas corpus cum cauſa*, emphatically ſtyled the writ of liberty,† lies for the defendant to remove himſelf, or for the plaintiff to remove him from the cuſtody of any ſheriff or officer, by whom he was arreſted, into the cuſtody of the ſheriff of the county where the court ſits; but the principal uſe of it in this ſtate, in civil caſes, is to remove a cauſe out of an inferior to the ſuperior court.

The writ, for this purpoſe, muſt be directed to the judges of the inferior courts, with their proper ſtyle and title, and is uſually made returnable in court; but, it is to be obſerved, that no perſonal action can be removed where the demand does not exceed 100l.‡ and, if iſſued, the inferior court are not bound to obey it;§ but I preſume it muſt be apparent on the proceedings.

When the *habeas corpus* is made out, it muſt, by direction of the ſtatute,‖ be taken to a judge for his allowance, who does it in this manner, "allowed this 16th day "of April, 1794, John Sloſs Hobart," or as it may happen to be, after which the clerk will ſeal it; but a precipe muſt be left.

When obtained, it muſt be delivered to the court to whom directed, at their next term, in open court, and motion muſt be thereon made, that it be read and filed, and a return entered accordingly; the clerk then reads it, and, from that moment, the inferior court have loſt their juriſdiction over the perſon of the defendant; of conſequence, they cannot proceed in the cauſe, and the

* 2 Lev. 1. 2 Mod. 306.
† Gilb. Repl. 116.
‡ Laws of N. Y. 10 ſeſſ. ch. 72. ſect. 2.
§ Ibid. ſect. 6.
‖ Ibid. ſect. 5.

the plaintiff muſt declare *de novo*.* Hence the writ of *habeas corpus* is the common method of removing cauſes from inferior courts.†

It was formerly uſual for the defendant, in an inferior court, to ſue out a writ of *habeas corpus*, and keep it in his pocket, without producing it till iſſue was joined, the jury ſworn, and the plaintiff had given his evidence, by which means the plaintiff was not only put to a conſiderable expence, but the defendant, knowing before hand what proofs he could produce, had an opportunity of oppoſing them by falſe witneſſes. To remedy this miſchief, the ſtatute 10 ſeſſ. ch. 72. ſect. 3. enacts, "that no writ of *habeas corpus*, or other writ to remove "any cauſe depending in any mayor's court, or court of "common pleas, ſhall be received or allowed by the "judges or officers thereof; but they may proceed there-"in as if no ſuch writ were ſued forth or delivered to "them, unleſs the ſame be delivered before any interlo-"cutory or other judgment in the cauſe, and before the "jury have appeared, and one of them is ſworn."

If, however, the writ be delivered in time, and iſſued out legally, it inſtantly ſuſpends the power of the inferior court, inſomuch that, if they afterwards proceed, they are liable to an attachment, and their proceedings are void, as being *coram non judice*.

In ſuch caſe, therefore, the writ ſhould be forthwith received and allowed; nor can the officer refuſe to obey it, under pretence of not being paid his *fees* in the court below, or the charges of bringing up the defendant. For the former he has a proper remedy by action, and for the latter, if not paid, the defendant may be remanded.‡

When

* Cro. Car. 261. 1 Mod. 125. T. Jon. 209. 3 Mod. 85. Skin. 244. 1 Salk. 148, 362. 6 Mod. 17[illegible].

† 1 Str. 814. 2 Bur. 1152.

‡ 1 Str. 308. 2 Str. 1262.

When the writ is received and allowed, the body of the defendant muſt be returned, with the cauſes of taking and detaining him, or the officer will be liable to an attachment. It is not ſufficient to return, that before the coming of the writ the party was bailed, for he is ſtill in cuſtody in contemplation of the law.* Even where the writ is diſallowed, for any of the cauſes before mentioned, it muſt be returned to the court, with the ſpecial matter.

The uſual way of returning the writ is by delivering it, with the return, to the party in whoſe favor it was granted.

The attorney for this perſon muſt, at the return, take it to the ſupreme court, pray that it may be read and filed, and they are then poſſeſſed of the cauſe.

On the return of the writ, if the defendant be in actual cuſtody on meſne proceſs, the court will not diſcharge him till bail be put in and perfected above, and, therefore, in ſuch caſe, the better way of gaining the defendant his liberty is to put in and perfect bail *below*, before the bringing of the *habeas corpus*. If it be returned upon the *habeas corpus*, that the defendant is condemned by judgment, he ſhall be remanded, and remain continually in priſon, without being let to bail againſt the will of the plaintiff, until ſatisfaction be made to him for the ſum adjudged.†

When the defendant is not in actual cuſtody, upon the return of the *habeas corpus* he muſt put in ſpecial bail in the court above, if called upon in the court be[illegible], in all actions whatſoever.

If the plaintiff mean to proceed in the court above, he muſt, at the return of the writ, obtain the common rule, "that the defendant put in bail to the *habeas corpus* in "twenty days, or that a *procedendo* iſſue; and that he "plead

* 1 Mod. 195. 3 Mod. 85. Carth. 59.
† Laws of N. Y. 10 ſeſſ. ch. 56. ſect. 13.

" plead in twenty days after declaration, or judgment." But the defendant cannot put in bail before the return of the writ, and, even afterwards, he is not obliged to do it unleſs called on by rule.

The bail upon a *habeas corpus* are taken on a bail-piece, ſetting forth that the defendant is delivered to bail on a *habeas corpus*, at the ſuit of the plaintiff in the plaint; in which reſpect it differs from the bail-piece upon a *capi corpus*. The bail-piece is to be annexed to the *habeas corpus* and return, and filed with the judge within the time allowed by the rule. Special bail may be put in at any time before a judge in town, or a commiſſioner in the country, and are either abſolute, or *de bene eſſe*, as upon a *capi corpus*.

The bail, in ſuch caſe, are liable to all the actions mentioned in the return of the *habeas corpus*, wherein the plaintiff or plaintiffs ſhall declare within two terms. But this muſt be underſtood of the bail upon a *habeas corpus* before declaration; for, if the plaintiff have declared, before the *habeas corpus* delivered, in one action requiring ſpecial bail, and in another not, the ſpecial bail ſhall be only as to that action which requires it. But ſpecial bail are alſo liable after declaration, though the plaintiff declare in a *different* kind of action in the court above, ſo as it be for the ſame cauſe.*

Where ſpecial bail are put in upon a *habeas corpus*, notice thereof ſhould be given, in writing, before the expiration of the rule, to the plaintiff's attorney, who is allowed twenty-eight days, after they are put in, to except to them; and if he do not except to them for inſufficiency within that time, the bail-piece ſhould be filed by the defendant's attorney, within four days next after the end of the twenty-eight days. If the bail, in an inferior court, offer to become bail in the action here, the plaintiff is,

* 1 Wilſ. 277.

in general, compellable to take them, becauſe he might, but did not except to them below.

If the plaintiff except againſt the bail, he may have a rule for a *procedendo*, unleſs theſe are perfected in eight 20 days after ſervice of the rule, and thereupon the ſame, or different bail muſt juſtify ~~as in other cases~~.

If bail be not put in and perfected in due time, a *procedendo* may be awarded, which is a writ directed to the inferior court, commanding them to proceed in the cauſe. The *procedendo* removes the ſuſpenſion created by the *habeas corpus*, and a cauſe once remanded thereby cannot afterwards be removed or ſtayed before judgment.* This writ may alſo be awarded, where it appears upon the return of the *habeas corpus*, that the court *above* cannot adminiſter the ſame juſtice to the parties as the court below.† A *procedendo* was likewiſe awarded, where, of two defendants, one only put in bail.‡

The record itſelf is never removed by a *habeas corpus*, as it is on a *certiorari*, but remains below, and the return is only an account or hiſtory of the proceedings ſtated and ſent up to the ſuperior court, to judge and determine the meaſure there; therefore, if a cauſe be removed hither by *habeas corpus*, the plaintiff here muſt begin *de novo*, and declare againſt the defendant.§

Upon a *habeas corpus* the plaintiff muſt declare, if at all, before the end of the ſecond term after putting in bail, including the term in which it was put in. If he do not declare within that time, the defendant's attorney is not bound to accept a declaration,‖ though the plaintiff cannot be nonproſſed for want of it,¶ if he have not

* Laws of N. Y. 10 ſeſſ. ch. 72. ſect. 4.
† 2 Rol. Abr. 96. Carth. 75. 2 Bur. 777. 2 Bla. Rep. 1060.
‡ 1 Str. 527.
§ 1 Salk. 352. Skin. 245. 6 Mod. 177. 1 Term. Rep. 372.
‖ 1 Str. 631. Barnes. 90.
¶ Cowp. 117. 1 Term Rep. 372.

not moved for the uſual rule, but, if this rule be obtained, he may be nonproſſed. If the action be tranſitory, the venue may be altered from that laid in the declaration below.

A *procedendo* will be granted for not pleading, rejoining, &c. in time; in other reſpects the ſuit proceeds as in common caſes.

CHAPTER IX.

Limitation—Of ſuing out Writ to ſave the Statute.

THE ſtatute is only a bar in caſe the plaintiff have not *commenced* his ſuit within the time limited. Now, the commencement of a ſuit is the ſuing out a writ againſt the defendant; if, therefore, any writ be ſued out within the period ſpecified, (although no attempt be made to ſerve the defendant therewith, or to arreſt him thereon, and no further ſteps be taken in the ſuit) ſuch proceedings ſhall be ſufficient to prevent the ſtatute of limitation from attaching.*

The proceſs may be a bill of New-York or Albany, *latitat*, *capias*, *attachment of privilege*,† or original; or, it is preſumed, any other proceſs by which an action can be commenced.

There are, however, two material things to be obſerved; 1. that the writ muſt be actually ſued out before the expiration of the limited period after the cauſe of action accrued, as it will not be allowed to operate by relation,

* Salk. 228.

† Buil. N. P. 151. Str. 736. 2 Bla. Rep. 925, 1131.

relation, *i. e.* the actual time of ſuing out the writ, and not the *teſte* will be conſidered; 2. the writ muſt be properly returned and filed, and an entry thereof made upon record.

Make out the writ in the uſual mode, and get the ſheriff to return it into the office, *non eſt inventus*, then enter the writ and return on a roll, ſtyling it of the term the writ is returnable. File the roll with the clerk as in other caſes.

When the plaintiff afterwards brings his action, if the defendant plead the ſtatute of limitation, the plaintiff may reply the ſuing out and return of the writ, and that the ſame has been continued from term to term until that time, ſetting forth ſuch continuances, which may be afterwards entered on the roll.*

CHAPTER X.

Original and Outlawry.

AN original writ is a mandatory letter, iſſued out of chancery, in the name of the people, ſealed with the great ſeal of the ſtate, and lies in *all* perſonal actions againſt every perſon not privileged as an attorney, officer, or priſoner of the court: but it is very ſeldom uſed, the neceſſity of it being ſuperſeded by the bill, *latitat* or *capias*, which are now held to be a ſufficient commencement of an action. Yet it is ſtill the only ground of proceeding againſt a corporation, or where, by reaſon of the defendant's

* Bul. N. P. 151.

dant's being abroad, or keeping out of the way, he can not be arreſted or ſerved with proceſs; and even where you do not mean to proceed to outlawry, it is attended with a conſiderable advantage, if the defendant have any diſtrainable property, ſince, if you proceed by original, or what is called a *quare clauſum fregit*, the ſummons thereon is ſufficiently ſerved by leaving it at the houſe of the defendant, and, if he do not appear then, his property may be diſtrained by degrees, and ſold to anſwer the plaintiff's demand. This is, in many reſpects, preferable to the mode pointed out by the act relative to abſent and abſconding debtors, as, by that, the property is liable to the demand of all the creditors; but, on proceeding in the way of which we are ſpeaking, it is only liable to the particular debt for which the action is brought. This practice, after having lain dormant for a conſiderable time, has been lately revived in England, and will probably be much uſed there in future.

The original writ is made out by a clerk of the court of chancery, and, as inſtructions for it, a precipe muſt be delivered him, expreſſing the cauſe of action particularly, as fully as in a declaration.

In actions of *covenant*, *debt* and *detinue*, the original writ is called a *precipe*, by which the defendant has an option given him either to do what is required, or ſhow cauſe to the contrary; but, in *aſſumpſit*, and actions for wrongs, it is called a *pone* or *ſi te fecerit ſecurum*.* In point of form, the original writ is ſpecial or general, *nominatum* or *innominatum*.† The former contains the time, place, and other circumſtances of the demand, very particularly; the latter only a general complaint, without expreſſing the particulars, as the writ of treſpaſs *quare clauſum fregit*, &c.

The

* Finch L. 257.
† 1 Bac. Abr. 29.

The original writ ſhould be directed to the ſheriff of the county where the action is brought and intended to be tried, and the venue muſt be laid as directed in ch. 6. of Part I. The defendant's addition and reſidence muſt be inſerted, or it will be error on outlawry;* and this muſt be carried on in all the ſubſequent proceedings. It muſt be teſted in the name of the chancellor, at the city of New-York, or wherever the chancery is held;† and as that court is ſuppoſed to be always open, it may be teſted in vacation as well as in term.‡ It ſhould, however, be always teſted after the cauſe of action accrued,§ and ſhould be made returnable in term time, wherever the court ſits. There muſt be fifteen days at leaſt between the *teſte* and return of an original,‖ the law requiring that time between the *ſervice* and return of it; though, if there be leſs, it will be aided by the defendant's appearing and pleading in chief.¶

The next thing to be conſidered is the *proceſs*, or means of compelling the defendant's appearance upon the original. In all perſonal actions, except treſpaſs *vi et armis*, or for injuries tending to a breach of the peace, as deceit and conſpiracy, the firſt proceeding upon an original is a *ſummons*,** or warning to appear, according to the exigency of the writ.

The defendant being ſummoned, was formerly allowed to caſt an *eſſoign*,†† or ſend an excuſe for not appearing; and, that being done, it was the plaintiff's duty to adjourn it to ſome day appointed by the court in the next term;

* Laws of N. Y. 10 ſeſſ. ch. 9. ſect. 1.
† 3 Bla. Com. 174.
‡ Sty. Rep. 402. 3 Keb. 214.
§ 2 Bur. 967.
‖ 2 Inſt. 567. Booth on Real Actions 5.
¶ 1 Salk. 63. 1 L. Raym. 671.
** Finch L. 305, 352.
†† 2 Inſt. 112, 137.

term;* if he did not, he was liable to be nonproſſed. But no eſſoign can now be allowed in any ſuit whatever.† The defendant has till four days after the return day of the original to appear, the manner of doing which is by entering his appearance with the clerk. If he make default, and the ſheriff return that he has ſummoned, the clerk of the ſupreme court iſſues an *attachment*, which is a judicial writ commanding the ſheriff to put the defendant by gages and ſafe pledges, that is, to take certain of his goods, which are forfeited if he do not appear, or to make him find perſonal pledges or ſecurities, who ſhall be amerced in caſe of his non-appearance.‡ This is the firſt and immediate proceeding upon the original in treſpaſs *vi et armis*,§ where the violence of the wrong requires a more ſpeedy remedy; and, therefore, the original writ commands the defendant to be at once attached, without any previous warning.

The ſheriff's return to the attachment is either that he has attached the defendant, or that he has nothing by which he can be attached. If the defendant, being attached, ſtill neglect to appear, the plaintiff may proceed to compel his appearance, by *diſtringas*, or diſtreſs infinite, which is a proceſs commanding the ſheriff to diſtrain the defendant, by all his lands and chattels, and to anſwer for the *iſſues* or profits of the ſame.‖ Upon the firſt *diſtringas*, the ſheriff uſually returns iſſues to the amount of 40s. and, if the defendant do not appear before or on the fourth day after the return, the plaintiff ſhould ſue out an *alias diſtringas*, and thereupon move the court to increaſe the iſſues. In general, if the debt be ſmall, the court will order iſſues to be returned to the amount of it at

* Cro. Eliz. 367.
† Laws of N. Y. 10 ſeſſ. ch. 5. ſect. 1.
‡ 3 Bla. Com. 280.
§ Finch L. 355.
‖ Finch L. 352. 2 Inſt. 453. 5 Mod. 117.

at once: but otherwiſe, on the defendant's non-appearance, the plaintiff ſhould ſue out a *pluries diſtringas*, and move the court a ſecond time, and ſo *toties quoties*, until iſſues be returned to the amount of the debt. When that is done, the plaintiff ſhould apply to the court for a ſale of the iſſues, under the ſtatute 10 ſeſſ. ch. 50. ſect. 33. which enacts, that, "the court out of which the writ "proceeds, may order the iſſues levied, from time to "time, to be ſold, and the money ariſing thereby to be "applied to pay ſuch coſts to the plaintiff, as the ſaid "court ſhall think juſt, under all the circumſtances to "order, and the ſurplus to be retained until the defendant ſhall have appeared, or other purpoſe of the writ "be anſwered."

If the ſheriff return upon the *diſtringas*, &c. that the defendant hath nothing by which he can be diſtrained, the plaintiff may have a *teſtatum diſtringas* into another county.*

The *diſtringas*, and other ſubſequent proceedings upon the original, ſtate the cauſe of action at large,† and each ſucceeding writ muſt be teſted on the fourth day after the return day of the preceding one; and there muſt be fifteen days at leaſt between the teſte and the return.

If the defendant appear upon any of theſe writs, he ſhould enter his appearance with the clerk, and the purpoſe of the writ being thus anſwered, "the iſſues (if "any have been levied) ſhall be returned, or, if ſold, "what ſhall remain of the money ariſing by ſuch ſale, "ſhall be repaid to the party diſtrained upon."‡ But the plaintiff in ſuch caſe, is intitled to his coſts, and where he had obtained rules for ſelling the iſſues upon a *diſtringas*, *alias* and *pluries*, and alſo a rule for an attachment againſt the ſheriff, but the defendant *appeared before*

* Trye Jus. Filiz. 10, 127.
† Trye 127.
‡ Laws of N. Y. 10 ſeſſ. ch. 50. ſect. 33.

fore any iſſues had actually been levied, the court ordered, that, upon payment of the coſts of iſſuing the writs, the rules ſhould be diſcharged, being of opinion that theſe coſts were not to abide the event of the ſuit, but were to be paid to the plaintiff immediately, and at all events, whether he ſhould finally ſucceed in the ſuit or not.*

This method of proceeding by ſummons and diſtreſs infinite, was the only one at common law where the injury was unaccompanied with force; but for a treſpaſs with force and arms, a *capias* might always have been had immediately on the original. The utility of this proceſs being evident, it was extended by ſeveral ancient ſtatutes, recognized by ſtatute 10 ſeſſ. ch. 9. ſect. 1. to actions of account, debt, detinue, annuity, covenant, conſpiracy, and of the caſe, and, by ſtatute 11 ſeſſ. ch. 9. ſect. 4. the like proceſs is given in actions on penal ſtatutes.

The nature of the *capias* has been before ſhown; it is only neceſſary to mention here, that, where you proceed by original, it muſt expreſs the cauſe of action fully, be teſted in term time on the fourth day after the return of the original, but not on a Sunday, or a *dies non juridicus*; and each ſucceeding writ ſhould be teſted on the fourth day after the return of the preceding one. There muſt be fifteen days between the teſte and the return, and the writ muſt be returnable in the ſame, or in the next term; for where a whole term intervenes between the teſte and return of a *capias*, it is null and void.†

If the defendant appear, it is done in the ſame manner as in other actions, and within the ſame time, ſave only that the recognizance of bail, by original, is taken in a penalty or ſum *certain*, being double the amount of

* 6 Bur. 2725.
† 2 Bla. Rep. 846.

the ſum demanded in the writ.* It is to be obſerved, that what is directed to be done on the return of any writ in common actions, is done, if by original, on the fourth day after.

The declaration, and all other ſubſequent proceedings, are governed by rules ſimilar to the proceedings before deſcribed; except that the commencement of the declaration is different, and, in entering on the roll, you do not inſert a memorandum. In account, annuity, covenant, debt, detinue and replevin, where the original is a ſummons, the declaration begins by ſtating that the defendant was *ſummoned* to anſwer; in actions on the caſe, ejectment, treſpaſs, &c. where the original is an attachment, it ſtates that he was *attached* to anſwer.†

But where the defendant is abroad, or keeps out of the way, ſo that proceſs cannot be executed upon him, the plaintiff, on the return of *non eſt inventus* to the *pluries capias*, may have a writ of *exigi facias*, and proceed to outlawry.‡

Outlawry, in civil actions, is putting a man out of the protection of the law, ſo that he is not only incapable of ſuing for the redreſs of injuries, but may be impriſoned, and formerly forfeited all his goods and chattels, and the profits of his lands; his *perſonal* chattels *immediately* upon the outlawry, and his chattels real, and the profits of his lands, when found by inquiſition.§

So penal were the conſequences of an outlawry in England, that until ſome time after the conqueſt, no man could have been outlawed, except for felony, the puniſhment whereof was death. But in Bracton's time,‖ and ſomewhat

* Trye 121, 122.

† Com. Dig. *tit.* Pl. C. 12. As the proceedings in this court are by *capias* ariſing from the original, the proper mode of commencing the declaration would be as mentioned above, and not in the uſual manner, which is, ſtrictly ſpeaking, peculiar to proceeding by bill.

‡ 3 Bla. Com. 283. § 1 Salk. 395. ‖ Bract. Lib. p. 425.

ſomewhat earlier, proceſs of outlawry was ordained to be in all actions *vi et armis*; and, ſince, by a variety of ſtatutes, (the ſame as introduced the *capias*) all re-enacted by ſtatute 10 ſeſſ. ch. 9. ſect. 1. proceſs of outlawry lies in account, debt, detinue, annuity, covenant, conſpiracy, and caſe upon a *capias* returned *non eſt inventus*.

If the defendant be a woman, the proceeding is called a *waiver*; for, as women in England were not ſworn to the law, by taking the oath of allegiance at the leet, (as men anciently were, at the age of twelve years and upwards) they could not properly be outlawed, or put out of the law, but were ſaid to be waived, that is *derelictæ*, left out or not regarded.* For the ſame reaſon, an infant cannot be outlawed under the age of twelve years.†

Outlawry is either upon *meſne* proceſs before, or upon *final* proceſs after judgment.‡ Upon *meſne* proceſs, the plaintiff cannot proceed to outlawry, unleſs the action be commenced by original:§ nor can the defendant be outlawed after judgment, unleſs the action were ſo commenced; for proceſs of outlawry only lies where there was a *capias* in the original action.‖ After judgment the plaintiff may have an *exigi facias*, and proceed to outlawry upon a *capias ad ſatisfaciendum*, without an *alias* or *pluries*.¶ No writ of proclamation is required upon an *exigent* after judgment, but only upon meſne proceſs.**

The writ of *exigi facias* is a judicial writ, iſſued by the clerk, and directed to the ſheriff of the county where the action is laid,†† commanding him to cauſe the defendant

* Lit. ſect. 186. Co. Lit. 1226. Trye 66.
† Co. Lit. 128. a.
‡ Trye 77. § 1 Sid. 159.
‖ Leon. 329.
¶ Trye 77, 124.
** Cro. Jac. 577.
†† Fitz. Abr. *tit.* Exigent 26. Bro. Abr. *tit.* Exigent and Capias 19. Dyer 195. but ſee 3 Bac. Abr. 769.

defendant to be required, from county court to county court, that is, at five ſucceſſive county courts,* until he be outlawed, if he do not appear, and if he do appear, to take him,† &c. This writ muſt be teſted on the fourth day after the return of the *pluries capias* before judgment, or on the fourth day after the return of the *capias* after judgment; and, if there be not five county courts, between the teſte and return of it, there iſſues an *exigent de novo*, grounded upon the ſheriff's return, to the former writ, with a clauſe (whence it is called an *allocatur exigent*) directing the ſheriff to allow the ſeveral county courts, at which the defendant has already been required.‡

For the purpoſe of demanding perſons upon *exigents*, and pronouncing outlawries, the ſheriffs are, either in perſon or by deputy, to hold a *county court*, on the firſt and third Mondays in every month, at the court-houſe of their reſpective counties; and it ſhall not be neceſſary for the coroner to attend, the judgment of the ſheriff or his deputy being ſufficient.§

In addition to the *exigent*, a writ of *proclamation* is directed by the ſtatute 10 ſeſſ. ch. 9. ſect. 7. which requires it to be directed to the ſheriff of the county of which the defendant is called or deſcribed in the original, for there he was ſuppoſed to dwell; and if he did not, in fact, dwell there, he might have avoided the outlawry for want of a proper addition.‖ The ſtatute enacts, that "in every action perſonal, wherein any "writ of *exigent* ſhall be awarded, a writ of proclama-"tion ſhall be awarded, and made out of the ſame "court, having day of teſte and return, as the ſaid "writ

* Plowd. 376.
† Trye 112.
‡ Trye 114. Raſt. Ent. 189, 359.
§ Laws of N. Y. 10 ſeſſ. ch. 9. ſect. 2.
‖ Dyer 214.

" writ of *exigent* ſhall have, directed and delivered of
" record to the ſheriff of the county where the defen-
" dant, at the time of the *exigent* ſo awarded, ſhall be
" dwelling, which writ of proclamation ſhall contain
" the effect of the ſame action. And the ſheriff of the
" county, unto whom ſuch writ ſhall be directed, ſhall
" make or cauſe to be made three proclamations, *one* in
" his open county court; *another* at the general ſeſſions
" of the peace, in thoſe parts where the defendant, at
" the time of the *exigent* awarded, ſhall be dwelling;
" and the *third* one month at the leaſt before the fifth
" demand, by virtue of the ſaid writ of *exigent*, at or
" near to the moſt uſual door of the church of the town
" or place where the defendant ſhall be ſo dwelling;
" and, if there be more than one church in ſuch town,
" then at or near the moſt uſual door of the church
" neareſt the defendant's dwelling; and, if there be no
" church in ſuch town, then at or near the moſt uſual
" door of the church in the next town neareſt the de-
" fendant's dwelling; and upon a Sunday immediately
" after divine ſervice and ſermon, if any there be: and
" if any ſuch defendant ſhall, at the time of awarding
" the *exigent*, reſide out of the ſtate, then ſuch writ of
" proclamation ſhall be directed to and executed by the
" ſheriff to whom the *exigent* ſhall be directed; and
" in ſuch caſe, the writ of proclamation ſhall be publiſhed
" in one or more of the newſpapers, to be printed in
" the city of New-York, for twelve ſeveral weeks before
" the return of the *exigent*; and that all outlawries had
" and pronounced, and no writs of proclamations award-
" ed and returned, according to the form of this ſtatute,
" ſhall be utterly void and of none effect, and may be
" avoided, by averment, without ſuing out any writ of
" error."

Upon the defendant's being put in *exigent*, he is either taken by the ſheriff, appears voluntarily, or makes

default.

default. If he be taken, he either remains in cuſtody of the ſheriff, or gives bail, &c. as upon a common arreſt. Formerly, if the defendant had appeared voluntarily at any time before the return of the *exigent*, he might have obtained a writ of *ſuperſedeas* from the clerk, on entering a common appearance of the term in which the *exigent* iſſued,* and he may ſtill do ſo, where the action does not require ſpecial bail; and the reaſon given for it is, becauſe he never was in cuſtody. But, upon a queſtion agitated ſome years ago, whether in a caſe originally requiring ſpecial bail, if the defendant ſtand out to an *exigent* (*outlawry* it is ſaid erroneouſly in the report) he can come in and appear to the *exigent*, without putting in ſpecial bail; it was ruled by the court that there ought to be ſpecial bail. "It would be very "unreaſonable," they ſaid, "that the defendant ſhould "gain an advantage, by ſtanding out till proceſs of "outlawry. He certainly ought not to be in a better "condition, than if he had appeared at firſt." Accordingly the direction was, that the *ſuperſedeas* ſhould not iſſue till the defendant had put in ſpecial bail.†

If the defendant be neither arreſted, nor appear, but make default, at five ſucceſſive county courts, he is outlawed, if a man; or, if a woman, ſhe is waived by the judgment of the ſheriff or his deputy;‡ and this judgment being returned by the ſheriff, the plaintiff may proceed in the manner pointed out by the ſtatute; which ſeems much more eligible, and indeed ſuperſedes the old mode of proceeding by iſſuing a *capias utlagatum*.

By ſtatute of 10 ſeſſ. ch. 9. ſect. 10. in caſes of outlawry before judgment in a perſonal action, the plaintiff may ſuggeſt his cauſe of action upon the roll of the *exigent* after the return thereof, upon which a writ ſhall be iſſued to the ſheriff of the county where the action is brought,

* Trye in Pref. 67, 68. Gilb. C. P. 19, 20. Fort. 39.
† 3 Bur. 1920. ‡ Laws of N. Y. 10 ſeſſ. ch. 9. ſect. 2.

brought, to ſummon a jury to appear, if the action be in the ſupreme court, before the juſtices thereof, at the next circuit court to be held in that county, to inquire into the truth of the matters charged by the plaintiff, and to aſſeſs his damages. And it ſhall be commanded, in the ſame writ, to the juſtices of the circuit court, to make return of the writ at the time therein mentioned to the ſupreme court; and, upon the return thereof, execution ſhall be awarded for the ſum found with coſts, both on the outlawry and inquiry. Upon the execution of ſuch writ, the plaintiff ſhall prove his cauſe of action and debt or damages, in the ſame manner as if the defendant had appeared and traverſed the ſame.

By the ſame ſtatute,* it is enacted, that, upon payment of the ſum ſo found and coſts, or, if the outlawry ſhall be had after judgment, upon payment of the debt or damages and coſts adjudged, or upon the ſame being levied by execution, or brought into the court by the defendant, ſuch outlawry and judgment ſhall be conſidered as ſatisfied; and an entry ſhall, in ſuch caſe, be made on the roll of the *exigent*, that the debt, or damages and coſts are levied, or brought into court, and that the defendant, as to the outlawry, or judgment and outlawry, and all execution thereupon, go without day.

This ſtatute has made conſiderable alteration in the ancient law relative to outlawries, in giving execution to the plaintiff for his debt on return of the *exigent*, ſince he may thereby obtain ſatisfaction immediately, and not, as in the Engliſh practice, mediately through government. If the *capias utlagatum* be not utterly aboliſhed, it is certainly rendered uſeleſs, and none will have recourſe to it; but I am inclined to think it cannot be iſſued in this ſtate, for the ſtatute of 10 ſeſſ. ch. 9. ſect. 11. expreſſly declares, "that no outlawry in a perſonal "action,

* Sect. 1.

" action, ſhall work any diſability or forfeiture whatſo-
" ever, in favor of any other perſon than the plaintiff at
" whoſe ſuit it was had." As then, forfeiture to the ſtate is aboliſhed, the *capias utlagatum*, which iſſues on the ſuppoſition of that forfeiture, muſt be virtually aboliſhed; and, therefore, it is not neceſſary to mention the old law upon the ſubject.

Having thus ſhown the conſequences of an outlawry, I ſhall proceed to conſider the mode of reverſing it, of which there are two ways; 1. by writ of error *coram nobis*: 2. by motion founded on a plea, averment, or ſuggeſtion of ſome matter apparent, as in reſpect of a *ſuperſedeas*, omiſſion of proceſs, variance, or other matter apparent on the record. But for any matter of fact, as death, impriſonment beyond ſea at the time of the *exigent* awarded,* &c. he is driven to his writ of error. It ſeems, however, diſcretionary in the court to relieve by motion, or put the parties to a writ of error; and, of late years, they have gone further than heretofore upon motion, the more effectually to expedite juſtice, ſave expence, and preſerve the credit and character of the defendant.

At common law, the party outlawed muſt have appeared in perſon, in order to reverſe the outlawry, and could not have appeared by *attorney*.† But by ſtatute 10 ſeſſ. ch. 9. ſect. 9. " no perſon outlawed for any " cauſe, matter, or thing whatſoever, other than for " treaſon or felony, ſhall be compelled to come or " appear in *perſon* to reverſe ſuch outlawry, but ſhall or " may appear by *attorney*, and reverſe the ſame, with- " out bail, in all caſes, *except where ſpecial bail ſhall be* " *ordered by the court*."

Before reverſal of any outlawry be had, by plea or otherwiſe, and before allowance of any writ of error thereon,

* 2 Str. 1178. 1 L. Ray. 349. Carth. 459.
† Cro. Jac. 362. 2 Salk. 496.

thereon, the ſame ſtatute* requires, "that the defen-
"dant in the original action ſhall put in bail, if bail
"were required in ſuch original action, not only to
"appear and anſwer to the plaintiff in a new action to
"be commenced for the cauſe mentioned in the firſt
"action, but alſo to ſatisfy the condemnation, if the
"plaintiff ſhall begin ſuch ſuit before the end of *two*
"*terms* next after allowing the writ of error, or other-
"wiſe avoiding the ſaid outlawry." The reaſon of requiring bail to anſwer in the new action ſeems to be, that the proceſs is determined by the outlawry, and conſequently the plaintiff cannot declare upon it, but muſt bring a new action.†

On viewing the two laſt recited ſections of the ſtatute, there appears to be an evident contradiction between them; one ſaying that the defendant may appear without bail, and the other requiring it in actions in which bail is demandable in the firſt inſtance. It may probably ariſe from the original ſtatute, from which the laſt is copied, being limited to a reverſal for want of proclamations, and having been tranſcribed generally, referring to all caſes. Be this as it may, the ſettled practice appears to be, that bail and common appearances ſhall be governed by the rules on a common arreſt. Where ſpecial bail is required, it need not be put in before the allowance of the writ of error, but it is well enough if put in at any time before the reverſal.‡ The recognizance, in ſuch caſe, is uſually taken in the common form;§ and, by a late determination,‖ the bail may render the defendant, and are not at all events anſwerable for the debt.

* Sect. 8.
† Cro. Eliz. 707. but ſee March 9
‡ 1 L. Raym. 605. 2 Str. 951. 2 Barnard. 298.
§ But ſee 12 Mod. 545, and 2 Salk. 496.
‖ Impey 456.

In general, an outlawry can only be reverſed upon payment of *coſts*. But if the proceſs have been abuſed, and made ſubſervient to the purpoſe of oppreſſion, as where a man has been outlawed, who was already in priſon at the plaintiff's ſuit,* or being at large did not abſcond, but appeared publicly, and might have been arreſted or ſerved with proceſs,† the court, on motion, will order the plaintiff to reverſe the outlawry at his own expence.

CHAPTER XI.

Partition.

PARTITION is the remedy which co-parceners, joint-tenants, or tenants in common have to compel each other to *divide* the lands ſo jointly held, in order to hold the ſame in ſeveralty; and may be done either by commiſſioners or by writ.

Partition may be made by commiſſioners in the manner directed by the ſtatute of 8 ſeſſ. ch. 39.

The proceedings on the writ of partition are regulated by ſtatute 11 ſeſſ. ch. 8. which directs, that joint-tenants and tenants in common of eſtates of inheritance, ſhall be compelled to make partition by writ, as co-parceners at the common law.

The proceſs is an original writ, made out by one of the clerks of the court of chancery; upon this a writ of ſummons

* 2 Vent. 46. 2 Salk. 495. Barnes 321.
† T. Jon. 211. Comb. 19. 12 Mod. 413.

ſummons iſſues out of the ſupreme court, which is delivered to the ſheriff, who will thereupon ſummon the tenants. If they do not appear on the fourth day after the return of the writ of partition, get affidavit of the ſervice of the writ from the ſheriff. The affidavit muſt ſtate due notice of the writ to the tenant or tenants to the action, and a copy thereof be left with the tenant or occupier, or, if they cannot be found with the wife, ſon or daughter (being of the age of twenty-one or upwards) of the tenant, or with the tenant in actual poſſeſſion, (unleſs ſuch tenant be demandant) at leaſt forty days before the return of the *pone* or attachment. Upon this affidavit, ſue out a *pone* or attachment, which muſt be teſted on the fourth day after the return of the writ of partition, having fifteen days between the teſte and return. This muſt be ſerved in the ſame manner as the ſummons.

If the tenant do not, within fifteen days after the return of the writ of *pone* or attachment, cauſe an *appearance* to be entered in the court where the writ was returnable, the demandant may enter his declaration; and the court will proceed to examine the demandant's title, and quantity of his part and purpart; and according as they find his right part and purpart to be, they will for ſo much give judgment by default, and award a writ to make partition, whereby ſuch proportion, part and purpart ſhall be ſet out ſeverally; which writ being executed (after eight days notice to the occupier or tenant of the premiſes) and returned, final judgment ſhall be thereupon entered, and all perſons concluded thereby.

If the tenant appear, the demandant declares: to the declaration the tenant pleads; and the parties, being at iſſue, proceed to trial as in other caſes. But, by the ſame ſtatute,* no plea in abatement can be admitted; and indeed the only plea in bar ſeems to be *non tenent inſimul*, every

* Sect. 4.

every other being tantamount thereto. The party may confeſs the action, and conſent that partition may be made.

There are two judgments after confeſſion of the action or verdict for demandant: the firſt judgment is *quod partitio fiat*, upon which a writ *de partitione facienda* goes to the ſheriff for him to make *partition*; this being done either by the ſheriff or under-ſheriff, the ſheriff makes his return accordingly. Then, upon the writ *de partitione facienda*, final judgment is entered *quod partitio firma & ſtabilis in perpetuum teneatur*.

Partition is a *real* action, and no damages are recovered above 5l.

CHAPTER XII.

Qui tam *actions*.

WHERE the ſtatute gives a penalty, *half* to the ſtate or to the poor, and *half* to the perſon who ſues, it is called a *qui tam* action, becauſe the plaintiff proſecutes *as well for the ſtate, or the poor, as for himſelf, qui tam pro domino rege quam pro ſe ipſo*; but where the *whole* of the penalty goes to the perſon ſuing, it is more properly a *popular* action, though *both* may be called *popular*.

The proceedings in a *qui tam* ſuit differ in ſome reſpects from thoſe in other caſes, in conſequence of the ſtatute.

By

By ſtatute 11 ſeſſ. ch. 9. ſect. 1. it is enacted, that informers on penal ſtatutes ſhall commence their ſuits in perſon, and purſue the ſame in perſon or by attorney: and that upon every proceſs ſhall be indorſed as well the name of the party purſuing, as the title of the ſtatute upon which the action is grounded; and every clerk iſſuing proceſs contrary to the meaning of the act, ſhall forfeit 3l. It has been adjudged upon this branch, that the want of an indorſement of the title of the ſtatute on the proceſs is fatal, and can be taken advantage of by the defendant, on a motion to ſet aſide the proceedings, even after iſſue joined, and that it cannot be cured by filing a right plaint.*

It is provided, that the like proceſs upon any penal ſtatute ſhall be had and awarded to all intents and purpoſes, as in an action of treſpaſs with force and arms at the common law.† The ambiguous wording of this clauſe has given riſe to a ſuppoſition, that it was meant to prohibit holding the defendant to bail, in an action on a penal ſtatute; becauſe, you could not demand bail in actions of treſpaſs *vi et armis* at the common law. This being a point of importance, and though urged in argument (on a motion for ſetting aſide the proceedings on an action with a *quod reddat*, in which the defendant was held to bail,‡) yet the court having giving no opinion on this ground, it may ſtill be conſidered as open to conſideration. A few words, therefore, on the ſubject, will not be deemed impertinent. Let us recur to the ancient law, and by tracing it accurately, we ſhall find a ſufficient anſwer to this contended doctrine. The humanity of the old Engliſh law, and the ſyſtem which prevailed in early ages, was utterly inconſiſtent with the

impriſonment

* N. Y. Mayor's Court, Birdſall *qui tam*, &c. v. Affleck; and the ſame v. Ryan and Childs.

† Laws of N. Y. 11 ſeſſ. ch. 9. ſect. 5.

‡ Birdſall *qui tam*, &c. v. Affleck, N. Y. Mayor's Court.

impriſonment of a debtor's perſon; and accordingly, in no inſtance of a mere wrong, unaccompanied with force, could the body of a defendant be attached; the proceedings in ſuch caſe being a mere ſummons. I need not ſay, what is obvious, that there cannot be bail without an arreſt. As the ſtate of politics changed, with the introduction and enlargement of commerce, it was found to be highly neceſſary for the preſervation of credit, that the plaintiff ſhould have a lien on the body of the defendant, for numerous were the loſſes which aroſe from unavoidably truſting indigent perſons. The neceſſity of this ſuggeſted to the practitioners of the times, (always fertile in expedients, as may be ſeen from hiſtory) to adopt the proceſs then in uſe, to the attainment of this *deſideratum*. At all times, in an injury accompanied with force, the common law, not willing to ſanction enormity, permitted the defendant to be arreſted on the *capias*;* and, in conſequence of that arreſt, the ſheriff was allowed to take bail for the defendant's appearance to anſwer the complaint. The utility of this ſecurity from the defendant ſoon brought up the practice, in actions where there was no real force, to arreſt him on a mere ſuggeſtion of force in the *capias*, and afterwards, by the connivance of the court, the plaintiff might declare in whatever action he thought proper. Hence it appears, that actions of treſpaſs with *force and arms at the common law*, were the only actions in which a defendant could have been corporally arreſted; in all others he muſt have been ſummoned. The admiſſion of the defendant to bail appears to be a natural conſequence of this arreſt; for, before the ſtatute of 23 H. 6. ch. 10. ſheriffs *might*, if they pleaſed, have taken bail on meſne proceſs, and by that ſtatute they were *compelled* to do it. The legiſlature, ſeeing the beneficial effects of this regulation, ſanctioned the practice by divers laws, and expreſſly

* 3 Rep. 12.

expreſſly allowed the *capias* in actions of account,* debt and detinue,† and on the caſe;‡ and the ſtatute of this ſtate recogniſing theſe laws, declares,§ "that in all ac- "tions of account, debt, detinue, annuity, covenant, "conſpiracy, and of the caſe, &c. *the like proceſs may be* "*had and uſed as in actions of treſpaſs done with force and* "*arms*;" and goes on to give proceſs of outlawry. By comparing this clauſe with the one in queſtion, we find them ſo exactly ſimilar in words, that it would be highly abſurd to ſay, that the meaning of one was not the meaning of the other. This ſtatute of 10 ſeſſ. is clearly meant to give the *capias* in the actions to which it extends; for, by comparing it with the Britiſh ſtatute on which it is founded, and with the deductions and explanation of every author who has written on the ſubject, no other idea can poſſibly be attached to the clauſe. If it mean to prohibit holding the defendant to bail in actions of debt, detinue, caſe, &c. why does the preſent practice fly in the face of the ſtatute, and demand bail of the defendant in thoſe actions? Surely if this be the intent of the ſtatute, it reflects diſgrace on the practitioners, ſince all muſt be ſo ignorant as not to underſtand the laws of their country. But we will not ſuppoſe this inconſiſtency; we will rationally infer, that the clauſe by no means prohibits what it was contended to prohibit; that inſtead of denying the plaintiff's right to demand bail for the defendant's appearance, it virtually allows it. Whence does this proceed? from the words, *giving* "*the like proceſs as in actions of treſpaſs with force and arms.*" what then does the clauſe of the ſtatute regulating penal actions ſay? "*that the like proceſs ſhall be had as in actions* "*of treſpaſs with force and arms.*" The meaning muſt be

* 52 H. 3. ch. 23. St. Weſtm. 2. 13 Ed. 1. ch. 11.
† 25 Ed. 3. ch. 17.
‡ 19 H. 7. ch. 9.
§ Laws of N. Y. 10 ſeſſ. ch. 9. ſect. 1.

be alike; the one gives the *capias*, ſo muſt the other, and the effect of a *capias* is an arreſt with the conſequence of bail. It is remarkable, that, though the ſuperior courts in England have determined that bail is not demandable in penal actions; yet theſe determinations are founded upon the common law, without recurring to a ſtatute from which the clauſe we are examining is apparently copied.* This ſhows their opinion, negatively indeed, that the ſtatute does not prohibit bail in this ſpecies of action.

As a further proof that the ſtatute of 11 ſeſſ. does not, in this ſection, contemplate a prohibition of bail, it expreſſly provides, in the next ſection, that "*citizens* of "this ſtate, or of the United States, ſued in the *ſupreme* "*court or exchequer*, upon any penal law, where ſuch *per*-"*ſon is bailable by law*, ſhall not be urged to put in bail." This part of the ſtatute affords of itſelf a complete anſwer to the propoſition, that the other clauſe does not relate to bail. If the other clauſe were general and concluſive, where was the neceſſity of enacting this? if no perſon, in any inſtance, could be held to bail in a ſuit on a penal law, was it of any uſe to ſay, that *particular* perſons, in *particular* courts, ſhould not be held to bail? One is a mere example of the other, and perfectly uſeleſs to enact. But I am perſuaded the ſtatute is much better reconciled to itſelf, by rejecting the explanation of the 5th ſection. When the ſtatute cautiouſly ſays, that *citizens* may appear without bail, the natural inference is, that foreigners muſt put in ſureties to anſwer the ſuit, otherwiſe it would have ſaid *perſons*. The law likewiſe limits this proviſion to the ſupreme court, and that of exchequer; as to other courts, not a ſingle word is ſaid.

From

* 21 Jac. ch. 4. This ſtatute means to give the county or *vicontiel* courts (in which actions of treſpaſs were cognizable) concurrent juriſdiction with the court of king's bench in penal actions.

From the practice in inferior courts, bail may be demanded in almoſt every caſe; and, from their limited juriſdictions, it is highly neceſſary that it ſhould be ſo. But the ſtatute goes farther, it ſays, "*where perſons ſued* "*upon any penal law are* BAILABLE BY LAW." This admits that there are ſome *caſes* on penal ſtatutes *bailable*, which overturns the pretended conſtruction of the 5th clauſe; for, if juſt at all, it muſt be univerſally ſo; but this ſhows that it is not.

Since we have ſaid ſo much about what is not the meaning of the ſtatute, it may probably be aſked, what is its meaning? This may be gathered, as all juſt explanations ought, from its words and its ſpirit. We find that it was not the practice to iſſue a *capias* in an action of debt; nor could a *capias* be iſſued in this inſtance, till authoriſed by ſtatute. To clear up any doubt on the point, whether an action on any penal ſtatute was ſuch an action of debt as was meant by the act of 10 ſeſſ. ch. 9. this clauſe was probably inſerted, and can evidently mean no farther than to extend the *capias* to this ſpecies of action. From the *capias* alone, and on no other proceſs, can the plaintiff proceed to outlawry; for, at the common law, proceſs of outlawry was only in writs, which were ſuppoſed *vi et armis*.* Unleſs, therefore, the *capias* could be uſed againſt a defendant in this inſtance, he could not be outlawed, which ſeems a ſufficient reaſon for enacting this clauſe.† This is further confirmed by the words of the ſtatute; for, by conſidering them attentively, they appear to be *remedial*, and not *directory*. The words are not negative; they do not ſay that no other proceſs may be had; but affirmatively, that the proceſs there mentioned may be had, without excluding the

* 35 H. 6. 6 b. Bro. *tit.* Proceſs pl. 16. Bro. *tit.* Exigent pl. 51. 22 Ed. 4. 11. Co. Lit. 128 b.

† 4 Inſt. 172. St. 21 Jac. ch. 4.

uſe of the uſual proceſs before the ſtatute. But ſufficient has been ſaid on this point.

In actions on penal ſtatutes, the defendants may plead the general iſſue, and give the ſpecial matter in evidence.* In other reſpects the proceedings are the ſame as in common ſuits, except that no jury ſhall be compelled to appear in the ſupreme court on the trial for any offence committed above thirty miles from the place where the court ſits, except where the attorney-general, for ſome reaſonable cauſe, obtains leave for a trial at bar, which requeſt ſhall be noted on the *diſtringas*.†

Qui tam actions cannot be compounded, until after anſwer made in the ſuit, and then, not without leave of the court, on pain of forfeiting 40l.‡ Leave to compound is to be obtained upon motion, for which purpoſe draw up an affidavit of the ſtate of the facts, the amount of the penalty, and the terms upon which the parties have agreed to compound. Of this compoſition the ſociety muſt be immediately paid to the treaſurer of the ſtate.

Where a perſon was conſcious of having offended againſt any penal ſtatute, and was apprehenſive of being ſued for the penalty, it was not unuſual for him to procure ſome friend to commence a ſuit againſt him, in order to foreſtal other actions; but to prevent, in a great meaſure, this practice, the ſame ſtatute enacts,§ that no recovery, otherwiſe than by verdict, obtained by colluſion, in an action popular, ſhall be a bar to any other action proſecuted *bona fide*; ſo that a judgment on *verdict* muſt be obtained to render ſuch *amicable* ſuit effectual.

* Laws of N. Y. 11 ſeſſ. ch. 9. ſect. 3.
† Ibid. ſect. 6.
‡ Ibid. ſect. 8 and 9.
§ Ibid. ſect. 7.

CHAPTER

CHAPTER XIII.

Replevin.

REPLEVIN is a remedy grounded upon the taking and wrongfully detaining the beaſts, or goods or chattels of any perſon, uſually called a diſtreſs, and gives him back the poſſeſſion, on ſecurity to proſecute his ſuit, and alſo to return the property if judgment ſhould be awarded againſt him.

Any perſon, therefore, whoſe goods are diſtrained, may have recourſe to replevin; but, if the diſtreſs were for rent, in order to prevent a ſale, they muſt be replevied within five days after notice of ſuch diſtreſs;* in all other caſes it may be done at any time within ſix years, as, at the common law, a diſtreſs is merely a pledge, and cannot be ſold or diſpoſed of by the diſtrainor. But replevin does not lie in caſe of diſtreſs for any tax, aſſeſſment, or fine levied, in purſuance of any law of the ſtate; and perſons ſuing out replevin, in ſuch caſe, are liable to a penalty of 50l. with coſts.†

It is to be obſerved, that, if the goods of ſeveral be taken, they cannot join in replevin, but each muſt have a ſeveral writ or plaint:‡ if the cattle of a *feme ſole* be taken, and ſhe afterwards intermarry, the *huſband alone* may have replevin;§ and the like where rent is due to the huſband and wife.‖

Replevin

* Laws of N. Y. 11 ſeſſ. ch. 39. ſect. 5.
† Ibid. ch. 5. ſect. 12.
‡ Co. Lit. 1456.
§ Bull. N. P. 53.
‖ Cro. Jac. 442.

Replevin may be either by writ or plaint, but the latter is commonly uſed. The form of both writ and plaint is preſcribed by the ſtatute,* and the plaint cannot now be by word of mouth,† but is expreſſly required to be in writing.‡

The writ iſſues out of chancery, returnable either in the ſupreme court, or common pleas of the county in which the diſtreſs was made, and is iſſued by one of the chancery clerks: upon being carried to the ſheriff, he is bound, before replevin, to take of the plaintiff ſufficient ſecurity to proſecute the ſuit, and to return the beaſts, goods or chattels, if return thereof be adjudged: if the ſheriff take ſecurity otherwiſe, or neglect to take any, he muſt anſwer for the price or value of the beaſts, goods or chattels; and the diſtrainor may have his recovery by writ, that the ſheriff ſhall reſtore to him ſo many beaſts, goods or chattels.§ If the diſtreſs were for rent, "the ſheriff ſhall take, in his own name, "from the plaintiff and two ſureties, a bond in double "the value of the beaſts, goods or chattels diſtrained, "(ſuch value to be aſcertained by the oath of one or "more witneſſes, not intereſted, and which oath ſuch "ſheriff is authoriſed to adminiſter) conditioned for "proſecuting the ſuit with effect, and without delay, "and for returning the beaſts, or goods and chattels, in "caſe a return ſhall be awarded, before any deliverance "be made of the diſtreſs."‖

This ſecurity being given, the ſheriff muſt then "cauſe the beaſts, goods or chattels to be replevied and "delivered, without let or gainſaying of the perſon who "took them, whether they were taken within liberties

"or

* Laws of N. Y. 11 ſeſſ. ch. 5.
† 2 Inſt. 139.
‡ Laws of N. Y. 11 ſeſſ. ch. 5. ſect. 1.
§ Ibid. ſect. 4.
‖ Ibid. ſect. 8.

" or without, and ſhall ſummon the perſon who took " them to appear at the return of the writ." *

" If any perſon ſhall take the beaſts, or goods or " chattels of another, and drive, and convey, and put " them into any houſe or place of ſtrength, and the per- " ſon from whom the ſame ſhall be taken ſue for a " replevin thereof, either by writ or plaint, the ſheriff " ſhall ſolemnly demand deliverance thereof, at the " houſe or place where the ſame are detained; and if " neither the taker, nor any perſon on behalf of ſuch " taker, ſhall, upon demand, deliver the ſame, or if no " perſon ſhall come upon ſuch demand to deliver the " ſame, the ſheriff ſhall take the power of his county, " and break open ſuch houſe or place of ſtrength, and " make replevin according to the writ or plaint." †

To prevent driving beaſts out of the county, or impounding property in different places, the ſtatute ‡ likewiſe enacts, " that no diſtreſs of beaſts ſhall be " driven out of the town, manor, diſtrict, or precinct " where ſuch diſtreſs is, or ſhall be taken, except that " it be to a *pound overt* within the ſame county, not " above *three* miles diſtant from the place where the " ſaid diſtreſs ſhall be taken and that no beaſts, or " goods or chattels diſtrained, or taken by way of " diſtreſs, for any cauſe whatſoever at one time, ſhall " be impounded in ſeveral places, whereby the owner " or owners of ſuch diſtreſs ſhall be conſtrained to ſue " ſeveral replevins for the delivery of the ſaid diſtreſs " ſo taken at one time, upon pain, that every perſon " offending therein ſhall, for every ſuch offence, forfeit " to the party grieved 10l. and reaſonable damages."

Where the goods diſtrained have been eloigned, ſo that the ſheriff cannot get at them to make replevin, the

* Laws of N. Y. 11 ſeſſ. ch. 5. ſect. 1.
† Ibid. ſect. 3.
‡ Ibid. ſect 7.

the plaintiff may bring this action in the *detinet*, and, after avowry, pray that the defendant gage deliverance;* or he may, upon a return of an *elongavit* to a *pluries* writ of replevin, have a writ, called a *capias in withernam*, commanding the ſheriff to take the beaſts, goods or chattels of the defendant.

If the defendant, or poſſeſſor of the beaſts, goods or chattels, claim a property in them, and give due notice thereof to the ſheriff, either to himſelf, his under-ſheriff, or bailiff, he muſt not make deliverance, nor diſpoſſeſs ſuch defendant before the claim of property is inquired into, under penalty of 100l. beſides being anſwerable to the defendant for the treſpaſs. If the proceeding be by writ, the ſheriff muſt make return of the claim, and the ſuit proceeds in the court where it is returnable, and there the property is to be finally tried.

As the practice by writ is productive of great delay, that by plaint is found more eligible. This is purſued by drawing out the plaint in proper form, and going with proper ſureties to the ſheriff, who muſt make replevin, return the plaint to the next court of common pleas,† and ſummon the defendant to appear there; afterwards, the proceedings upon writ and plaint are both the ſame.‡ If the defendant claim property on a plaint in replevin, he ſhould ſue out a writ *de proprietate probanda*, and thereupon the ſheriff muſt ſummon an inqueſt to inquire into the property; if it be found for the plaintiff, he is to make deliverance; if for the defendant, he can proceed no farther.

If the defendant do not appear at the return of the writ or plaint, he may be attached; and, if he do not appear at the return of the attachment, he ſhall be diſtrained from

* Bul. N. P. 52.
† Laws of N. Y. 11 ſeſſ. ch. 5. ſect. 1.
‡ Ibid.

from time to time, till he do appear at the ſuit of the plaintiff.*

If the plaintiff do not proſecute the ſuit within the time limited in the bond, and the diſtreſs were for rent, but not otherwiſe, this bond may be aſſigned within four days excluſive afterwards, by virtue of the ſtatute 11 ſeſſ. ch. 5. ſect. 8. which enacts, "that the ſheriff ſhall, "at the requeſt and coſts of the defendant, avowant, "or perſon making cognizance, aſſign ſuch bond to the "defendant, avowant, or perſon making cognizance, "by indorſing the ſame, and atteſting it under his hand, "in the preſence of two witneſſes; and, if the bond "be forfeited, the defendant, avowant, or perſon mak-"ing cognizance, may bring an action thereupon, in "his or her own name; and the court may, by rule, "give ſuch relief to the parties, upon ſuch bond, as ſhall "be agreeable to juſtice; and ſuch rule ſhall have the "nature and effect of a defeazance to ſuch bond." The proceedings upon a replevin bond are ſimilar to thoſe on a bail bond, treated of before.†

Either party wiſhing the cauſe to be removed to the ſupreme court may, any time before a juror ſworn or any judgment obtained, cauſe the writ or plaint, and the proceedings thereon, to be removed from the common pleas in which the ſame is depending, to the ſupreme court, by *certiorari*; and the proceedings ſhall be thereupon in the ſupreme court, as if the ſuit had been originally commenced there.‡ This *certiorari* iſſues out of the ſupreme court; but if the cauſe be removed by *pone* (which it may by the common law, where the proceedings are by writ) the *pone* iſſues out of chancery.

If the plaintiff, having removed the cauſe, wiſh to compel the adverſe party to proceed, he muſt, on the re-

turn

* Laws of N. Y. 11 ſeſſ. ch. 5. ſect. 1.
† *Ante*, p. 71.
‡ Laws of N. Y. 11 ſeſſ. ch. 5. ſect. 1.

turn of the *certiorari*, file it, with the neceſſary return, in the office of the clerk of the ſupreme court, and rule the defendant to appear; upon non-appearance, he muſt proceed by attachment and *diſtringas* as before, until he do appear. But, if the defendant wish to compel the plaintiff to proceed, having removed the cauſe himſelf, he muſt file his writ and return as before, and enter an appearance; then rule the plaintiff to declare; and for want of a declaration, at the expiration of the rule, he may move for a nonpros. If the diſtreſs were for rent, proceed according to the ſtatute treated more fully afterwards; if not for rent, the nonpros is in order to ground thereon a *retorno habend.* at the common law.

If the plaintiff remove the cauſe, and do not file the *certiorari* and return, the defendant, upon motion, may obtain a *procedendo*, after which the cauſe cannot be again removed; and, if the plaintiff do not proceed below, the defendant may ſue the ſureties.

The writ being duly returned, filed, and appearance of defendant entered in the uſual manner, the plaintiff muſt declare *de novo*, nor need any notice be taken of the former proceedings. The declaration is either in the *detinet* or *detinuit*. In the *former*, if the ſheriff have not made replevin, or reſtored the goods to the plaintiff, becauſe damages are demanded, not only for the caption, but the detention. In the *detinuit*, if replevin have been made, becauſe damages can only then be had for the unlawful taking.* The declaration muſt be certain in ſetting out the number and kind of cattle or goods diſtrained, for the purpoſe of rendering it ſufficiently clear to the ſheriff to make deliverance, if neceſſary.† But the avowry cures this defect, for, by not taking advantage of the uncertainty, it admits the deſcription to

* Lutw. 1492. Hale's P. N. B. 169. 2 Espin. [illegible]

† Style [illegible]

to be right. The * very place where the taking happened muſt be defined with preciſion, for it is not ſufficient to lay the venue in ſuch a city or townſhip, but it muſt particularly ſet out "at a certain place, called "Small Dean, in the townſhip of, &c." This is, however, no error, if not ſpecially ſhown ſo for cauſe in a demurrer. If the defendant plead *non cepit*, the count ſhall ſtand; for, if there were no taking, the place is immaterial; yet it is, in this caſe, incumbent on the plaintiff to prove at the trial, that the taking was actually at the place laid in the declaration.† The plaintiff may declare for ſeveral takings, and at ſeveral places, part at one time or place, and part at another: and if the plaintiff allege two places, and the defendant anſwer only to one, that is, if the plea begin as an anſwer to the whole, which, in fact, is but an anſwer to a part, it is a diſcontinuance; to take advantage of which, the plaintiff muſt move for judgment by *nil dicit*; but, if he demur or plead, the whole action is diſcontinued.‡ When the declaration is duly filed and ſerved, the defendant, within the uſual time, muſt put in his anſwer to the charge, which is done by either pleading in abatement, or in bar, avowing, or making cognizance, *i. e.* juſtifying the taking in his *own right*, or as bailiff in right of *another*.

Pleas in *abatement* either induce a return of themſelves, or require an avowry or cognizance to be added to them, for that purpoſe. Of the firſt kind is the plea of *property* in the defendant, or ſome other, which, neither denying, confeſſing, nor avoiding the caption, ſhows that the plaintiff, having no property in the goods, had no right to have them delivered to him, ſo that the writ or plaint ſhould be quaſhed, and the defendant have a

* Hob. 16. Cro. Eliz. 896.
† 1 Str. 507.
‡ Hale's P. N. B. 168. Bull. N. P. 54. Salk. 94, 179.

return.* Of the ſecond kind is the plea that the goods were the *property of the plaintiff and another perſon*, which going only to the form of the action, gives the defendant no right to a return, unleſs he adds a claim to the property by cognizance or avowry;† ſo that the general rule of adding a claim to a plea in abatement is, that it muſt always be done where the plea itſelf does not diſaffirm property in the plaintiff.

Pleas in *bar* are of three kinds: 1. the general iſſue *non c[illegible]* 2. the ſtatute of limitation; 3. a juſtification.

1. The plea of *non cepit* confines the iſſue to the taking merely, and allows property in the plaintiff.‡ This plea is good if the taking were in another place than that laid in the declaration; and proof of this, on the part of the defendant, will ſupport the plea.§ But, if the plaintiff can prove that the defendant ever had the goods in the place mentioned, it will intitle him to a verdict;‖ for, if the defendant took them in one place, and only had them in that laid, in the way to the pound, he ought to have ſhown the facts ſpecially. 2. The ſtatute of *limitation*¶ is alſo a good plea in bar, ſince, by that, replevin muſt be brought within ſix years after the cauſe of action accrued. 3. A plea *in juſtification* admits the caption, but denies the injuſtice of it; as property in defendant or a ſtranger, (which may be pleaded either in abatement or in bar) becauſe, deſtroying the plaintiff's right of action, it juſtifies the defendant in holding the goods.** This plea is alſo proper where the original taking was lawful, but has ceaſed to be ſo at the time of pleading.††

An

* 2 Lev. 92. Salk. 94.
† Co. Lit. 145.
‡ Bro. Rep. 5.
§ 1 Str. 507. Bull. N. P. 54.
‖ Bull. N. P. 54.
¶ Laws of N. Y. 11 ſeſſ. ch. 43. ſect. 10.
** Salk. 5. 2 Lev. 92.
†† Bull. N. P. 55. Danv. Abr. 652. Roll. Abr. 319.

An *avowry* is an acknowlegement by the defendant of taking the goods, and ſetting forth the cauſe thereof, for the purpoſe of having a return. This, where done by a perſon in his own right, is ſtrictly an avowry; but, if done in right of another, it is called making *cognizance*. The general rule for avowry is, that the defendant may do it wherever he had a right to diſtrain. Avowry may alſo be where the diſtreſs was for *damage feaſant*, and this either for a treſpaſs done to one's own land, or to a common. To the avowry or cognizance the plaintiff may plead, and the cauſe is tried in the uſual way; but, as both parties are *actors* in this cauſe, either may prepare the record and bring the action to trial.

The next ſubject to be conſidered under this head is the judgment, which differs in three caſes: 1. if for the plaintiff; 2. if for the defendant, and the diſtreſs were for rent; 3. if the like, and the diſtreſs be not for rent.

In the *firſt* caſe, the plaintiff having already poſſeſſion of the goods diſtrained, judgment can only be for damages ariſing from the caption, which are to be aſſeſſed by a jury on a writ of inquiry, in caſe of judgment by default or nonpros, or on demurrer; and by the jury on the trial, if judgment be after verdict, or on a nonſuit at ſuch trial.

In the *ſecond* caſe there ariſe three points: 1. Where the plaintiff ſuffers himſelf to be nonproſſed before iſſue joined, whether the cauſe be removed or not: here the defendant having moved for a nonpros, and entered up his judgment *pro retorno habend.* he muſt, under the ſtatute 11 ſeſſ. ch. 5. ſect. 11. make "a ſuggeſtion, in nature of "an avowry or cognizance for his rent, to aſcertain the "court of the cauſe of the diſtreſs; and the court, upon "his or her prayer, inſtead of awarding a return of the "diſtreſs, ſhall award a writ to the ſheriff of the county "where the diſtreſs was taken, to inquire, by the oath "of *twelve* good and lawful men of his bailiwick, "touching

" touching the ſum in arrear at the time of ſuch diſtreſs, " and the value of the beaſts, or goods or chattels diſ- " trained; and thereupon *three* days notice ſhall be given " to the plaintiff, or his or her attorney in court, of the " time and place of ſuch inquiry; and thereupon the ſheriff ſhall " inquire of the truth of the matters contained in ſuch " writ, by the oath of twelve good and lawful men of " his county; and, upon the return of ſuch inquiſition, " the defendant ſhall have judgment to recover againſt " the plaintiff the arrearages of ſuch rent, in caſe the " beaſts, goods and chattels diſtrained ſhall amount un- " to that value; and in caſe they ſhall not amount unto " that value, then ſo much as the value of the ſaid beaſts, " goods and chattels ſo diſtrained, ſhall amount unto, to- " gether with his or her full coſts of ſuit, and ſhall have " execution thereupon for the ſame by *ca. ſa.* or *fi. fa.* or " otherwiſe, as the law ſhall require." 2. Where the plaintiff is nonſuited after iſſue joined, or a verdict given againſt him, the ſame ſtatute provides, that the jury, at the trial ſhall inquire of the arrears, and of the value of the diſtreſs, and the defendant ſhall have the like judgment and execution. 3. Where judgment is had upon demurrer for the avowant, the ſame remedy is given as if the plaintiff were nonproſſed before iſſue joined. In either of theſe caſes, if the diſtreſs be not equal to the arrears, the plaintiff, by the ſtatute, may diſtrain again for the reſidue.

In the *third* caſe, namely, where the defendant has judgment, and the diſtreſs were not for rent, the judgment at the common law, for the ſtatute makes no proviſion, is, that the defendant have a return of the goods, and recover the damages ſuſtained by him. Theſe damages, if the judgment be on a nonpros or a demurrer, are aſcertained by a writ of inquiry, if upon verdict or nonſuit, by the jury at the trial.

The

The execution for the defendant in caſe of his obtaining the judgment, is a writ *de retorno habend.* and, if the ſheriff return a removal of the goods, ſo that he cannot make a return, technically called an *elongata*, the defendant may, if the diſtreſs were for rent, take an aſſignment of the replevin bond, and proceed thereon under the ſtatute before mentioned.*

If the diſtreſs were not for rent, or if it were, and the defendant prefer the common law remedy, he muſt apply to the ſheriff for the names of the ſureties; if the ſheriff refuſe, the court will compel him, upon motion. Theſe ſureties muſt be proceeded againſt by *ſcire facias*; if they be inſufficient, and a *nihil* be returned to the *ſci. fa.* the ſheriff himſelf may be proceeded againſt by another *ſci. fa.* But the defendant may have an action on the caſe againſt the ſheriff for taking inſufficient pledges, without any previous *ſci. fa.* againſt them;† though he has a more ſummary remedy by motion.‡ In proceeding againſt the ſheriff ſome evidence muſt be given of the inſufficiency of the pledges, but very ſlight evidence ſuffices to throw the proof on him, as he is ſuppoſed to know them better than the party.§

Where the plaintiff makes default, and a return of the beaſts, or goods or chattels is awarded to the diſtrainor, the plaintiff may have a writ of ſecond deliverance, under which the right may be again tried; but, if a return be once more awarded to the diſtrainor, the diſtreſs muſt remain for ever irrepleviable.‖

* *Ante*, p. 319.
† Buli. N. P. 60.
‡ 2 Bla. Rep. 1220.
§ Ibid.
‖ Laws of N. Y. 11 ſeſſ. ch. 5. ſect. 5.

CHAPTER

CHAPTER XIV.

Scire Facias.

IN a former part of this work, the method of proceeding by *ſcire facias* againſt bail has been diſcuſſed; we are now to conſider it as it relates to the renewal of ſuits and revival of judgments. In this light there are three caſes in which a *ſcire facias* is neceſſary: 1. where the parties to the ſuit are ſtill living, but the time allowed for taking out execution is elapſed; 2. where one of the parties, plaintiff or defendant, dies after verdict or interlocutory judgment, and before final judgment; and, 3. where either of the parties dies after final judgment, and before execution. The intent of ſuing out a *ſcire facias* was originally to prevent ſurpriſe, and to give the party an opportunity of ſhowing cauſe why final judgment ſhould not be given, or execution awarded. But the practice generally now purſued defeats this intent; for, by the mode of obtaining two writs returned *nihil*, the defendant need not be ſummoned, or appriſed at all of the proceedings.

With reſpect to the *firſt* caſe, the rule in all actions whatſoever is, if execution be not ſued out within a year and a day from the day of ſigning final judgment, or, in the caſe of writs of error,* or injunctions,† from the time ſuch impediment is removed, judgment muſt be revived by *ſci. fa.* But the judgment may be kept alive by *ca. ſa.* or *fi. fa.* being actually iſſued out within the year,‡ and returned, filed, and entered upon the roll

* 5 Co. 88.
† 2 Bur. 662. *contra.* 1 Str. 301.
‡ 2 Wilſ. 8. Barnes 213.

roll, though no execution really made, as it may afterwards be continued on the roll to the time of making execution; and this continuance is as effectual as if new writs were iſſued every term.* If the judgment were, however, given with a ſtay of execution, there needs no *ſci. fa.* till a year and a day after the time agreed.† Execution cannot be ſued out on a judgment revived by *ſcire facias* after the year and a day and no execution iſſued, but muſt be revived again. The writ of *ſci. fa.* may be ſued out of courſe at any time within ſeven years after judgment ſigned; but, from that time, it muſt be done upon motion, which is of courſe, and need not be ſerved; though, if the judgment be above ten years ſtanding, and no execution taken out, the motion muſt be grounded on an affidavit of the debt, or that the defendant is living.

The *ſcire facias* muſt be ſued out into the county where the venue of the original action was laid.

The *ſecond* inſtance in which a *ſcire facias* is neceſſary to revive a judgment, is where a party dies after verdict or interlocutory judgment, and before final judgment. This formerly after interlocutory judgment, abated the ſuit at common law; but the ſtatute for the amendment of the law authoriſes a *ſcire facias*,‡ by or againſt the repreſentatives of the deceaſed; the intent of which is for the party to ſhow cauſe why damages ſhould not be aſſeſſed upon a writ of inquiry. If the defendant die after a writ of inquiry executed, and before its return, the *ſcire facias* is to ſhow cauſe why the damages aſſeſſed by the jury ſhould not be recovered.§ The proceedings on theſe two and the *third* caſe mentioned above, are all nearly ſimilar.

The

* Str. 100. Mod. Caſ. 288.
† Mod. Caſ. 288.
‡ Laws of N. Y. 11 ſeſſ. ch. 46. ſect. 9.
§ 1 Wilſ. 243. 1 Salk. 115.

The *ſcire facias*, in caſe *the defendant is to be ſummoned*, muſt have eight days * between the teſte and return by bill, and fifteen days by original. It muſt be left in the ſheriff's office four days before the return day thereof, excluſive of the day on which the writ is returnable. The defendant may be warned on the return day.†

In caſe the defendant is not to be ſummoned, but two writs of *ſcire facias* are uſed, there muſt be fifteen days between the teſte of the firſt and the return of the ſecond;‡ and the *alias* muſt bear teſte the return day of the firſt.§ If the firſt *ſcire facias*, be left at the ſheriff's office one day before the return, it is ſufficient; but the *alias* muſt be left there four days excluſive before the return. The ſheriff muſt indorſe on the writs the day of receiving them.

The *ſcire facias*, having been properly ingroſſed and ſealed by the clerk, muſt be delivered to the ſheriff, with a proper return indorſed in due time. At the return of the firſt, if returned *ſcire feci*, or at the return of the ſecond, if *nihil*, enter the uſual rule, which is, that the defendant appear in four days and plead in twenty; but, if there be not four days in the term, then by the firſt day of the next term.‖

If the defendant do not appear, at the expiration of the rule move for judgment. The roll muſt be of the term in which the firſt writ was returnable, if two; and an award made of the ſecond as far as the return day; but, if only one, then of the term in which that is returnable. Enter the writs on the roll, ſaying, "City "and county of New-York, ſs. the people of the ſtate "of New-York have ſent to their ſheriff of their city "and

* Str. 765.
† 3 Bur. 1360.
‡ Mod. Caſ. Law and Eq. 227, 305. Salk. 599.
§ Salk. 599. 6 Mod. 86.
‖ Rule S. C. Oct. Term, 1791.

"and county of New-York, their writ close in these "words, &c." then award the return, and enter the judgment, get it signed by the judge, file it in the office, and issue your execution. If the proceedings were to revive a cause after interlocutory judgment, you must give notice of writ of inquiry, and proceed in the usual way to final judgment; after which, enter on the *sci. fa.* roll, the award of inquiry, inquisition, and final judgment.

If the defendant appear to the *scire facias*, this is done by the defendant's attorney entering an appearance on his docquet, and giving notice of being concerned to the opposite party in the usual manner; after which the plaintiff declares. The declaration* consists of the *scire facias* and an entry of the return, in the same manner as the judgment, with a prayer of execution or writ of inquiry, as the case may be. To this the defendant pleads, and the subsequent proceedings are as in common cases.

It is to be observed, that if a *scire facias* be bad, it cannot be amended, but you must move to quash it, and then proceed *de novo*.

An executor cannot revive a suit after final judgment by *scire facias*, before probate,† nor *a fortiori*, an administrator before letters of administration.‡

In ejectment the judgment must be revived after a year and a day, and the *scire facias* must be as well against the terre-tenants as against the other defendants.§

There is one general rule with respect to a *scire facias* to revive a judgment, which is, that it must always be had where the parties to the judgment are changed; as,

* It has been mentioned in p. 217, that some practitioners do not make out a declaration, but consider the writ itself as one; this is, however, erroneous practice.

† 6 Mod. 134.

‡ 7 Mod. 15.

§ 3 Salk. 319. 1 Sid. 317, 361. 1 Salk. 258. 2 Salk. 600.

if a judgment be againſt the teſtator, there muſt iſſue a *ſcire facias* againſt the executor or adminiſtrator; and ſo, on the plaintiff's part, if heir, executor, or adminiſtrator: ſo, if one recover againſt a *feme ſole*, and ſhe be married within the year and a day, a *ſci. fa.* muſt go againſt the huſband.*

CHAPTER XV.

Waſte.

A Writ of waſte is an action partly founded on the cammon law, and partly on the ſtatute; but, as it is ſeldom uſed, a perſonal action upon the caſe, in nature of waſte, being uſually brought in the room of it, I ſhall be very brief on this head. A writ of waſte may be brought by him who hath the immediate eſtate of inheritance in reverſion or remainder, againſt the tenant for life, tenant in dower, tenant by the curteſy, or tenant for years; ſo by one parcener, joint-tenant, or tenant in common, againſt another; by the ward againſt his guardian, and by the heir for waſte in the time of his anceſtor.† Tenants for life, years, or other term, letting or granting their eſtates to others, are liable to this action if they take the profits.‡

By the ſtatute 10 ſeſſ. ch. 6. ſect. 4. the proceſs is ſettled to be by writ of *ſummons*, *pone* or *attachment*, to compel

* Wood's Inſt. 610.
† Laws of N. Y. 10 ſeſſ. ch. 6.
‡ Ibid. ſect. 7.

compel an appearance; and, upon default of the defendant on *diſtringas*, the ſheriff ſhall take a jury of twelve men to the place waſted, who ſhall inquire of the waſte done and the damages, and return an inqueſt.

Upon confeſſion, or default after appearance, the jury only aſſeſs the damages, the waſte being acknowleged.

If the defendant appear, the plaintiff declares, and the proceedings are carried on to iſſue and trial, as in other caſes, only in awarding the *venire facias* the jury are to have a view of the place.

The judgment is, that the plaintiff ſhall have the place waſted, (for which a writ of ſeiſin iſſues) and treble the damages aſſeſſed by the jury, to be recovered by a *ca. ſa.* or *fi. fa.*

In actions by one parcener, tenant in common, or joint-tenant, againſt the other, the defendant, at the time of giving judgment, may chooſe to take his part out of the place waſted, or grant to take nothing in the ſame premiſes, but as his other partners; but, if he do not chooſe, or the waſte exceed his proportion, the plaintiff ſhall recover damages.*

CHAPTER XVI.

Writ of Right.

THE writ of right is the higheſt writ in the law. It only lies of an eſtate in fee ſimple, and is uſed either when no poſſeſſory action can be brought, on account of

* Laws of N. Y. 19 ſeſſ. ch. 6. ſect. 5.

of the ſtatute of limitations having attached, or when ſuch action has been brought, and judgment be given againſt the demandant.

Even this remedy muſt be proſecuted within ſixty years of the ſeiſin of the perſon under or through whom the demandant claims; for, after ſixty years uninterrupted poſſeſſion, no title is ſuffered to be impeached: but, after the beginning of the year 1800, forty years is to be the limitation.*

Having obtained the original out of chancery in the manner directed in the chapter treating of dower,† to which this proceſs is nearly ſimilar, make out the writ of ſummons, get it ſealed by the clerk of the ſupreme court, and leave it with the ſheriff, who muſt, by good ſummoners, ſummon the tenant, either perſonally or on the land, and likewiſe make proclamation at the church door of the town where the land lies.‡ The ſheriff muſt make return of the writ, indorſing thereon the names of the ſummoners, and the time and place of making proclamation. This writ and return muſt be entered on a roll, and filed in the office. The title of the roll, and of all others in real actions, muſt be, "Pleas of land inrolled at the City-Hall of the city of "New-York, before Robert Yates, Eſq; and his aſſo-"ciates, juſtices of the people of the ſtate of New-York, "of the ſupreme court of judicature of the ſame peo-"ple, of the term of April, in the year of our Lord one "thouſand ſeven hundred and ninety-four." Upon default of the tenant appearing at the return of the writ, a *grand cape* iſſues, commanding the ſheriff to ſeize the lands demanded. The tenant may, on the return thereof, come in and ſave his default, if the demandant releaſe it, which he generally does. The demandant then counts

* Laws of N. Y. 11 ſeſſ. ch. 43. ſect. 1.
† *Ante*, p. 251.
‡ Ibid.

counts or declares. The count demands the premiſes, and alleges ſeiſin within ſixty years, by himſelf or anceſtors taking the *eſplees* or profits.

The tenant then pleads: the defence is, "and the "ſaid A B comes and defends his right and ſeiſin when, "&c. and the whole, &c. and whatſoever, &c." If he plead the general iſſue, the tenant does not put himſelf on the country in the uſual way; but, "he "puts himſelf on the grand aſſize of the people of the "ſtate of New-York, and prays a recognition to be "made, whether he the ſaid A has a greater title to hold "the tenements aforeſaid, with the appurtenances, to him "and his heirs as tenants thereof, as he holds the ſame, "or whether the demandant has title to hold the ſame, "as he has above demanded."

Upon the iſſue, or *miſe*, as it is called, being ſo joined between the parties, a writ of ſummons is directed to the ſheriff, commanding him to ſummon, "by good "ſummoners, four good and lawful men of his county, "before the juſtices, at the return of the writ, to make "election of the grand aſſize between the parties." Each of theſe electors muſt have the like qualifications, as thoſe who vote for ſenators.* If the ſheriff make no return thereof, an *alias* writ of ſummons iſſues, which is returned with the names of the four electors ſummoned.

If either party ſhall have good cauſe of challenge againſt either of the electors, it muſt be made, if at all, on the return of the writ, before they are ſworn;† and, if allowed, a new writ muſt iſſue, and the cauſe be adjourned.‡ When four indifferent electors appear, they are placed in the jury box, and are ſeverally ſworn, lawfully and truly to chooſe, in the preſence of the parties,

* Laws of N. Y. 9 ſeſſ. ch. 7. ſect. 2.
† Mod. 67.
‡ Laws of N. Y. 9 ſeſſ. ch. 7. ſect. 3.

parties, in addition to themſelves, twenty other good and lawful men of the county, who beſt know and will declare the truth between the parties. Theſe twenty muſt be perſons qualified to ſerve as jurors at the bar of the court,* and may be challenged, which challenge is to be tried by the electors, and if found unqualified, another is to be elected. When the four have completed a panel of twenty-four with themſelves, they return to the bar of the court, and produce it to the juſtices.† Upon this, a writ of *venire facias* iſſues to the ſheriff, commanding him to cauſe the ſaid recognitors to come before the juſtices, at a certain day and place, *to make recognition of the grand aſſize between the parties.*‡ If the cauſe be tried at the circuit, a *niſi prius* clauſe may be inſerted.§

All trials on a writ of right muſt be had in the county where the lands lie, unleſs the court, upon motion of either party, order one at bar.‖

Upon the day of trial, the recognitors appear, are called, and ſworn as they ſtand on the panel, until ſixteen are ſworn, who try the matter of right between the parties.¶ If the recognitors ſhould make default, a *diſtringas* may iſſue.**

When the cauſe is brought on, the counſel for the tenant begins,†† ſtates his caſe, and attempts to confirm it by evidence; then the counſel for the demandant goes into his caſe and evidence. A verdict for the demandant, where the *miſe* is joined on the mere right, is, that the

* Laws of N. Y. 9 ſeſſ. ch. 7. ſect. 3.
† Ibid.
‡ Ibid. ſect. 4.
§ Ibid.
‖ Ibid. ſect. 6.
¶ Ibid. ſect. 4.
** Ibid. ſect. 5.
†† Mo. 762.

the demandant has greater right to hold the tenements, with the appurtenances, to him and his heirs, than the tenant to hold the ſame as he then held them, being the form of language in which the *miſe* was joined. The jury cannot find a ſpecial verdict on a writ of right.* The judgment conſequently awarded upon this verdict muſt be, that the demandant recover his ſeiſin againſt the tenant of the tenements aforeſaid, with the appurtenances, to hold to him and his heirs, quit of the tenant and his heirs for ever.

If judgment be for the tenant, by verdict, or by default of the demandant, it is entered that the tenant hold the land to him and his heirs, quit of the demandant and his heirs for ever.†

It deſerves to be mentioned, that by the ancient common law of England (aboliſhed here by ſtatute 9 ſeſſ. ch. 7. ſect. 1.) the tenant needed not to have put himſelf on the grand aſſize, but have demanded a trial by *battel*,‡ which was the only method of deciſion in ancient periods under the feudal law. In this § ſingular proceeding the demandant and tenant could not fight for themſelves; becauſe, if either of them were ſlain, the ſuit would be abated, and no judgment could be given. The ferocity of the times, and the romantic thirſt of being ſignaliſed by feats of hardineſs, muſt chiefly account for the eaſe with which ſubſtituted champions were procured. The practice, however, fell into diſuſe with the riſe of civilization, and it can only now be conſidered as a monument of ancient barbariſm, venerable indeed for its antiquity, but deteſtable for its cruelty. The recollection of this relic ſerves at preſent only to afford us reaſon

* Mo. 762.

† 1 Inſt. 295, b. Plowd. 357. Bull. N. P. 160.

‡ 3 Bla. Com. 337, 341. 21 Vin. Abr. 33. 3 Cro. 522. Spelm. Gl. 103. Yearb. 1 H. 6. 7, a, b.

§ Booth 100.

reaſon to rejoice in the ſuperiority of modern periods to former ages, and to bleſs the inſtant when the light of civilization was diffuſed over mankind. America, in looſening the fetters of feudal rage, has freed her ſons from ſavage laws, and checquered the whole ſyſtem with mildneſs and humanity. One object more remains to be attained, and the rights of man will reign triumphant. A dark and heavy cloud ſtill obſcures the luſtre of an enlightened people: the ſanguinary laws, which inflict capital puniſhments for any crime ſhort of murder, diſgrace the annals of liberty. The moment the efforts of humanity ſucceed in the abolition of ſuch puniſhments, America will aſſume her native dignity, the natural rights of man will be reſtored, and freedom---pure and holy freedom will grace the land.

INDEX.

A

		Page.
ABATEMENT,	plea, in	108
	order of	ibid
	different ſpecies	109
ACCOUNT,	action of	14, 233
	when the proper remedy	233
	againſt whom it lies	233, 234
	proceſs in	234
	declaration	235
	pleas	ibid
	judgment *quod computet*	236
	proceedings before auditors	237
	final judgment	ibid
AC ETIAM,	nature of	28, 29
	forms of	46
ACTIONS	defined	13
	diviſion	13—26
	election to bring one kind or another	26
	who may bring them	27
	againſt whom they may be brought	28
	in what actions ſpecial bail may be demanded	ibid
	on the caſe upon a ſtatute	23
	for criminal converſation	24
ADMINISTRATORS, *vide* EXECUTORS.		
ADMISSION of attornies and counſel		4—6
ADULTERY, action of aſſault for		24
AFFIDAVIT of the cauſe of action, when requiſite		60
AGENTS to attornies		
AMBASSADORS not liable to arreſt		33
	nor their ſervants	ibid
AMENDMENT of proceſs		53
	of other proceedings	92

Page.
ANNUITY, action of . . . 14
APPEARANCE, when to be indorſed on proceſs 51, 59
how perſons are to appear . 57
in perſon . . ibid
by atterney . . 58, 304
prochein ami or guardian 206, 207
of the defendant, what . 59
different from bail . ibid
how to be entered . . ibid
ARBITRATION, *vide* REFERENCE.
nature of . . 238
when ſubmiſſion made a rule of court 238, 239
pending a ſuit . . 239
proceedings upon 239, 240, 241
ARREST OF JUDGMENT, when granted . 177
ARREST at common law . . 28
ſtatutes reſpecting it . . 28, 29
in what caſes allowed and in what not 29
of courſe or by ſpecial order . . ibid
in trover . . . 30
debt on ſtatute . . ibid
covenant for a penalty . . 29
on recognizance of bail, &c. . 30
where there have been mutual dealings 31
not allowed for the ſame cauſe . ibid
after a nonpros . . ibid
diſcontinuance . . . . . ibid
ſuperſedeas . . . 32
in debt on judgment . . ibid
upon an award . . . 33
privilege from, ambaſſadors . ibid
members of the legiſlature 34
of corporations aggregate 35
inſolvents . ibid
heirs, executors & adminiſtrators ibid
married women . 36
attornies and other officers of the court . . ibid
parties to a ſuit and their witneſſes . . ibid
in what places . 37
at what time . 38
how taken advantage of 39

Page.

ARREST upon the *exigi facias* . . 301
how made 50
by whom . . . . ibid
when . . . . ibid
where . . . . ibid
by what authority . . 51
conſequences of . . ibid
ASSAULT, action of . . . 24
for loſs of ſervice . . ibid
crim. con. . . ibid
ASSUMPSIT, action of . . . 16
when grounded on a written promiſe ibid
implied . . 17
action for money had and received ibid
for implied warranties . 23
ATTACHMENT, in what caſes grantable . 244
proceedings upon . 246
for a contempt may be executed on Sunday, . . 37
againſt the ſheriff for not returning the writ 77
for not bringing in the body 79
to whom directed ibid
may be moved for on the laſt day of the term ibid
proceedings on ibid
of privilege . . 202, 204
contempts puniſhable by . 244
for a reſcue . . 55
not bailable by the ſheriff . 246
proceedings on . . 244
ATTORNIES, by whom appointed, . 4
requiſite qualifications for admiſſion ibid
mode of examination and admiſſion 5
oath . . . ibid
admiſſion of attornies from other ſtates ibid
perſons inadmiſſible to practiſe 6
precautions againſt diſhoneſt practice 7
againſt impoſition and extortion . . . ibid
preliminary ſteps before commencing a ſuit for fees . . ibid

ATTORNIES,

Page.

ATTORNIES, when an attorney can be changed, 8, 58
what lien they have on their client's papers to ſecure payment of their bill 8
muſt appoint agents 9
cannot juſtify as bail . . . 66
intitled to ſue in their own courts 202
how to be ſued 203
not to be holden to a ſpecial bail 36, 293
where not privileged . . . 203
how this privilege is waived . ibid
proceedings at the ſuit of . 294
proceedings againſt . . . ibid
bill . . . . . ibid
mode of being diſcharged when arreſted 205
how appointed 58
how warrant countermanded ibid

B

BAIL, in what actions defendant may be held to bail 28, 29
ac etiam 29
where debt or damages aſcertained . . ibid
where not aſcertained, . . . ibid
judge's order to hold to bail . 30
in actions on a penal ſtatute . . . ibid
whom to be let to bail . . . 52
in error, ... 276
on a *habeas corpus* 288
upon an *exigi facias* . . . 302
reverſing an outlawry . . 305
in a *qui tam* ſuit 309
to the ſheriff 52
not diſcharged by a render before the return of the writ . 60, 67
for what liable . . 75
ſpecial, by whom put in . . 60
when . . . . ibid
before whom . . . 61
mitigation of bail . 60
recognizance of . . . 61
abſolute or *de bene eſſe* . 62
notice of . . . ibid
in caſe the bail-bond be forfeited 75
exception to 63
when neceſſary to fix the ſheriff 75

		Page.
BAIL, ſpecial,	what ſhall be a waiver of bail	63
	time allowed to add and juſtify	ibid
	further time	66
	adding	63
	juſtifying	ibid
	notice of juſtification	64
	affidavit of ſervice	ibid
	grounds of oppoſing	ibid
	may take their principal at any time	37
	when and how diſcharged,	
	by rendering him	67
	in what caſe the render may be pleaded	68
	notice of render	70
	diſcharged by deci...g for a different cauſe of action	ibid
	cannot be a witneſs for the principal	ibid
proceedings againſt		216
previous ſteps to ſuch proceedings		ibid
proceſs againſt them		ibid
where the venue muſt be laid		ibid
proceedings by *ſcire facias*		217
rule thereon		ibid
BAIL-BOND,	form of	53
	when good, though the condition vary from the writ	54
	when an aſſignment ſhould be taken	72
	at what time it may be taken	ibid
	by whom made	ibid
	action on, muſt be brought in the ſame court	73
	proceedings in the action	73, 74
	of ſetting aſide or ſtaying proceedings	74
	terms on ſtaying them	74
BAIL-PIECE,	ſpecial	61
	when tranſmitted	ibid
	exoneretur	69, 70
BAR, pleas in		117
different ſpecies		ibid
BATTERY, action of		24
BILL of Exception, when proper		166
BILL of New-York or Albany,	nature of	41
	form of	44
	alias and *pluries*	45
	whether it can legally be ſued out here or not	42, 43

C

		Page.
CAPIAS,	to proceed to outlawry	297
CAPIAS *ad reſpondendum*,	nature of	41, 42
	form of	ibid
	how ſued out	45
CAPIAS *ad ſatisfaciendum*,	to fix bail	217
	nature of	196
CASE,	actions on the	18
CERTIORARI,	when it does not lie	2
	how to be iſſued	248
	to remove proceedings from before a juſtice	249
CHALLENGES,	when allowable	154
CIRCUIT COURTS,	authority to hold them	11
	times	ibid
	in the county where S. C. ſits	12
	power veſted in the judges	ibid
	clerk of the circuit	ibid
CIVIL ACTIONS,	definition	13
CLERK,	his duty	3
	oath	ibid
	where his offices ſhall be kept	4
	fees	ibid
COMMISSIONERS	to take Affidavits, their authority whence derived	9
	who they are	ibid
CORPORATIONS,	how to be ſued	217
	how ſuable	217, 218
	how to ſue in ejectment	218
	members not liable to arreſt	35
	how to appear	57
COSTS,	in what caſes allowed	179
	how taxed	185
COVENANT,	action of	15
COUNSELLORS,	by whom appointed	4
	mode of examination and admiſſion	5
	admiſſion of counſellors from other ſtates	6
	perſons inadmiſſible to practiſe	ibid
	precautions againſt diſhoneſt practice	7

D

		Page.
DEBT,	action of	15
DECEIT,	action of	20
DECLARATION,	defined	81
	formal parts	82
	how ſerved	90
	amendments	92
	againſt priſoners	211
DEFENCE,	what it is	107
DEMURRER to Evidence,	when neceſſary	166
DEMURRER,	defined	173
	when proper	ibid
	proceedings upon	174
DETINUE,	action of	15
DEVISEES,	*vide* HEIRS.	
DISCONTINUING,	when plaintiff may diſcontinue	136, 137, 138
DISTRINGAS,	when neceſſary	150
DISTURBANCE,	action for	19
DOWER,	what the action is	251
	proceedings in	ibid
	count	252
	pleadings in	255
	judgment	257

E

EJECTMENT,	definition	25, 256
	explanation of the nature of the action,	256
	requiſites to maintain it	257
	of what ejectment lies	259
	proceedings where premiſes are tenanted	260
	declaration	ibid
	demiſe	261
	amendment	262
	judgment by default	263
	defence	264
	of landlord defending	ibid
	ſecurity for coſts	265
	retraxit	266
	how to recover coſts,	266, 267
	proceedings where the premiſes are untenanted	267
	proceedings on non-payment of rent	268

Page.
EJECTMENT, proceedings to obtain ſatisfaction on a mortgage . . . 269
how to obtain poſſeſſion after execution on a freſh ouſter . . 270
action for meſne profits . . 271
ELISORS 80, 150
ERROR, when it lies . . . 272, 273
from and into what courts . . 272
by and againſt whom it may be brought 273, 274, 275
within what time . . 275
what ſhall not be alleged for error . ibid
proceedings from an inferior to the ſupreme court, 276
how to ſue writ out . . . ibid
bail . . . . ibid
exception to bail . . . ibid
rule to tranſcribe . . ibid
aſſignment of errors . . ibid
of alleging diminution . . 280
proceedings in the court of errors . 281
rules of the court of errors . . 282
error *tam quam* . . . 284
error *coram vobis* . . . ibid
ESCAPE, where *debt* is the proper action . 15
where caſe . . . 21
what to be conſtrued an eſcape . 54
ESSOIGN, what it is 294
ESTOPPEL, definition of . . . 127
EVIDENCE, general principles of . 158
EXECUTION, different ſpecies of . . 195
EXECUTORS, what actions they may bring . 219
what they may not bring . ibid
what actions may be brought againſt them 220
what actions do not lie againſt them 221
when chargeable on a *devaſtavit* ibid
proceedings upon a *devaſtavit* . 222
how actions muſt be brought by and againſt them . . 223
plene adminiſtravit . . 224
not liable to arreſt . . 35
exception . . ibid
EXIGI FACIAS, writ of . . 299

F

		Page.
FIERI FACIAS,	nature of	197
FEME COVERT,	not liable to arreſt	36
FOREJUDGER,	how to obtain it	204, 205
	how to ſet it aſide	205

G

GENERAL ISSUES,	different ſpecies of	124

H

HABEAS CORPUS,	when it lies and when not	2, 286, 287
	nature of this writ	285
	how to get it allowed	286
	return	ibid
	rule on return	288
	bail	ibid
	declaration	290
	procedendo	290, 291
HEIRS	not liable to arreſt,	35
	proceedings by and againſt them	225
	how they muſt ſue	225, 226
	how ſued	226
	when the parol may demur	ibid
	pleadings	226, 227
HUSBAND and Wife,	proceedings by and againſt them	227
	in what actions they ought to join	ibid
	in what actions they ought to be joined	228
	where the huſband may ſue alone	ibid

I

JAILER,	within what time he is to deliver a declaration left with him to a priſoner	212
IMPARLANCE,	different ſpecies of	101
	what pleas not admiſſible after	102
IMPRISONMENT,	action for falſe	24
INFANT,	how ſued	206
	how ſuable	ibid
INQUIRY,	writ of	189
INSOLVENT DEBTORS,	not liable to arreſt	35
	how to be diſcharged	229
IRREGULARITY	in proceſs	49
	when to be taken advantage of	97

Page.

ISSUE ROLL, what it contains . . 146
JUDGES, whence they derive their authority . 2
oath of office . . . 3
ſalary . . . . . ibid
how ſued 206
how to be ſued . . ibid
JUDGMENT, how obtained . . 186
upon demurrer . . 187
upon verdict . . ibid
by confeſſion . . ibid
by default . . . 189
of nonpros . . . 192
as in caſe of a nonſuit . 193
JURISDICTION of the courts . . . 1
JUSTICES of the peace, in actions againſt them where the venue muſt be laid 209
may plead the general iſſue ibid

L

LATITAT, writ of 44
form of . . . 44, 45
how ſued out . . 45
LEGISLATURE, proceedings againſt members of the 201
during what times protected from civil actions . 34, 35, 201, 202
LIMITATION, plea of the ſtatute . 124
replication . . . 133
of ſuing out writ to ſave the ſtatute 291

M

MALICIOUS PROSECUTION, action for 19
MAYHEM, action of . . . 24
MISFEAZANCE, action of . . 21
MIXED ACTIONS, defined . . 13
diviſion of . . 25
MUTUAL DEALINGS . . 119

N

NEGLIGENCE, action for . . 21
NEW TRIALS, when granted . . 176
NISI PRIUS ROLL, what it contains . 148
NONSUIT, at the trial . . 167
NUSANCES, action for . . . 19

OATH,

O

		Page.
OATH,	of the judges	3
	of the clerk	ibid
	of attornies and counſellors	5
	of referees	243
OFFICERS	of the court, how ſued and ſuable	206
	actions againſt them, how brought, and under what reſtrictions	209, 210
ORIGINAL,	nature of	292, 294
	how iſſued	293
	proceſs upon	294
	appearance	297
	declaration	298
	when aided or amendable	94, 95, 96
OUTLAWRY,	nature of	298
	exigent	299
	proclamation	300
	appearance on *exigent*	301
	bail	302
	judgment	ibid
	execution	303
	reverſal	304
	bail on reverſal	304, 305
OYER		92

P

PAUPERS,	proceedings by	208
PARTITION,	proceedings by writ of	306
PAYING	money into court, in what actions allowed	104
	in what not	105
	how it is done	106
PENAL ACTIONS, *vide* QUI TAM.		
PERSONS,	who may ſue	27
	in what manner	ibid
	who incapacitated from ſuing	28
PENAL ACTIONS,	definition of	14
	diviſion	14—25
PLEAS,	definition of	107
	requiſites	128
	how to ſerve and file them	131
PLEADING,	time for	100
	terms upon which time granted	102
PLEA *puis le darrein continuance*,	what it is	135

Page.
PLENE Adminiſtravit, when and how to be pleaded 224
POSTEA, what it is . . . 169
PRISONERS, proceedings againſt . 210
rule on return of writ againſt them ibid
mode of ſerving declaration 210, 211, 212
when declaration to be ſerved . 212
how charged at the ſuit of a third perſon 211
within what time to proceed to trial or final judgment againſt them . 213, 214
how charged in execution . 213
how ſuperſeded . . . 214
cauſes againſt a diſcharge . 214, 215
PRIVILEGE, *vide* ARREST.
PROCESS, nature of . . . 41
requiſites of . . . 47—50
amendment of . . 50, 97
when may be ſet aſide . . 49
proceedings upon . . 50, 51
when an appearance to be indorſed 51
PROCHEIN AMI. how appointed . . 206, 207
PROFERT of letters of adminiſtration, when neceſſary 225
PROTESTATION, what it is . . 134

Q

QUI TAM, proceedings in . . . 308
bail . . . 309
plea . . . 314
jury not obliged to go above 30 miles ibid
compounding . . ibid
when another recovery no bar . ibid

R

REAL ACTIONS, definition of . 13
RECORD, how made . . 146
REFERENCE, what cauſes to be referred . 241
mode of reference . ibid
proceedings upon . 242
REJOINDER, nature of . . . 134
REPLEADER defined . . 178
REPLEVIN, definition of . . 23, 315
when to be made . . 315
who may bring it . . ibid
different modes of proceeding . 316
by writ . . . ibid

REPLEVIN,

Page.

REPLEVIN, ſecurity to proſecute and return . ibid
when the goods have been eloigned 317
claim of property . . 318
by plaint . . ibid
remedy for not proſecuting . 319
removal of the cauſe . . ibid
compulſion to proceed . . ibid
declaration . . . 320
pleas . . . 321
avowry and cognizance . 321, 323
judgment . . 323
execution . . 325
ſcire facias, &c. againſt the ſureties ibid
writ of ſecond deliverance . ibid
REPLICATION, nature of . . 132
RESCUE, proceedings upon return of . 55
RETURN, ſheriff's return to proceſs . 56
REVERSION, action for injuries to . 19
RULE, on admiſſion of an attorney . 4
to file ſecurity for coſts . . 38
on return of writ *cepi corpus*, with an appearance indorſed 56
on like return without . . ibid
on return *cepi corpus in cuſtodiæ* . 56, 210
the like where ſeveral defendants, ſome not found 56
the like where the action is joint . ibid
on a ſheriff to return a writ . 76
to bring in the body . . 78
for time to plead . . 102
on paying money into court . 106
to plead ſeveral matters . . 131
on diſcontinuing by rule of courſe . 137
ſpecial motion . ibid
conſent of the defendant 138
for coſts for not going to trial . 140
to put off a trial . . ibid
for a ſtruck jury . . 141
for a view . . . 143
to examine witneſſes . . 144
to make record a *remanet* . . 152
on an iſſue *nul tiel record* . . 170
to join in demurrer . . 174
for a *concilium* . . . . ibid
for judgment on verdict . . 176

RULE,

Page,

RULE, for a new trial . . . 177
to arreſt a judgment . . 178
for judgment on demurrer . . 187
by confeſſion . ibid
for interlocutory judgment in caſe . 189
in debt . ibid
for final judgment on inquiſition . 190
to declare, reply, &c. . . 192
for a nonpros . . 193
for judgment as in caſe of a nonſuit . 194
in a ſuit againſt an attorney . . 205
for admiſſion of a *prochein ami* or guardian . 207
for the plaintiff to name a guardian . 208
to ſue in *forma pauperis* . . ibid
for judgment againſt a priſoner . 212
for a *ſuperſedeas* . . . 214
on return of a *ſci. fa.* . 217, 328
to diſcharge inſolvent debtors . 229, 230
to make an award a rule of court . 240
to ſet aſide an award . . ibid
to refer a cauſe . . 242
for judgment on a report . . 243
for an attachment . . 246
to return a *certiorari* . . 248, 249
to aſſign errors thereon . . 250
to join in error thereon . . ibid
for a *concilium* thereon . . ibid
common rule in ejectment . 263
for judgment thereon . . ibid
conſent rule . . . 258
to make the landlord defendant . 265
in error to the ſupreme court,
for better bail . . 279
to tranſcribe . . ibid
for judgment on *ſci. fa. qu. ex. non.* 279
for a *certiorari* . . 280
to return the ſame . ibid
in error to the court of errors,
to aſſign errors . . 282
on delivering of a *habeas corpus* . 287
on return thereof . . 288
for a *procedendo* for want of bail . 290
to compound a *qui tam* action . 314
for a nonpros in replevin . 320

RULES

Page.

RULES OF COURT,
A. D. 1699, October term . . 211
1702, April term . . 49
1703, October term . 10, 91
1706, September term . 10
1723—4, March term . ibid
1727, June term . . 195
1735, July term . . 60
1736, July term . . . 131
1754, April term . . 10
1755, April term . . 10, 56
1762, October term . . 11
1763, April term . 10, 140, 153
1767, April term . . . 4
October term . 10, 56, 73
1772, October term . 9, 91
1778, April term . . 4
1779, April term . . 5
1782, January term . . ibid
April term . . ibid
October term . . 9
1783, April term . . 4, 5
1786, January term . . 10
October term . . 56
1789, January term . 5, 9, 91
1791, October term . . 328
1793, July term . . 5

S

SATISFACTION, how to enter it . 199
SCIRE FACIAS, againſt bail . 216, 217
when neceſſary to revive a judgment 326
for default of execution . ibid
death of the party before final judgment 327
before execution ibid
how ſued out . . . 328
teſte and return . . ibid
entry on the roll . ibid
declaration . . 329
cannot be amended . ibid
in ejectment . . ibid
general rule . . ibid
SECURITY FOR COSTS, when to be filed 38, 39
SET OFF, plea of . . . 119

SHERIFFS,

Page.

SHERIFFS, their duty and fees . . 10
to attend circuit courts . . 12
proceedings againſt, to compel bail . 76
rules againſt, for this purpoſe . 77
attachment againſt . 79
diſtringas againſt . . ibid
SLANDER, action of . . 18
SPECIAL PLEAS, definition of . . 123
different ſpecies . ibid
STATUTES, 8 ſeſſ. ch. 11. *error* . . 275, 281
ch. 21. *clerk* . 4
ch. 39. *partition* . . 306
ch. 61. *terms* . . 10
9 ſeſſ. ch. 4. venire . . 149
ch. 7. *writ of right, wager of battle* 172, 333, 334, 335
ch. 27. *heirs* . . 226
ch. 41. *circuit courts, notice of trial, ſtruck jury*, &c. 11, 139, 141, 142, 147, 151, 153, 154, 155, 157, 166, 167
10 ſeſſ. ch. 1. *bail* . . 60
ch. 4. *dower* . . 251
ch. 5. *wager of law, eſſoign*, &c. 15, 172, 221, 294, 295
ch. 6. *waſte* . 330
ch. 9. capias, *outlawry*, &c. 28, 297, 299, 300, 302, 303, 304, 311
ch. 10. *error* . . 280
ch. 14. *coſts* 179, 181, 182, 183, 185
ch. 19. *account* 14, 219, 333
ch. 24. *appearance* . 59
ch. 26. *attachment of privilege, bail-bond* . . 52, 204
ch. 27. *venue* . 88, 209, 210
ch. 32. *ſheriffs* . . 77
ch. 35. *proceſs, warrant of attorney*, 49, 58, 59, 90
ch. 36. *attornies, nonpros* 4, 6, 7, 8, 91
ch. 44. *frauds* . . 16
ch. 50. *iſſues, real actions* 80, 251, 296
ch. 56. *judgments, executions*, habeas corpus . 186, 197, 198, 288
ch. 72. *ſuits, coſts*, haheas corpus . 180, 181, 286, 287, 291

STATUTES,

Page.

STATUTES, 11 seſſ. ch. 3. *error* . 276
ch. 4. *account* 188, 233, 237
ch. 5. *judgments, replevin* 315, 316, 317, 318, 319, 323, 325
ch. 8. *partition* . 306
ch. 9. *venue, coſts,* capias 88, 184, 206, 297, 299, 309, 313, 314
ch. 17. *witneſſes* . 150, 151
ch. 21. *bail* . . 65
ch. 24. *inſolvent debtors* 229, 230, 231, 232
ch. 28. *judges, clerk* . 3
ch. 32. *warrant of attorney, amendment, demurrer* 59, 93, 94, 96, 173
ch. 33. *pledges* . . 90
ch. 34. *members of the legiſlature* 34, 201
ch. 36. *diſtreſs, ejectment* 117, 259, 264, 266, 268
ch. 39. *replevin* . . 315
ch. 42. *Sunday* . 37
ch. 43. *limitation* 124, 125, 126, 127, 322, 332
ch. 46. *commiſſioners to take affidavits, paupers, priſoners,* &c. 9, 30, 56, 71, 115, 116, 118, 119, 128, 139, 140, 193, 208, 210, 241, 242, 243, 275, 327
ch. 92. *inſolvents* . 35
12 seſſ. ch. 24. *clerk, appearance, fees,* &c. 7, 10, 12, 57, 197, 213, 214
ch. 25. *joint actions* . 74
ch. 28. *pleadings,* &c. 11, 121, 130, 144, 151, 183
13 seſſ. ch. 57. *executions* . 198, 199
14 seſſ. ch. 20. *arbitration,* . 238
ch. 29. *inſolvents,* . 229
15 seſſ. ch. 63. *judges* . . 3
16 seſſ. ch. 5. *voters* . . 37

STRUCK JURY, how obtained . . . 141
SUBPŒNA, for witneſſes, how made out . 150
SUITORS, when privileged from arreſt . 36
SUITS, not to be commenced under the value of 100l. 2
SUNDAY, no civil proceſs to be executed on this day 37
SUPERSEDEAS, to diſcharge a priſoner, how obtained 214

Page.

SUPREME COURT, its jurisdiction . 1
causes to what value may be brought therein . 2
its officers . 2—10

T

TENDER, how to pay money in on a plea of . 106
plea of . . . 117
TERMS, when held . . . 10
returns . . . ibid
business allotted for the days in each . ibid
TESTATUM CAPIAS, nature of . 42
seldom used . 45
TRESPASS ON THE CASE, definition . 18
division . ibid
for injuries affecting a reversion, . 19
when it lies in general 22
TRESPASS *vi et armis*, definition of . . 24
division of . . ibid
quare clausum fregit . 25
quare domum fregit . ibid
de bonis asportatis . . ibid
TROVER AND CONVERSION, action of 22
TRIAL, notice of 139
countermand . . . 140
at bar . . . 151
by jury . . . 152
by proviso . . . ibid
by record 170
by inspection . . . 171
by certificate . . 172
by witnesses . . . ibid
by *battel* . . . 335

V

VENDITIONI EXPONAS, when it issues . 199
VENIRE, nature of . . . 249
VENUE, local 87
transitory . . . ibid
in what actions it must be laid in a particular county . . . 88
in what cases irremoveable . 88, 89

VERDICTS,

Page.
VERDICTS, general . . . 167
special . . . 168
special case . . . 169
VIEW, how obtained . . . 142
VOTERS at elections privileged from arreſt . 37

W

WAGER OF LAW abolished . . 15
WASTE, action of . . . 25
nature of . . . 330
proceſs . . . ibid
judgment . . . 331
WARRANT OF ATTORNEY, how made . 58
how long it continues in force . ibid
when to be filed 59
WITNESS, when privileged from arreſt . 36
when going abroad how examined . 144
when reſident abroad how examined ibid
WRIT OF PRIVILEGE, how obtained . 205
WRIT OF RIGHT, what it is . . 331
when uſed . . ibid
within what time . 332
proceſs . . ibid
plea . . . 333
recognitor proceſs . ibid
when trial to be had . 334
trial . . . ibid
verdict . . ibid
judgment . . 335
trial by *battel* . . ibid

ERRATA.

Page 5, l. 16, after "United States," add "ſubject to the rules of thoſe courts."

Page 50, firſt note, *dele* "part iv. ch. 1." and read "p. 97."

Page 57, l. 6, 7, *dele* "for the mode of preparing and time of filing a docquet, vide part iv. ch. 7."

Page 57, l. 25, *dele* "*feme coverts.*"

Page 89, l. 10, after "declaration" add "and not elſewhere."

Page 101, l. 16, for "cannot" read "can only."

Page 118, l. 1, for "neceſſary" read "acceſſary."

Page 119, l. 19, after "court" add "to ſave himſelf from coſts."

Page 175, l. 22. in ſome of the copies, for "defendant" read "plaintiff."

Page 217, l. 22, after "actions" add "but this is erroneous practice." *Vide poſt*, p. 323.

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