fected. *Cremer* v. *Bulman*, *Hil.* 8 *Geo.* 2. reſolved, 1 *Barnes's Notes* 57.

Motion to ſet aſide execution againſt the bail. It appeared that the defendant was rendered, and that the *reddidit* was entered in the judge's book, but not on the bail-piece as uſual, the ſame having been taken away by plaintiff's attorney. *Cur'* held the render to be good, and ordered the execution to be ſet aſide with coſts. *M.* 5 *Geo.* 2. *Knight* v. *Winter*, *Rep. and Caſ. of Pract. in C. P.* 123.—1 *Barnes's Notes* 60. S. C. ſays defendant was bailed upon an *habeas corpus*, and that the bail-piece had been delivered out by the judge's clerk to plaintiff's attorney, to be filed, who did not file it, but proceeded to judgment againſt the bail for want of a *reddidit ſe* being marked upon the bail-piece. *Cur'* held the practice of plaintiff's attorney in taking away the bail-piece, to be unwarrantable, and ſet aſide the judgment with coſts, (defendant having done every thing in his power to make the render effectual) defendant conſenting to bring no action, and ordered the bail-piece to be filed, and the *reddidit ſe* entered.

Bail to an action upon a judgment; judgment in this action againſt defendant. After a *ca. ſa.* returned againſt the principal, and before the return of the writ in an action of debt upon the recognizance againſt the bail, the court on motion ſtaid proceedings on the recognizance, pending a writ of error brought to reverſe the firſt judgment; the bail conſenting to give judgment in the action brought againſt them. *M.* 14 *Geo.* 2. *Goſtelow* v. *Wright*, 2 *Barnes's Notes* 57.

Plaintiff after a *ca. ſa.* returned againſt the principal, filed a bill in an action of debt againſt

againſt *Wall* an attorney, one of the bail firſt put in (tho' after exception two other bail juſtified in court) and ſued out proceſs againſt *C. D.* another of the bail, but ſerved it two days only (inſtead of four) before the return. *Cur'*, on ſhewing cauſe why proceedings againſt *Wall* and *C. D.* ſhould not be ſtaid, held, that the proceedings by bill againſt *Wall* was regular, but that the other bail having juſtified he was diſcharged, and ordered his name to be ſtruck out of the bail-piece, and the entry of the recognizance to be amended accordingly, and gave *Wall* his coſts, and ſtaid proceedings againſt *C. D.* becauſe he was not ſerved with the writ in time. *T.* 24 & 25 *Geo.* 2. *Wilſon and others* v. *Lafortune*, 2 *Barnes's Notes* 87.

Bail cannot be witneſs for the defendant, therefore if defendant would examine him as a witneſs at the trial, he muſt make an affidavit that ſuch bail is a material witneſs. Bail cannot be a witneſs.

One perſon became bail for defendant before a judge, and ſurrendered him to the *Fleet* priſon. Plaintiff, after the render, proceeded to ſerve ſheriff with a rule to bring in the body. *Cur'* held the render inſufficient, and refuſed to ſtay proceedings againſt the ſheriff; but afterwards *two* bail were put in and juſtified in court, and thereupon proceedings againſt the ſheriff were ſtaid on payment of coſts. *E.* 6 *Geo.* 2. *Steward* v. *Biſhop*, 1 *Barnes's Notes* 46.—*Pract. Reg. in C. P.* 84. S. C.—Putting in *one* bail is the ſame as putting in none. *M.* 8 *Geo.* 2. *Smith* v. *Randall*, *Ibid.* 85.—1 *Barnes's Notes* 172. S. C. One bail as no bail.

Two bail bound by recognizance in 140 *l.* Verdict for the plaintiff againſt principal for 300 *l.* Plaintiff may proceed againſt both bail, for one 140 *l.* will not ſatisfy the recognizance. Two bound, &c.

Recognizance in declaration variant from the record.

A recognizance of bail in the declaration being variant from the record, plaintiff cannot have judgment on *nul tiel record*. *E.* 6 *Geo.* 2. *Atterbury* v. *Ward*, 1 *Barnes's Notes* 46.

The form of a *ſcire facias* on a recognizance of bail in debt, *vide p.*

If *nul tiel record* be pleaded in an action of debt, or to a *ſcire facias*, on a recognizance of bail, the proper officer (*i. e.* the filazer or prothonotary, according to whoſe bail it is) will draw you up the form of the entry of the recognizance, which you make uſe of to verify the record.

The entry.

Middleſex. THE ſheriff was commanded that he ſhould take *A. B.* late of *Weſtminſter* in his county, widow, if ſhe could have been found in his bailiwick, and that he ſhould have kept her ſafely ſo that he might have had her body at this day (that is to ſay) on the morrow of *All Souls*, to anſwer *C. D.* of an action, wherefore ſhe broke the cloſe of the ſaid *C.* with force and arms, and did other wrongs to the ſaid *C.* to his great damage, and againſt the peace of our ſovereign lord the king, and alſo in a plea of treſpaſs upon the caſe on promiſes unperformed, to the damage of the ſaid *C.* forty pounds; and now here at this day *E. F.* of *York Street* in *Covent Garden*, in the ſaid county, Gent. and *G. H.* of St. *James's Street* in the ſaid county, ſpinſter, came perſonally before Sir *J. K.* Knight, and his companions, juſtices of this court of Common Bench, and they and each of them acknowledged themſelves to owe to the ſaid *C.* the ſum of

Note; tho' the recognizance is taken before a judge at his chambers, yet it is entered as taken in court.

of forty ſum pounds, which ſaid ſum they the ſaid *E.* and *G.* and each of them, did will and grant for them and their heirs, to be made and levied of their and each of their lands and chattels, to the uſe and behoof of the ſaid *C.* and alſo at the ſame day the ſaid *A.* came perſonally before the ſame juſtices, and acknowledged to owe to the ſaid *C.* the ſum of eighty pounds; which ſaid ſum of eighty pounds the ſaid *A.* for herſelf and her heirs, willed and granted for herſelf and heirs, to be made and levied of her lands and chattels, to the uſe and behoof of the ſaid *C.* ſubject to this condition, that if judgment ſhould happen to be given in the ſame court here for the ſaid *C.* againſt the ſaid *A.* in a certain plea of treſpaſs upon the caſe, then the ſaid *A.* ſhould make ſatisfaction to the ſaid *C.* for all ſuch damages as ſhould be awarded to the ſaid *C.* in the ſame court here againſt the ſaid *A.* or ſhould render her body in execution of the ſaid judgment to the priſon of the *Fleet*, and ſo forth.

See tit. *Scire facias.*

Of Declarations and declaring.

IF the action be in *debt*, *detinue*, *covenant*, *account*, *annuity* or *replevin*, it muſt be ſaid in the declaration "the defendant was *ſummoned* to "anſwer, *&c.*" If the action be in *caſe*, *treſpaſs*, *trover* or *ejectment*, then you ſay in the declaration, "that the defendant was *attached* "to anſwer, *&c.*"

On a common *clauſum fregit*, plaintiff may declare in any county, or for any cauſe of action; for that proceſs is only to bring the

party into court. *Rep. and Caſ. of Pract. in C. P.* 75. *Pract. Reg. in C. P.* 136.

On a common *clauſum fregit* with an *acetiam* in *debt*, plaintiff may declare in caſe, or for any cauſe of action in any county. *Pract. Reg. in C. P.* 137, 138. But then he loſes his bail.

On a *præcipe quod reddat*, plaintiff cannot declare but in *debt*, except he deliver a declaration by the bye; but even in that caſe he muſt firſt deliver a declaration in the original action. *Pract. Reg. in C. P.* 137.—The like on an attachment of privilege *de placito debiti*, for an attachment of privilege is in nature of a *ſpecial* original.

The ſpecial writ in battery never mentions but one battery, tho' the declaration may contain many. *Rep. and Caſ. of Pract. in C. P.* 48. and ſo it is in covenant, tho' many breaches are aſſigned in the declaration. *Ibid.*

Declaration muſt be delivered four days excluſive, before the end of the term; as if notice of declaration be given on the 9th of *Feb.* and the term ends the 12th, declaration ſhould have been delivered on the 8th of *February*, to have plea the ſame term. *E.* 3 *Geo.* 2. *Porter, jun.* v. *Barnes, Pract. Reg. in C. P.* 125.

But an adminiſtrator plaintiff muſt ſet out his adminiſtration.

In an action againſt an adminiſtrator, it is ſufficient to call him in the declaration, *adminiſtrator of the goods and chattels of the inteſtate*, without alledging that adminiſtration had been granted to him. *Hil.* 25 *Geo.* 2. *Wade, jun.* v. *Wadman, Gent. one &c. adminiſtrator*, 2 *Barnes's Notes* 142.

Plaintiff muſt declare in prohibition if defendant inſiſts on it. *Pract. Reg. in C. P.* 356. Declaration in aſſault and battery containing thirty counts, court refuſed to order any to be ſtruck

ſtruck out upon reading plaintiff's affidavit that defendant had aſſaulted him ſixty ſeveral times. *Hil.* 2 *Geo.* 2. *Jones* v. *Enderup*, *Pract. Reg. in C. P.* 150.

Three declarations for the ſame aſſault ordered to be reduced into one without coſts. *Hil.* 7 *Geo* 2. *Harper, an attorney,* v. *Woodhouſe*, *Pract. Reg. in C. P.* 151.

Declaration reduced from nine counts to five, five counts being ſufficient to take in plaintiff's whole demands. *Vide Pract. Reg. in C. P.* 151. 1 *Barnes's Notes* 257.

On a *certiorari* or *habeas corpus*, plaintiff may declare in this court as he pleaſes, and is not confined to the ſame ſpecies of action he declared in below, tho' the parties were at iſſue in the court below. *E.* 13 *Geo.* 2. *Turner* v. *Bean*, *Pract. Reg. in C. P.* 221.

What time plaintiff has to declare.] Upon all proceſs, returnable the firſt, or any other return in any term, plaintiff has to the end of the next enſuing term to deliver his declaration to the defendant's attorney, or to leave the ſame in the office, and the defendant's attorney having entered his appearance as of that term in which the proceſs is returnable, may at the end of the ſecond term, or in four days after, give a rule to declare, and having demanded a declaration *(a)* of plaintiff's attorney (if he can be found) the defendant may any time in the vacation of ſuch enſuing term, after the rule for note in writing. *Per* notice in the office, *M.* 1 *Geo.* 2.----and muſt be demanded of the agent in town, and not of the country attorney. *T.* 6 & 7 *Geo.* 2. *Elwood* v. *Elwood*, *Pract. Reg. in C. P.* 124.

(a) All declarations muſt be demanded by a

declaring is out, sign a *nonpros*, but not afterwards, for want of declaration, and the plaintiff shall not, without the leave of the court, have any longer time to declare than as above, other than the time to be limited by the defendants. Rule *Hil.* 9 *Ann.*—It appears by the above rule that defendant is not bound to accept a declaration after the second term, nor can he sign a non-process after the vacation following the second term. Where no rule to declare is given at the end of the second term, plaintiff has till the essoin-day of the third term to deliver or file his declaration. *M.* 4 *Geo.* 1. *Steward* v. *Harding*, *Rep. and Cas. of Pract. in C. P.* 12.—*Pract. Reg. in C. P.* 121. S. C.

And it has been held, that plaintiff has two terms to declare in after bail is perfected. *M.* 6 *Geo.* 2. *Lin* v. *Smith*, *Pract. Reg. in C. P.* 121.

Drawing and ingrossing declaration.] Declaration to be ingrossed on treble one-penny stamp paper, and delivered to defendant's attorney (if defendant appears). Charge on the back for every sheet 4*d.* reckoning seventy-two words to a sheet, besides the duty, and for filing defendant's warrant of attorney, as follows, *viz.* in *debt*, *trespass* and *detinue*, 4*d.* and in other actions 8*d.* Entring appearance for defendant according to the statute, 5*s.* 10*d.* if at the suit of an attorney 7*s.* 2*d.*

NOTE.

The *alias dict'*, if inserted in the declaration, should be in *Latin* if the bond is so. *Rep. and Cas. of Pract. in C. P.* 91.

Delivering

Delivering or filing declaration when defendant appears.] If defendant's attorney has appeared, plaintiff's attorney muſt deliver a copy of the declaration to him, whereupon he muſt pay for the ſame, duty, and warrant as above-mentioned, or on refuſal by him, or his clerk in his abſence, or if his abode is unknown, it may be left in the office, and then on notice thereof given to defendant (from the time of giving ſuch notice, and not before, declaration is well delivered) and on rule to plead given and out, judgment for want of a plea may be ſigned, and no plea may be received till declaration, &c. is paid for.

All declarations and notices to be delivered before nine in the evening. Rule 10 *Geo.* 2.

Declaration delivered to defendant, his attorney being known, is a bad delivery; but if not known, the declaration may be left in the office, and notice thereof given to defendant. *Vide Pract. Reg. in C. P.* 126.

Where neither the defendant nor his attorney, can be found, the court muſt be applied to, and will order notice, &c. in the office to be good, unleſs the bail (if any) ſhew cauſe to the contrary. See 2 *Barnes's Notes* 243.

Delivering declaration when appearance is entered for defendant according to the ſtatute.] In all caſes where a copy of proceſs is ſerved on defendant, and an appearance is entered according to the ſtatute, for preventing frivolous and vexatious arreſts *(a)*, copy of declaration muſt be left in the office, and notice thereof given to defendant, or left at his *laſt* or moſt *uſual* place of abode, ſignifying the nature of ſuch action, at whoſe ſuit it is proſecuted, and in whoſe office ſuch declaration is left, and from the

(a) 12 *Geo.* 1. c. 29.

the time of giving ſuch notice, declaration is well delivered to defendant, and if defendant don't plead within the time limited (a rule to plead being firſt given and out) judgment may be ſigned without further calling for a plea. Rule *M.* 1 *Geo.* 2.

NOTES.

1. Where plaintiff enters an appearance for defendant according to the ſtatute, and notice of the declaration is given to the defendant himſelf, plaintiff may proceed to judgment without calling on defendant's attorney for a plea, for he is not obliged to take notice of any attorney defendant may, after ſaid appearance entered, employ. *Vide Rep. and Caſ. of Pract.* 50. 1 *Barnes's Notes* 177.

2. Plaintiff appeared for defendant according to the ſtatute, filed a declaration, and gave rule to plead, and ſome days after ſerved defendant with notice of the declaration. *Cur'* held that the rule was irregular, for it ſhould not have been given 'till after the notice was ſerved, the declaration being well delivered from the time of notice only. *Hil.* 8 *Geo.* 2. *Gray* v. *Saunders*, *Rep. and Caſ. of Pract. in C. P.* 111.—1 *Barnes's Notes* 173. S. C.

3. In notice of declaration being left in the office, it is only neceſſary to ſet forth the nature of the action, *viz. in debt*, or *in caſe*, but need not ſet forth the ſubſtance of the declaration at large. *E.* 4 *Geo.* 2. *Parſons et al'* v. *Smith*, *Rep. and Caſ. of Pract. in C. P.* 63. *Pract. Reg. in C. P.* 131. S. C.—There was the like reſolution in *Prior* v. *How*, this term, and in *High-*

more

more v. *Tiffin*, *Hil.* 5. *Geo.* 2. *Rep. and Caſ. of Practt. in C. P.* 63. and in *Ball* and *Merrick*, *E.* 4 *Geo.* 2. *Practt. Reg. in C. P.* 132.—Notice of declaration need only mention the nature of the action without mentioning for what, for that will appear by the declaration itſelf. *E.* 4 *Geo.* 2. *Skin* v. *Gwinnet*, *Practt. Reg. in C. P.* 133.

4. But where the notice was "a declaration "in an action of treſpaſs on the caſe," without further deſcription, it was held inſufficient, the intent of the rule being, that defendant ſhould know what he was ſued for. Actions on the caſe for contracts and for torts are widely different; *on ſeveral undertakings*, or at leaſt *on promiſe*, ſhould have been added. *Hil.* 29 *Geo.* 2, *Taylor* v. *Oxley*.

5. Notice of declaration was that "a de- "claration is left againſt you in the office, *&c.* "for 15*l.* due by note under your hand", without ſaying *in debt* or *caſe*. Judgment ſet aſide, for an action of debt might be brought on ſuch note, ſo that the nature of the action did not appear. *M.* 9 *Geo.* 2. *Taylor* v. *Sharman*, *Rep. and Caſ. of Practt. in C. P.* 122. 1 *Barnes's Notes* 216.—Notice was, "that a "declaration upon a note under hand, and for "goods ſold, was filed in the office", without ſetting forth the nature of the action, whether in *debt* or *caſe*, held to be bad, for an action of *debt* might be brought for the ſame. *Hil.* 5 *Geo.* 2. *Seller* v. *Faceby*, *Rep. and Caſ. of Practt. in C. P.* 68. The nature of the action muſt be ſet forth. 1 *Barnes's Notes* 204.

6. The plaintiff having entered an appearance for the defendant, *delivered the declaration* to

to defendant (a), and at the same time gave him notice thereof, tho' after the appearance he knew the defendant's attorney, yet declaration held to be well delivered, and that it was a complying with the rule *M.* 1 *Geo.* 2. in an *equitable construction. M.* 2 *Geo.* 2. *Morris* v. *Parry*, *Rep. and Cas. of Pract. in C. P.* 50.

(a) Note; by the rule *M.* 1 *Geo.* 2. the declaration should have been left in the office, and notice thereof given to defendant.

7. Leaving a declaration in the office, and giving notice to the attorney, who had appeared for the defendant, is the same as if the declaration itself was delivered to him; and plaintiff's attorney is not bound to give notice the same day the declaration is left in the office, but may give notice in any reasonable time afterwards; but it is deemed as no declaration but from the day of notice. *Hil.* 6 *Geo.* 2. *Thomas* v. *Bushell*, *Rep. and Cas. of Pract. in C. P.* 84.

8. Writ returnable in *Hil.* Declaration left in office the same term. Afterwards appearance entered according to the statute, but no notice of declaration was given till the 12th of *April* for defendant to plead within the first four days of this term. Judgment good, the *declaration being a declaration well delivered from the time of the notice (b)*; but *cur'* made a rule to set aside the judgment on payment of costs, pleading an issuable plea, and taking short notice of trial. *T.* 6 & 7 *Geo.* 2. *Mathews and wife administratrix* v. *Stone*, 1 *Barnes's Notes* 164.

(a) Vide 2 *Barnes's Notes* 186. S. P.

9. Writ returnable in *Easter* term last, plaintiff appeared for defendant according to the statute, and left declaration in the office, but rested all *Trinity* and *Michaelmas* terms, and before the essoin-day of *Hilary* term gave defendant notice of declaration. Declaration deemed well delivered only from the notice, and consequently came too late. Defendant

was

was then out of court. *Hil.* 13 *Geo.* 2. *Pritchard* v. *Lewis*, 1 *Barnes's Notes* 224.—*Pract. Reg. in C. P.* 135. S. C.

10. Notice of declaration to one defendant when there are two, irregular, and proceedings ſtaid. 1 *Barnes's Notes* 171, 208.

11. Notice of declaration left in the office without date, bad. *Ibid.* 210. *Pract. Reg. in C. P.* 134.

12. Proceſs ſerved upon defendant, who afterwards removed from his houſe, and plaintiff not being able to find him, followed the firſt ſervice, and left the notice of the declaration under the ſtreet door of the defendant's *empty* houſe. *Cur'* held the judgment regular. *T.* 6 & 7 *Geo.* 2. *Sheridan* v. *Aſhby*, 1 *Barnes's Notes* 289.

13. Notice of declaration ſworn to be put under the latch of defendant's door *June* 15, 1738, but not what time of the *day* or *night*, nor that the perſon who left the notice knocked at, or endeavoured to open the door. It not appearing that the notice came to the defendant's hands, or any of his family, but being left ſo openly might be taken away by any body, notice was held inſufficient, and judgment ſet aſide. *M.* 12 *Geo.* 2. *Talbot* v. *Odeham*, *Ibid.* 301.

14. Plaintiff appeared for defendant, and left declaration in the office in *Eaſter* term, and in *Trinity* term gave notice thereof to defendant, and for want of a plea ſigned judgment. *Cur'* in *Trinity* term ſet aſide the judgment, the nature of the action being omitted in the notice. In *Michaelmas* term following plaintiff gave new notice of the declaration, and ſigned a ſecond judgment, which was ſet aſide; for *cur'* held,

that

that the declaration was well delivered from the time of serving the second notice only, and that the writ being returnable in *Easter* term last, the declaration was delivered too late *(a)*, and plaintiff must begin again. *M.* 6 *Geo.* 2. *Bartholomew one, &c.* v. *Goulding*, 1 *Barnes's Notes* 204. *Pract. Reg. in C. P.* 121. S. C. Notice of declaration on the third term too late. *Ibid.*

(a) i. e. after 2 terms from the return of the writ.

15. Notice of declaration served on a *Sunday* bad within the statute *Car.* 2. which ought to have a large construction in favour of religion. An imparlance granted, *T.* 19 & 20 *Geo.* 2. *Walker* v. *Towne and Lee*, 2 *Barnes's Notes* 245.

16. Copy of process had been tendered to defendant at his house, who refusing to accept the same, it was left there, and within sixteen days after notice of declaration was left under the door of said house, which was then empty and shut up. *Cur'* thought the shutting up of the house a trick of defendant's to avoid process, *&c.*—By the general rule *M.* 1 *Geo.* 2. Notice of declaration is to be left at defendant's last place of abode. *T.* 26 & 27 *Geo.* 2. *Wood* v. *Dodgson*, 2 *Barnes's Notes* 225.

17. Plaintiff having appeared for defendant, a practising attorney, delivered a declaration to him at his chambers, but did not leave a declaration in the office, and give defendant notice thereof in writing, pursuant to the rule. *Per cur'*: Notice ought to be given to an attorney as well as a common person. *Hil.* 2 *Geo.* 2. *Heber, an attorney*, v *King*, *Pract. Reg. in C. P.* 128.

18. Notice to defendant's attorney of a declaration being left in the office, should be in writing. *E.* 6 *Geo.* 2. *Hale* v. *Breedon*, *Pract. Reg. in C. P.* 130.

19. Notice

19. Notice of a declaration being left in the office muſt be given before a rule to plead be given. Settled upon hearing counſel on both ſides. *M.* 8 *Geo.* 1. *Lane* v. *Elliot*, *Pract. Reg. in C. P.* 131. *Ibid. Hil.* 8 *Geo.* 2. *Gray* and *Saunders*, S. P.

20. Notice that a declaration "for goods ſold and delivered, and materials found," was left in the office, when there was a count alſo in the declaration for money lent, good, the nature of the action being ſet forth. No need to ſet forth the whole declaration. *E.* 2 *Geo.* 2. *Turner*, *adminiſtrator*, v. *Bownus*, *Pract. Reg. in C. P.* 132.

21. Judgment ſet aſide without coſts, for a defect in the notice of declaration as to the nature of the action. The words of the notice were [*in an action upon the caſe*] generally without further addition. The intent of the general rule requiring notice is, that defendant ſhould know what he was ſued for. Actions on the caſe on contracts and for torts are extremely various; the notice ſhould have expreſſed at leaſt *on promiſe*, or *on ſeveral undertakings and promiſes*. *Hil.* 29 *Geo.* 2. *Taylor* againſt *Oxley in caſe on promiſe*, *Supplement to 2d. vol. Barnes's Notes p.* 44.

General rule for delivering declaration on proceſs returnable *firſt* or *ſecond* return of any term.] Upon *all* proceſs returnable firſt or ſecond return of any term, if the plaintiff declares in *London* or *Middleſex*, and the defendant lives *within* twenty miles of *London*, declaration muſt be delivered with notice to plead within four days *after* (*a*) delivery, in which time defendant muſt plead without any imparlance. And in caſe the plaintiff declares in any other

(*a*) See note 1. p. 112.

county

county, or the defendant lives above twenty miles from *London*, declaration to be delivered with notice to plead within eight days *after* the delivery, in which time defendant must plead, without any imparlance, and in default of pleading as aforesaid, judgment may be signed. Rules *M.* 3 *Geo.* 2. and *E.* 3 *Geo.* 2.

Note; the Rule *M.* 3 *Geo.* 2. does not mention *notice*, only says defendant shall plead in four or eight days, after declaration delivered; and *E.* 3 *Geo.* 2. says notice shall be given to plead, &c.

When a declaration may be delivered *de bene esse*.] Upon all process returnable *first* or *second* return of any term, declaration may be delivered *de bene esse* at the return of the process, with *notice* to plead, as in the *General rule for delivering declaration on process returnable first or second return of any term*, is mentioned. Rule *M.* 3 *Geo.* 2.—Where a *common appearance* is only required, if defendant does not enter it, and plead in time, (a rule to plead being given and out) plaintiff may enter appearance for defendant according to the statute, and sign judgment. And where defendant has put in *special bail*, and does not plead in time, (a rule to plead being given, and the time out) judgment may be signed by default.

NOTES.

1. Tho' the word *after* in the above rules of *M.* 3 *Geo.* 2. and *E.* 3 *Geo.* 2. seems to *exclude* the day of the delivery of the declaration; yet the construction of the said rules must be governed by the rule to plead, which is *inclusive* of the day on which it is given, and therefore if a declaration

claration be left in the office *de bene esse* on the first day of a term, notice thereof may be given on the same day to plead within the first four or eight days (as the case may be) of the term; and not say within the first four or eight days *after* the declaration delivered.

2. In an action which requires only a common appearance, if a declaration be delivered *de bene esse*, plaintiff cannot sign judgment for want of a plea till the time defendant has to enter his appearance is expired; as if the *capias* is returnable on the *octave* of Saint *Hilary*, and a declaration is left in the office *de bene esse* on 23d *January*, and notice and a rule to plead is given same day, the rule will be out the 26th, but as the defendant has eight days to appear *exclusive* of the return-day, the plaintiff cannot sign judgment for want of a plea till the 29th *January*, and then an appearance must be first entered either by the defendant or the plaintiff for him.

Attachment of privilege returnable *Thursday* next after 15 *Hil.* a copy whereof was served on defendant before the return, and on the return-day (30th *Jan.*) a declaration was left in the office *de bene esse*, and notice to plead served on defendant; defendant by the statute having eight days to appear after the return of the writ (*i. e.* exclusive of the return-day) *viz.* till 7 *February*, his last day of appearing, and then entered his appearance and pleaded a tender *after* his time for pleading given by the said notice, but *before* the rule to plead expired, plaintiff looked on this plea as a *nullity*, because pleaded after the time of pleading expired, and after the rule to plead was out, signed judgment. Defendant insisted that this plea ought to be received any time before his *time for appearing* expired, or any time before plaintiff was entitled to sign judgment for want of a plea; interlocutory judgment set aside, costs to attend the event of the cause. *T.* 28 *Geo.* 2. *Barnard, one, &c.* against *Irwin*, *Supplement to* 2 *vol. Barnes's Notes*, *p.* 39.

3. A common *clausum fregit* returnable first return of this term. Declaration filed *de bene esse*, and notice thereof delivered, and a rule to plead given, plaintiff signed judgment before the expiration of eight days from delivery of the

notice, tho' defendant lived *above* twenty miles from *London*: judgment set aside; the court held that plaintiff should have staid eight days after the delivery of the notice, tho' he gives but a four days rule to plead. *Hil.* 6 *Geo.* 2. *Godfrey* v. *Matthews & al'*, *Rep. and Cas. of Pract. in C. P.* 85.——*M.* 7 *Geo.* 2. *Lazenby* v. *Bradley*. The writ was returnable first return of this term; defendant appeared by his attorney, plaintiff declared in *Yorkshire*, gave rule to plead, and after demanding a plea signed judgment for want thereof in *four* days. *Cur'* held, that pursuant to the rule *M.* 3 *Geo.* 2. in all cases upon writs returnable first or second return of any term, if plaintiff doth not declare in *London* or *Middlesex*, or the defendant lives *above* twenty miles from *London*, defendant has eight days time to plead. Judgment set aside. 1 *Barnes's Notes* 167.—*Rep and Cas. of Pract. in C. P.* 94. S. C. says, *cur'* declared that the late rules (*M.* 3 *Geo.* 2. and *E.* 3 *Geo.* 2.) should extend to declarations delivered to attorneys as well as to declarations filed in the office *de bene esse*, and notice thereof delivered to defendant.

4. When a declaration is left in the office *de bene esse*, you must indorse thereon, that it is left in the office *de bene esse*, or conditionally; or for this reason judgment will be set aside *without* costs. *Hil.* 11 *Geo.* 2. *Evans* v. *Tillan*, 1 *Barnes's Notes* 189.—But in *T.* 24 *Geo.* 2. *in case Gascoigne & Ux'* v. *Brown*, 2 *Barnes's Notes* 185. on looking into the general rules *M.* 3 *Geo.* 2. and *E.* 3 *Geo.* 2. *cur'* held that it was not necessary to indorse notice to plead on the declaration where it is filed *de bene esse*, and notice thereof given to defendant.

5. A

5. A declaration may be delivered *de bene esse* on the essoin or return-day, or on any day after, tho' rule to plead cannot be given till first day of term. *Hil.* 5 *Geo.* 2. *Seller* v. *Taceby*, *Rep. and Cas. of Pract. in C. P.* 68.

6. Writ served on defendant in *London*, at which time he lodged in *London*, and notice of declaration and to plead in four days, left for him at his lodgings in *London* as his last place of abode; tho' defendant dwelt in the country *above* twenty miles from *London*, and lodged only occasionally in *London*, yet held good, and that defendant had only four days time to plead. *M.* 4 *Geo.* 2. *Poulter* v. *Skinner*, *Rep. and Cas. of Pract. in C. P.* 59.—*Pract. Reg. in C. P.* 129. S. C. and P.

7. Declaration filed *de bene esse* first day of term (and notice to defendant), defendant's attorney put in bail in time, whereupon plaintiff's attorney demanded a plea, and for want thereof signed judgment. Defendant insisted that his attorney ought to have had notice of the declaration. The declaration is well delivered *de bene esse*, and notice thereof to defendant's attorney is not necessary. *Hil.* 12 *Geo.* 2. *Christophory* v. *Otto*, 1 *Barnes's Notes* 221.—*Pract. Reg. in C. P.* 149. S. C.

8. Plaintiff declared *de bene esse*, and gave notice to plead in four days instead of eight; bad, tho' plaintiff staid eight days before he signed his judgment. *E.* 12 *Geo.* 2. *Braty* v. *Baldock*, 1 *Barnes's Notes* 222.—*Pract. Reg. in C. P.* 135. S. C.

9. Declarations *de bene esse* are necessary to take the advantage of the term, if the writ be of the *first* or *second* return, where defendant is

to plead without imparlance, but not otherwise. 2 *Barnes's Notes* 66.

Of delivering declarations on process returnable on other returns than *first* or *second*.] If the process be returnable on any other return than *first* or *second*, the defendant is intitled to an imparlance, and in such case notice must be for defendant to plead within the first four days of the next term.

Of declaring by the Bye.] Defendant's attorney is bound to receive a declaration by the bye at the suit of the *same* plaintiff, but not at the suit of any other person. *M.* 11 *Ann. Methwin* v. *Pople*, *Rep. and Cas. of Pract. in C. P.* 6.

On a *special* writ plaintiff cannot declare by the bye, till he has delivered a declaration in the *original* action, otherwise where the writ is an *acetiam* only, for then the plaintiff by declaring will only lose his bail, but may declare in any action, or in any county, as he may upon a *clausum fregit*, and deliver as many declarations the *same* term between the *same* parties as he will. *Vide M.* 4 *Geo.* 1. *Holmes* v. *Small*, *and in three other causes*, *Ibid.* 58.

Declaration may be delivered by the bye in the *same* term, tho' debt and costs on the first declaration are paid. *T.* 14 & 15 *Geo.* 2. *Hand*, *an attorney*, v. *Willet*, *Pract. Reg. in C. P.* 144.

On process at the suit of the husband *only*, he cannot deliver a declaration by the bye at the suit of himself and wife. But on process at the suit of husband and wife he may deliver a declaration by the bye at his own suit *only*.

2. *Wreeks & ux'* v. *Robins*, *Rep.*

and

and Caſ. of Pract. in C. P. 131.—*Pract. Reg. in C. P.* 142. S. C.

A declaration by the bye cannot be regularly delivered *after* the term in which the writ was returned, and therefore two declarations by the bye delivered 16th *October* next before this term (after a declaration in chief delivered in *Eaſter* term laſt) was held to be out of time. *M.* 14 *Geo.* 2. *Dun* v. *Hutt*, *in trover*, *Dun* v. *Hutt*, *in aſſumpſit*, 2 *Barnes's Notes* 270.

On an attachment of privilege *de placito debiti*, the plaintiff cannot deliver a declaration by the bye *in caſe*, till he has declared *in debt*. *Pract. Reg. in C. P.* 141.

Particular caſes relating to declarations.

IRregularity in delivering declarations on notice to be complained of to the court two days before executing inquiry.—It will be too late after inquiry executed. *M.* 2 *Geo.* 2. *Wyatt* v. *Bacon*, *Pract. Reg. in C. P.* 127.—When any irregularity happens, the party injured muſt take the firſt opportunity of applying to the court. *Ibid.*

Plaintiff's attorney not being able to find defendant's attorney, delivered declaration to defendant, and for want of a plea ſigned

Declaration delivered to the defendant when his attorney was known by plaintiff's attorney irregular; and *cur'* ordered an imparlance, for it ſhould have been delivered to defendant's attorney, or left in the office, and notice thereof given to defendant's attorney. *Hil.* 13 *Geo.* 1. *Turner* v. *Shrimpton*, *Rep. and Caſ. of Pract. in C. P.* 32. *Pract. Reg. C. P.* 126. S. C. judgment. And tho' defendant's attorney owned the receipt of the declaration from defendant; yet judgment was ſet aſide, for that declaration was delivered to defendant, and not received by his attorney till after the eſſoin-day of this term. *Hil.* 9 *Geo.* 2. *Hutching* v. *Lillyman*, *Rep. and Caſes of Pract in C. P.* 128.

Declaration delivered to the attorney in the country not good. *T.* 7 & 8 *Geo.* 2. *Adderley* v. *Dixie, Rep. and Caſ. of Pract. in C. P.* 101.

A declaration reduced from four counts to two, there being no neceſſity for more, and the attorney to pay coſts. *Hil.* 9 *Geo.* 2. *Mackdonnel* v. *Gunter & al*, *Rep. and Caſes of Pract. in C. P.* 128.—The ſame term *Morgan* and *Hill*, the like reſolution, but no coſts. *Ibid.*

A declaration in treſpaſs reduced from five to two counts. 2 *Barnes's Notes* 294.

Plaintiff may amend his declaration on payment of coſts by adding new counts any time before the end of the ſecond term, but not afterwards. *T.* 10 *Geo.* 2. *Green* v. *Ball, Rep. and Caſes of Pract. in C. P.* 131.

If agent gives time to plead, country attorney cannot ſign judgment till that time is out. All matters of this ſort are to be tranſacted between the agents in town, and not by country attornies. *Hil.* 11 *Geo.* 2. *Wallace* v. *Willington*, 1 *Barnes's Notes* 189.

Pledges need not be put into the declaration. Pledges are upon the writ, and may be found any time before judgment. *E.* 15 *Geo.* 2. *Littlebolds, one, &c.* v. *Boſanquett*, by attachment of privilege, 2 *Barnes's Notes* 134.

Action of debt on judgment obtained againſt teſtator ſuggeſting the judgment to have been obtained in *Eſſex*. The *venue* in the action of debt was laid in *Eſſex*, declaration held bad on demurrer; it ſhould have been in *Middleſex*. *M.* 20 *Geo.* 2. *Savile* v. *Wiltſhire and another, executors*, 2 *Barnes's Notes* 139.

Declaration amended, on plaintiff's motion, by changing *venue* from *London* to *Middleſex*, after plea pleaded and iſſue joined, on payment

ment of costs; it being on a remedial law, and confined to *Middlesex*. In other cases not usual. 2 *Barnes's Notes* 4, 17, 385.

Declaration amended by adding a new count after the second term, on payment of costs of plea, and replication, and defendant having leave to plead *de novo*. 2 *Barnes's Notes* 17.

Declaration amended by adding pledges, and a memorandum making the declaration agreeable to the bill on record, on payment of costs. *M.* 22 *Geo.* 2. *Wood* v. *Boon, Esq*; having privilege of parliament, 2 *Barnes's Notes* 18.

Leave given to amend the declaration delivered, by inserting the usual memorandum, on payment of costs. *T.* 21 *Geo.* 2. *Penvold* v. *Tomlinson, one &c. by bill*, 2 *Barnes's Notes* 287.

Declaration amended in the conclusion from [and therefore they pray suit] to [pray remedy] after demurrer for that cause, by consent. *E.* 25 *Geo.* 2. *Spencer and another, executors*, v. *Thomlinson, one, &c. by bill*, 2 *Barnes's Notes* 134.

Declaration amended after issue joined, notice of trial, and motion for judgment, as in a case of a nonsuit, the amendment being small, and the issue roll not being stuck into the bundle, on payment of costs of application, and for not proceeding to trial, and appointed a peremptory day for trial. *M.* 26 *Geo.* 2. *Beere* v. *Brooking*, 2 *Barnes's Notes* 256.

After *supersedeas* ordered for want of judgment, plaintiff charged defendant with a new declaration for a different cause of action, and held regular. 2 *Barnes's Notes* 348.

Motion to amend declaration by adding two new counts denied, because issue was joined; and *cur'* said it was never usual to give plaintiff

leave to add a new count after defendant had pleaded. *M.* 2. *Geo.* 2. *Cooper* v. *Middleton*, *Pract. Reg. in C. P.* 16.

Declaration amended after iſſue joined, and verdict ſet aſide. *Ibid.* 17.

Amendments tending to a new cauſe of action, prayed after notice of trial, denied. *Ibid.* 19.

Declaration amended after argument on demurrer, and *ulterius concilium* ordered. *Ibid.* 19.

Pledges to a declaration may be added at any time before judgment ſigned. *Ibid.* 323.

Plaintiff muſt declare in prohibition, if defendant inſiſt on it. *Ibid.* 356.

Declaration amended by altering the *venue* after iſſued joined, and cauſe entered and counſel feed, by laying the *venue* in *Middleſex* inſtead of *London*; this being a plain miſtake, the *Stat.* 9 *Geo.* 2. *c.* 29. directing the action to be brought in *Middleſex*. *T.* 13 & 14 *Geo.* 2. *Cooke* v. *Shone and others*, *Pract. Reg. in C. P.* 20.

Imparlance.

WHERE the proceſs is returnable the *firſt* or *ſecond* return of any term, and the declaration is not delivered or filed, and if filed notice of the filing given before the laſt four days in the term, defendant is intitled to an imparlance of courſe; and ſo he is if declaration be on proceſs returnable on any other return than firſt or ſecond, and in ſuch caſe the notice muſt be for the defendant to plead within the firſt four days of the next term.

NOTES.

NOTES.

1. Motion for an imparlance till *Michaelmas* term next, becauſe declaration was delivered laſt *Michaelmas* term, and no plea called for in three terms, according to the rule *M.* 1654. *ſ.* 15. *T.* 3 *Geo.* 2. *Cole* v. *Pinnell*, *Rep. and Caſ. of Pract. in C. P.* 57.

2. When the declaration is delivered ſo late in term that the defendant is not obliged to plead that term, he muſt within the firſt four days in the next term apply to the prothonotary for a *ſpecial* imparlance, if he would plead in abatement, which he may do having ſuch *ſpecial* imparlance. *M.* 6 *Geo.* 2. *Threlkeld* v. *Goodfellow*, *Rep. and Caſ of Pract in C. P.* 78. —S. C. *Pract. Reg. in C. P.* 1.—S. C. 1 *Barnes's Notes* 149.

3. Actions for words touching the murder of defendant's huſband, imparlance granted till next term, plaintiff being indicted and in cuſtody for the crime. *Hil.* 10 *Geo.* 2. *Sibſon* v. *Niven, widow*, *Rep. and Caſ. of Pract. in C. P.* 139.—S. C. *Pract. Reg. in C. P.* 225.—1 *Barnes's Notes* 150. S. C.

4. If plaintiff amends his declaration, and pays coſts, defendant ſhall not have an imparlance. *E.* 1 *Geo.* 2. *Know* v. *Wychel et al'*, *Pract. Reg. in C. P.* 17, 18.

5. After an imparlance only four days time to plead in a country cauſe. *T.* 6 & 7 *Geo.* 2. *Mathew and wife* v. *Stone*, *Ibid.* 288.

6. An imparlance is a matter of right, *per cur'*. *Ibid.* 425.

7. Plaintiff has a right to enter continuances by imparlance on the roll, from the declaration to judgment or iſſue. 2 *Barnes's Notes* 133, 269.

8.

8. Time to plead and an imparlance are the same thing. *Ibid.* 133, 269.

9. Too late to plead a tender after a general imparlance. *Hil.* 19 *Geo.* 2. *Smith* v. *Philips, one, &c. Ibid.* 284.

10. There can be no imparlance after a peremptory rule to plead. 2 *Barnes's Notes* 85.

11. Defendant appeared to be a lunatic by affidavits of his wife and Dr. *Monro*, and a commission of lunacy produced under seal in chancery, imparlance ordered on hearing the attornies on both sides. *Ibid.* 181.

12. Writ returnable first return, defendant put in bail in time, and plaintiff declared, an imparlance granted, declaration not having been delivered with notice to plead, according to the general rule, *E.* 3 *Geo.* 2.—But denied where a notice of declaration being left in the office and to plead had been served on defendant, tho' no notice to plead indorsed on the declaration. *Ibid.* 182, 3.—*Ibid.* 185. The court on looking into the general rules *M.* 1. *M.* 3. and *E.* 3 *Geo.* 2. held, that in case of notice of declaration being left, *&c.* it was not necessary to indorse notice to plead on the declaration, the notice served on the defendant is sufficient; it was the original course. After rule *M.* 1. (directing how notice is to be served on defendant where plaintiff appears for him) defendant was intitled to an imparlance, till the rule of *M.* 3. took away the imparlance. The rule of *E.* 3. directs nothing about the notice, only that declaration shall be delivered *with notice*. The declaration is not compleat till notice.

13. By

13. By virtue of a rule for leave to file a bill to warrant proceedings, plaintiff may, as a neceſſary conſequence, enter an imparlance on the roll. *Ibid.* 184.

14. But where imparlance is not entered on the roll in time, plaintiff pays coſts. *Ibid.*

15. Imparlance not to be given in real actions, eſſoins are ſufficient delays. *Ibid.* 2.

16. Imparlance denied, tho' plaintiff declared on ſeveral batteries, tho' but one in the writ. *Rep. and Caſ. of Pract. in C. P.* 48.

Rule for bringing money into court.

Cooke,

MIchaelmas term in the —— year of King *George* the ſecond, *A.* againſt *B. Wedneſday* the 28th of *November*, it is ordered, that the defendant ſhall pay to the plaintiff, or to his attorney, —— together with coſts, to be taxed by Mr. prothonotary *Cooke*, if the plaintiff will accept thereof, and that thereupon all further proceedings in this action ſhall be ſtayed; but if the plaintiff will not accept thereof, the defendant ſhall immediately bring the ſaid —— into this court, and plead the general iſſue; and if upon the trial of the iſſue between the ſaid parties, the plaintiff ſhall become nonſuit, or the jury ſhall not aſſeſs damages to the plaintiff exceeding the ſaid —— then the plaintiff ſhall have no coſts, but ſhall pay to the defendant, or to his attorney, coſts to be taxed by the ſaid prothonotary, which coſts ſhall be paid out of the money ſo brought into court if ſufficient for that purpoſe, and the reſidue, if any, ſhall be paid to the plaintiff. But if the money ſo paid into court be not ſufficient to pay the ſaid

coſts,

costs, the deficiency shall be made good by the plaintiff; but if upon the trial of the said issue the jury shall assess damages to the plaintiff exceeding the —— *l.* then judgment shall be entered for the plaintiff upon the verdict with costs and the plaintiff shall have the said —— *l.* out of court towards satisfaction of such judgment, and may take out execution for the residue.

Entered. On the motion of Mr. Serjeant —— for defendant.

By the court. FOTHERGILL.

The reason of making the rule for payment of money into court, was to prevent vexation, and to make an end of the cause. *Vide Pract. Reg. in C. P.* 256.

Five pounds or under may be brought in on a motion in the treasury.

NOTES.

1. Money may be brought into court upon the common rule after rule to plead is out, at any time before plea pleaded. *M.* 6 *Geo.* 2. *Anon.* 1 *Barnes's Notes* 197. — Rule to pay money into court discharged, the money not having been paid in till after plea pleaded. *Hil.* 11 *Geo.* 2. *Strephon* v. *Thompson*, *Ibid.* 200. —*Cur'* can't give leave to bring money into court after plea pleaded without plaintiff's consent. 2 *Barnes's Notes* 275.—*Pract. Reg. in C. P.* 261. S. P. — In *M.* 13 *Geo.* 2. *Usher et al'* v. *Edmunds*, leave was given to withdraw the general issue, plead the same *de novo*, and pay money into court. In this case plaintiff had directed his attorney to pay money into court on the common rule, the attorney died before it

it could be done, and his clerk delivered the general iſſue by miſtake. *Cur'*: The general practice is againſt defendant, but muſt be diſpenſed with in caſe of accidents. *Pract. Reg. in C. P.* 262.

2. Motion, upon affidavit that defendant was dead, that 10*l.* paid into court might be paid to his executors, denied *per cur'*, *M.* 6 *Geo.* 2. *Knapton* v. *Drew*, 1 *Barnes's Notes* 197.—*Pract. Reg. in C. P.* 252. S. C. and P. for *per cur'*, money being once paid in it belongs to the plaintiff.

3. Motion to bring principal, intereſt and coſts into court, and refer to prothonotary. *Cur'* refuſed to grant the rule, plaintiff being an executor, but ſaid, plaintiff might be willing to accept the debt and coſts, and therefore granted a rule to ſhew cauſe. *Hil.* 6 *Geo.* 2. *Bryan, executor*, againſt *Holloway*, 1 *Barnes's Notes* 197.

4. Money paid into court in debt for rent, and *nil debet* pleaded; ſo in covenant for not payment of rent. *T.* 7 & 8 *Geo.* 2. *Dixon* v. *Allen* (a), *Ibid.* 198.—*Ibid.* 201. *M.* 12 *Geo.* 2. *White* v. *Daman*, S. P.

(a) *Pract. Reg. in C. P.* 257. S. C.

5. Where plaintiff ſues as adminiſtrator, rule to bring money into court muſt be ſo drawn up. *Hil.* 8 *Geo.* 2. *Satterthwaite and wife adminiſtratrix* v. *Watford. Ibid.* 198.

6. After iſſue joined and notice of trial, plaintiff may have leave to take money out of court with coſts, to the time of bringing the ſame in, on payment of coſts to defendant, ſubſequent to the time of bringing the money into court. *Hil.* 8 *Geo.* 2. *Savage* v. *Francklyn*, *Ibid.*—*Pract. Reg. in C. P.* 254. S. C.—*Hil.* 13 *Geo.* 2. *Davies* v. *Manſell, Bart. Ibid.* 255. S.P.--2 *Barnes's Notes* 230. *Hil.* 17 *Geo.* 2. *Vane* v. *Mechell*, S. P.

S. P.—*Ibid.* 235. *E.* 24 *Geo.* 2. *Bate, assignee,* v. *Crane, in covenant,* S. P. Defendant's subsequent costs to be paid out of the money in court.

7. Plaintiff recovers a smaller sum than that paid into court, defendant shall have that money out of court towards his costs. In the treasury *Hil.* 8 *Geo.* 2. *Anon.* 1 *Barnes's Notes* 199.

8. Tho' plaintiff dies before trial, defendant cannot have his money back. *E.* 5 *Geo.* 2. *Crockay* v. *Martin, Ibid.* 199.—*Pract. Reg. in C. P.* 255. S. C. *Rep. and Cas. of Pract. in C. P.* 129. says it was objected that the money belonged to plaintiff's executor, that a rule was made that the plaintiff's executor should bring a new action, and in the mean time all things should stay.

9. In trover, motion to bring the goods specified in the declaration into court, but they being ponderous, motion denied, *per cur'*. But plaintiff to shew cause why he should not consent to accept the goods and costs. *T.* 10 *Geo.* 2. *Cook* v. *Holgate,* 1 *Barnes's Notes* 200. *Pract. Reg. in C. P.* 260. – *Rep. and Cas. of Pract. in C. P.* 130. S. C. says, the motion was to bring many houshold goods into court. If it had been any particular thing, *Cur'* would have granted it, but they would not incumber the court with many goods, but made a rule as above.—*Watkinson* v. *Cockshot, Hil.* 6 *Geo.* 2. A motion to bring goods into court denied. *Ibid.*

10. Money cannot be brought into court after a regular judgment. *Per cur'*, *M.* 12 *Geo.* 2. *Burgess* v. *Pollamounter,* 1 *Barnes's Notes* 200. *Pract. Reg. in C. P.* 262. S. C. 2 *Barnes's Notes* —— *T.* 21 *Geo.* 2. *Tidmash* v. *Smith, in covenant,*

nant, S. P. Rule to bring money into court comes in lieu of a tender.—*Pract. Reg. in C. P.* 258. *Hil.* 6 *Geo.* 2. *Grove* v. *Ask*, S. P. *Pract. Reg. in C. P.* 289. S. P. *Rep. and Caſ. of Pract. in C. P.* 85. S. P.

11. After money paid in, and iſſue joined, it cannot afterwards be increaſed. *Per Cur'*, *Hil.* 13 *Geo.* 2. *Swan* v. *Freeman*, *ibid.* 202. *Pract. Reg. in C. P.* 263. S. C.— 2 *Barnes's Notes* 233. Leave to add more money denied, defendant having pleaded and brought no money in. *M.* 22 *Geo.* 2. *Green*, *executor*, v. *Beaton*, *in covenant*. 2 *Barnes's Notes* 233.

12. Common rule obtained from ſecondary for payment of money on a bill penal, with a count added on *mutuatus*, is wrong; but *Cur'* refuſed to ſet it aſide after verdict in defendant's favour. *E.* 14 *Geo.* 2. *Peirce* v. *Sanders*, 2 *Barnes's Notes* 228.

13. Rule to ſhew cauſe why on defendant's bringing into court curtains, &c. proceedings ſhould not ſtay, diſcharged, they having been altered, and thereby leſſened in value.—Theſe ſort of rules are diſcretionary. *M.* 15 *Geo.* 2. *Royden* v. *Batty*, *in trover*, *ibid.* 229.

14. Money brought into court in covenant, where the breach was aſſigned in a ſum certain, *viz.* for 11 *l.* for not dreſſing corn. *Hil.* 15 *Geo.* 2. *Walnouth* v. *Houghton*, *ibid.*

15. Money brought in by defendant ordered to be paid out to plaintiff though judgment arreſted, and conſequently no coſts were to be paid on either ſide. *E.* 16 *Geo.* 2. *Fiſher* v. *Kitchingman*, *ibid.* 230.

16. Leave to bring money into court refuſed in an action on a bond, conditioned for bailiff's good behaviour, and for his paying money col-

collected for the sheriff's use. *Hil.* 18 *Geo.* 2. *Atkins* v. *Taylor*, *ibid.* 231.

17. So in an action of debt for the penalty of a charterparty. *E.* 19 *Geo.* 2. *Yeoman* v. *Ross*, *ibid.*

18. Leave to pay money, &c. with respect to two counts, and as to the rest to plead the general issue; the statute of limitations and a set off. This is similar to covenant for not payment of rent where other breaches are also assigned. If plaintiff takes the money out, he must have costs of the whole to that time. *Cur'* will not give defendant leave to pay money into court, and plead as to some of the counts, and demurrer (*a*) to the rest. *T.* 21 & 22 *Geo.* 2. *Hellier* v. *Hellier*, *widow and administratrix*, *in case*, *in nine counts*, *ibid.* 232.

(*a*) Motion to pay money into court on all the counts in the declaration except the last, and to demur to that, denied *M.* 2 *Geo.* 2. *James* v. *Hosey*, *Pract. Reg. in C. P.* 256.—Motion to bring money into court upon some of the promises in the declaration, and to demur to one of the promises, denied. *M.* 2 *Geo.* 2. *James* v. *Gosey*, *Rep. and Cas. of Pract. in C. P.* 43.

19. In debt for penalty of a bond, conditioned for performance of covenants in a lease; breach assigned for non-payment of 10 *l.* for half a year's rent. Motion to bring 10 *l.* into court on the common rule denied. This has never been done in debt, though in covenant it may. By the 8 & 9 *W.* 3. the judgment in covenant is to stand, and *scire facias* may be sued out for subsequent breaches, but that statute does not extend to this case. In debt on bond for payment of money by instalments, money cannot be brought in on the common rule. On suffering plaintiff to enter judgment, and payment of 10 *l.* and costs, proceedings

ceedings ſtaid. *Hil.* 22 *Geo.* 2. *Wright* v. *Bennington*, 2 *Barnes's Notes* 233.

20. Leave to bring money, and plead *plene adminiſtravit*, as well as the general iſſue, to the whole. *Hil.* 23 *Geo.* 2. *Auſtin* v. *Roſs, executor*, 2 *Barnes's Notes* 234.

21. Leave to plead bankruptcy to the firſt count, pay money, *&c.* on the common rule, and plead the general iſſue to the other counts. *E.* 16 *Geo.* 2. *Hall* v. *Lane, in caſe, on ſeveral promiſes*, 2 *Barnes's Notes* 276.

22. Leave to withdraw plea, pay 50 *l.* into court, and plead the general iſſue, defendant doing ſo within a week, and taking ſhort notice of trial for next aſſizes. *T.* 26 *&* 27 *Geo.* 2. *Pitfield* v. *Morey*, *ibid.* 296.

23. Money is paid into court, the plaintiff refuſes it, proceeds to trial, and is nonſuited; defendant cannot have it back, for defendant by bringing the money into court had admitted that the plaintiff was intitled to it at all events. Afterwards plaintiff brought a new action, and in *Hil.* 1 *Geo.* 2. *Cur'* made a rule for plaintiff to have the money if he thought fit, but if not, that it ſhould remain in conrt upon the common rule in the new action. *M.* 1 *Geo.* 2. *Lane* v. *Wilkinſon*, *Pract. Reg. in C. P.* 250. — *Vide Dickins* v. *Tallowin*, *p.* 130. *Ca.* 25.

Rep. and Caſ. of Pract. in C. P. 36. *T.* 13 *Geo.* 1. *Lane and others* v. *Wilkinſon* S. P. defendant cannot have the money, for he paid it into court as knowing and being conſcious that he owed the plaintiff ſo much, and therefore the plaintiff ſhall have it. *Ibid.*

24. Money paid back out of court to defendant towards ſatisfaction of his coſts, he having a verdict. *T.* 1 *Geo.* 2. *Rathbone* v. *Steadham*, *Pract. Reg. in C. P.* 251. — *Rep. and Caſ. of Pract. in C. P.* 54. — *E.* 8 *Geo.* 2. *Maddox* v. *Paſton*. Six pounds brought into

court on the common rule, and plaintiff recovered but five pounds; by the words of the rule, plaintiff was to have the money out of court, but the defendant moved to have the ſix pounds paid in part of his own coſts, and granted. *E.* 8 *Geo.* 2. *Maddox* v. *Paſton*, *Rep. and Caſ. of Pract. in C. P.* 117.

25. Plaintiff nonſuited at trial after money brought into court, new action brought, leave to defendant to pay in a further ſum, and both ſums to remain on the common rule in the new action. *T.* 3 *Geo.* 2. *Dickins* v. *Tallowin*, *Pract. Reg. in C. P.* 252.

26. Money paid into court to attend the event of the verdict, paid back to the defendant, the plaintiff being nonſuited. *E.* 6 *Geo.* 2. *Frampton* v. *Cooke*, *Pract. Reg. in C. P.* 253.

27. Coſts of paying money into court, and taking it out, muſt be paid by defendant, tho' the money was tendered (after rule for paying it into court) to plaintiff's attorney and refuſed before paid in; for though defendant tendered the debt, he could not tender the coſts till they were taxed. *T.* 8 & 9 *Geo.* 2. *Cotton* v. *Perk's*, *Pract. Reg. in C. P.* 258.—*Rep. and Caſ. of Pract. in C. P.* 120. S. C.

28. Leave to plead double, and to bring money into court. *Hil.* 9 *Geo.* 2. *Bowles* v. *Wheeler*, *Pract. Reg. in C. P.* 260.—*Pract. Reg. in C. P.* 310. *M.* 11 *Geo.* 1. *Dun* v. *Holditch* S. P.

29. Motion to bring money into court, defendant ſuggeſting that the ejectment was brought for nonpayment of a fine, and for letting a leaſe contrary to the cuſtom of the manor, but denied; for though it can be no diſadvantage to a leſſor to ſtay proceedings on payment of his

his rent and coſts, yet the granting this motion may probably give the defendant ſuch an advantage over the leſſors, who have brought this ejectment for a juſt cauſe, as may do them injuſtice. *Hil.* 1 *Geo.* 2. *Rocks* v. *Ateaſe, on the demiſe of Lady Briſcoe, widow, et al', Rep. and Caſ. of Pract. in C. P.* 42.

30. An action of aſſault, and for taking away one ſhilling; moved to bring the ſhilling into court, and plaintiff to proceed at his peril for the reſidue, rule to ſhew cauſe, but *Q.* whether it was ever made abſolute, or oppoſed? *T.* 2 *Geo.* 2. *Smith* v. *Dobby, Rep. and Caſ. of Pract. in C. P.* 46.

31. In trover, motion to bring a note into court, and granted. Court thought it as reaſonable that goods, or their value, ſhould be brought into court in an action of trover, as money in an *aſſumpſit. M.* 4 *Geo.* 2. *Tuney* v. *Clarke, Rep. and Caſ. of Pract. in C. P.* 59.—*Billings* v. *Wilcocks, Hil.* 1733. a rule was granted for bringing working tools into court. *Ibid.*

32. Motion to pay money into court, but not brought in till three terms after; proceedings ſet aſide, upon payment of coſts by the defendant. *M.* 7 *Geo.* 2. *Bond* v. *Jope, Rep. and Caſ. of Pract. in C. P.* 93.

33. In replevin and avowry for rent, the plaintiff was allowed to bring money into court.

34. Where the plaintiff is an executor [or adminiſtrator] money may not be brought into court; *per cur'*, but a rule was granted for the plaintiff to ſhew cauſe. *Hil.* 6 *Geo.* 2. *Gibbs, executor,* v. *Gawler, Pract. Reg. in C. P.* 250.

The reaſon given is, *that an executor or adminiſtrator is not by law to pay coſts*; Q. therefore whether money may not be brought into court, if the action brought by the executor or adminiſtrator be ſuch an action as he might have brought in his own right, and in which he need not have named himſelf executor or adminiſtrator, for in ſuch an action he will be liable to pay coſts on a nonſuit, *&c.*

35. Caſe on ſeveral *Undertakings* and *promiſes*, the laſt count for money received for plaintiff's uſe as executrix; rule to ſhew cauſe why defendant ſhould not have leave to pay money into court on the common rule, as to the *laſt* count, and why, if plaintiff ſhould not recover more money than the ſum paid into court on that count, and ſhall not recover any thing on the other counts, why ſhe ſhould not pay defendant's coſts, it appearing that plaintiff might, as to the fourth count, have brought the action in her own right. On ſhewing cauſe a rule was entered into by conſent, that plaintiff do accept the money offered, as to the laſt count, with coſts hitherto as to it, and that the laſt count be ſtruck out of the declaration. *Hil.* 25 *Geo.* 2. *Emes Widow, executrix*, v. *Jew*, 2 *Barnes's Notes* 236.

36. Defendant moved for leave to bring money into court, denied, ſhe being an executor,—but afterwards was allowed, conſenting not to take the money out again. *M.* 1 *Geo.* 2. *Caſs* v. *Iveſon, executor, Pract. Reg. in C. P.* 249.

37. Defendant paid money (37 *l.*) into court on the common rule, the plaintiff proceeded to trial, and recovered a larger ſum, and afterwards

wards became a bankrupt; the aſſignees under the commiſſion moved to have the money paid out of court to them; which was oppoſed by plaintiff's attorney, who ſubmitted whether he who had been the means of recovering the verdict, ought not to be firſt paid his bill of coſts? Rule to refer his bill to the prothonotary to be taxed, and the attorney to allow 7*l.* 4*s.* received by him of plaintiff in part, and then to be paid out of the 37*l.* and the reſidue to be paid the aſſignees. *T.* 27 & 28 *Geo.* 2. *Owſton* v. *O Brian*, *M. S. Notes*, *Supplement to* 2 *vol. Barnes's Notes*, *p.* 11. S. C.

38. Rule to bring money into court upon the breach aſſigned for nonpayment of rent made laſt *Trinity* term; plaintiff afterwards died (*viz.* in *July* laſt) before any thing further done. Plaintiff's executrix moved for leave to take the money out of court, with coſts to the time it was paid in, which plaintiff in his life-time was intitled to. A rule was made by conſent, That the money be paid out of court to plaintiff's executrix with ſuch coſts as plaintiff would have been intitled to, if he had accepted the money at firſt; and that no action ſhould be brought by the executrix for the ſame cauſe for which the former action was brought by the teſtator. *E.* 27 *Geo.* 2. *Rogers*, *aſſignee*, againſt *Stanford*, *aſſignee*, *in covenant broken*, *Supplement to* 2 *vol. Barnes's Notes*, *p.* 40.

39. Action on bond to a truſtee, to ſecure an annuity by inſtalments to defendant's wife. Rule abſolute to ſtay proceedings on payment of 3*l.* (the only inſtalment due) and coſts. *T.* 27 & 28 *Geo.* 2. *Moſs*, *adminiſtrator*, v. *Hardy*, *Supplement to* 2 *vol. Barnes's Notes p.* 41.

40. Defendant obtained a rule for plaintiff to ſhew cauſe, why he ſhould not have leave to bring into court, on the common rule, 40 *s.* in lieu of each heriot demanded by plaintiff; but on ſhewing cauſe the covenant appeared to be, to render to plaintiff the beſt live beaſt for a heriot, or pay him 40 *s.* in lieu thereof, at plaintiff's election. Rule diſcharged. *Hil.* 28 *Geo.* 2. *Davy, Baronet,* v. *Martyn, aſſignee,* &c. *in covenant broken, Supplement to* 2 *vol. Barnes's Notes* 41.

41. Upon the common motion by defendant to bring principal, intereſt and coſts into court, purſuant to the ſtatute; objected by plaintiff, that he being an executor, this caſe is not within the ſtatute. *Bryan, executor,* againſt *Holloway, Hil.* 6 *Geo.* 2. was quoted to ſhew that ſuch a notion was once entertained. But *per cur'*: The words of the ſtatute are general and extend to all actions on bond, brought by executors as well as other perſons. Rule abſolute to bring principal, Intereſt and coſts into Court, and thereupon proceedings to be ſtayed. *Hil.* 28 *Geo.* 2. *Wright, executor,* v. *Swayne, Eſquire, in debt on bond, Supplement to* 2 *vol. Barnes's Notes* 42.

42. Rule abſolute for leave to withdraw plea of general iſſue, on payment of coſts, pay 2 *l.* 2 *s.* into court on common rule, and plead the ſame plea again; defendant taking notice of trial for the ſitting after term in *Middleſex.* No delay had been occaſioned to plaintiff by defendant's omitting to bring money into court before plea pleaded. *Hil.* 29 *Geo.* 2. *Phillips* v. *Barker, Supplement to* 2 *vol. Barnes's Notes p.* 42.

Venue.

OF laying the *venue* in *local* actions.] All real and mixt actions, as waſte, *ejectione firmæ*, &c. are *local*, and muſt be laid in the county where the lands lie. And actions of treſpaſs *quare clauſum fregit*, muſt be laid in the county where the wrong was done.

Of laying *venue* in *tranſitory* actions.] Actions of *debt*, *detinue*, *aſſault*, *annuity*, *account*, &c. are tranſitory, and may be laid in any county where the plaintiff pleaſeth.

But by a rule of this court, actions *upon the caſe*, *treſpaſs for goods*, *aſſault*, or *impriſonment*, ariſing in any *Engliſh* county, are to be laid in the proper counties, unleſs they ariſe where the juſtices of *niſi prius* ſeldom come. And becauſe *treſpaſs* or *trover* for goods, *battery*, impriſonment and ſlander, muſt needs be notorious in what county they ariſe, the attorney knowingly laying them out of their proper county (unleſs in caſes before expreſſed, or ſuch other cauſes as ſhall be allowed by a judge of the court) ſhall be ſeverely puniſhed. Rule *M.* 1654. *ſect.* 8.

Of changing the *venue*.] In a tranſitory action *before the defendant has pleaded*, on motion and affidavit, that the cauſe of action (if any) aroſe in the county of *A.* and not in the county of *B.* as laid in the declaration, or elſewhere out of the county of *A.* the court will change the *venue* to the proper county, and the defendant muſt plead to the new action, as he ſhould have done to the former, without delay, and the *venue* may be changed in this manner, though

the defendant comes in on the *exigent*. *Same Rule.*

The defendant cannot move to change the *venue* in any action until his appearance be entered. Rule *E.* 24 *Car.* 2.

NOTES.

1. Formerly the *venue* could not be changed after application, and an order obtained for time to plead, nor even after a ſummons. *Vide Rep. and Caſ. of Pract. in C. P.* 57, 126. *Pract. Reg. in C. P.* 425, 426. 1 *Barnes's Notes* 342, 344, 350, 338, 348. 2 *Barnes's Notes* 387. But now by a rule of this court made *M.* 16 *Geo.* 2. any defendant may move to change the *venue* at any time before plea pleaded, in all ſuch actions where the *venue* may be changed by the courſe of this court, notwithſtanding ſuch defendant may have applied for and obtained further time to plead before ſuch motion made.

2. The *venue* was changed from *Middleſex* to *London*, for *London* has always been conſidered in this reſpect as a county at large, and motions to change the *venue* into *London* have uſually been granted, though not to any other city or town which is a county of itſelf. *Hil.* 1 *Geo.* 2. *Biddolph* v. *Brown*, *Rep. and Caſ. of Pract. in C. P.* 41. *Venue* changed from *Norfolk* into *London*. *T.* 8 & 9 *Geo.* 2. *Bickley* v. *Mackerell*, 1 *Barnes's Notes* 341.—*Gallant* v. *Squire*, *T.* 5 & 6 *Geo.* 2. *Venue* changed from the city of *Norwich* to *London*. *Cur'* ſaid the *venue* had been often changed into *London*. They do ſo in *B. R. Pract. Reg. in C. P.* 429.

3. *Venue* changed from *London* to *Middlesex*. *Hil.* 13 *Geo.* 2. *Stoneham* v. *Denton*, *Pract. Reg. in C. P.* 430.—1 *Barnes's Notes* 352. *Stoneham* v. *Dent* S. P.—The like resolution, *Gibson* v. *Letchmere*, *Hil.* 3 *Geo.* 2. *in B. R. Pract. Reg. in C. P.* 430.

4. Affidavit to change the *venue* should be, that "the plaintiff's cause of action (if any such he hath) did arise in, &c." and not that the promises in the declaration were made in, &c. and not in, &c. *Pract. Reg. in C. P.* 421, 422. 1 *Barnes's Notes* 336.

5. *Venue* may be changed from *Middlesex*, though the plaintiff be an attorney, if he sues by *capias* and not by attachment. *T.* 10 *Geo.* 2. *Welland* v. *Funieall*, *Rep. and Cas. of Pract. in C. P.* 132.—*Welland* v. *Feument*, *T.* 7 & 8 *Geo.* 2. S. P. *Pract. Reg. in C. P.* 419. 1 *Barnes's Notes* 339. S. C.

6. The words of the Affidavit for changing the *venue*, were that "plaintiff's cause of action (if any) arose in the county of *B.* and "not in the county of *M.* or elsewhere out of "the county of *B. to the defendant's knowledge* "*or belief*," which words were held to be insufficient as not being positive. *M.* 7 *Geo.* 2. *Belshaw* v. *Porter*, *Pract. Reg. in C. P.* 422. 1 *Barnes's Notes* 338. S. C.

7. An attorney not declaring in person loses his privilege, and therefore *venue* changed from *Middlesex* into *Suffolk*. *Hil.* 7 *Geo.* 2. *Dent* v. *Lambert*, 1 *Barnes's Notes* 338.

8. *Venue* cannot be changed after defendant is bound to plead the general issue, and take short notice of trial, for changing the *venue* would in effect be putting off the trial. *M.* 8 *Geo.* 2. *Orpwood* v. *Banniere*, *Pract. Reg. in C. P.*

C. P. 70. 1 *Barnes's Notes* 337. *Hardreſs* v. *Sandell, M.* 7 *Geo.* 2. S. P.

9. *Venue* cannot be changed after plea pleaded. *Hil.* 13 *Geo.* 1. *Carter, Eſquire,* v. *Dormer, Eſquire, Rep. and Caſ. of Pract. in C. P.* 33.—*Coſtar and wife* v. *Standen, Hil.* 8 *Geo.* 2. S. P. *Ibid.* 192. *Pract. Reg. in C. P.* S. C.—But may at any time before, though rule to plead be out. *Rep. and Caſ. of Pract. in C. P.* 159.

10. *Venue* not changed on a bill of exchange or *promiſſory notes,* for theſe are in the nature of *ſpecialties. T.* 8 & 9 *G.* 2. *Ward* v. *Colclough, Rep. and Caſ. of Pract. in C. P.* 119. 1 *Barnes's Notes* 341. S. C. *Pract. Reg. in C. P.* 417. S. C.—*Viggers* v. *Viggers, T.* 10 *Geo.* 2. *Cur'* made the like reſolution, and ſo it was ſaid to be ruled in *B. R. Rep. and Caſ. of Pract. in C. P.* 119.—Motion to change the *venue* from *Middleſex* to *Surry.* On producing declaration, it appeared to be an action on a promiſſory note only, therefore rule diſcharged. *M.* 12 *Geo.* 2. *Watſon* v. *Lewis, Rep. and Caſ. of Pract. in C. P.* 152.—*Watſon* v. *Wallis, M.* 12 *Geo.* 2. S. P. *Pract. Reg. in C. P.* 418.—*Rice* v. *Vinal, H.* 10 *Geo.* 2. There was a count in the declaration upon a promiſſory note; *cur'*, let plaintiff make affidavit that there is a *real* note, which he did, and thereupon the rule to change the *venue niſi* was diſcharged. *Pract. Reg. in C. P.* 417. 1 *Barnes's Notes* 345. S. C.—*Ibid.* 351. *Maugir* v. *Hinds, Hil.* 13 *Geo.* 2. Action on a bill of exchange only, *venue* not changed, plaintiff undertaking not to give evidence upon any other count, ſave that upon ſaid bill.—2 *Barnes's Notes* 390. *Cur'* refuſed to change the *venue* where declaration contained *int' al'* a promiſſory note, on which plaintiff undertook to give evidence

dence at the peril of a nonſuit. *M.* 17 *Geo.* 2. *Duke of Bedford* v. *Bray*, *Ibid.* 392. *Litſon* v. *Cooke*, *Hil.* 21 *Geo.* 2. S. P.

11. Affidavit "that if the words were ſpoken "as in the declaration, they were ſpoken in "*Herefordſhire* and not in *Middleſex*," held bad, the words ſhould be mentioned in the affidavit. *Hil.* 8 *Geo.* 2. *Caſtle* v. *Boucher*, 1 *Barnes's Notes* 340.

12. *Venue* never changed into a county palatine. *T.* 6 & 7 *Geo.* 2. *Herbert* v. *Shawe*, *Rep. and Caſ. of Pract. in C. P.* 91. 1 *Barnes's Notes* 337. S. C.—*Pract. Reg. in C. P.* 429. S. C.—1 *Barnes's Notes* 337. S. C.—*Craſtell* v. *Cockerell*, 1 *Barnes's Notes* 341. S. P.

Venue ariſing in a county palatine. Rule to ſhew cauſe why it ſhould not be laid in an adjacent county upon a full affidavit. *M.* 5 *Geo.* 2. *Deniſon* v. *Law*, *Pract. Reg. in C. P.* 428.—2 *Barnes's Notes* 386. *Richardſon* v. *Walker et' al'*, *T.* 14 & 15 *Geo.* 2. *Venue* is never changed into a county palatine.

13. *Venue* laid at *Leek* without ſaying in the county aforeſaid, held good on demurrer. *E.* 9 *Geo.* 2. *Spooner* v. *Milward*, 1 *Barnes's Notes* 342.

14. May move to change the *venue* after time to perfect bail. *M.* 10 *Geo.* 2. *Newby* v. *Burton*, 1 *Barnes's Notes* 338.

15. Defendant pleads after rule *niſi* to change the *venue*, and before it was made abſolute, no waiver of the rule, ſeeing defendant's firſt application to the court was made before plea pleaded. *M.* 10 *Geo.* 2. *Lucas* v. *Rudd*, *Rep. and Caſ. of Pract.* 136. *Pract. Reg. in C. P.* 423. S. C. 2 *Barnes's Notes* 392. *T.* 24 & 25 *Geo.* 2. *Herbert* v. *Flower and others*, *in trover*, S. P. The plea put in by inadvertency is no waiver of the rule. *Cur'* gave defendant leave to withdraw

withdraw the plea on payment of coſts, and made the rule abſolute to change the *venue*.

16. *Venue* not changed in *ſcandalum magnatum*. *T.* 10 *Geo.* 2. *Lord Griffin* v. *Bugby*, *Rep. and Caſ. of Pract. in C. P.* 132.—*Lord Griffin* v. *Buckley*, *Pract. Reg. in C. P.* 417. S. C.—1 *Barnes's Notes* 343. *Lord Griffin* v. *Buckby*, S. C.—*Lord Stanford* v. *Brown*, *T.* 1 *Geo.* 1. The like reſolution, *Rep. and Caſ. of Pract. in C. P.* 132.—*Pract. Reg. in C. P.* 417. S. C.

17. An attorney has no privilege to change the *venue* into *Middleſex*, where he is defendant. *M.* 10 *Geo.* 2. *Mills* v. *Johnſon*, an attorney. *Rep. and Caſ. of Pract. in C. P.* 135.—*Pract. Reg. in C. P.* 419. S. C. 1 *Barnes's Notes* 344. *Cooper* v. *Mills*, attorney, *M.* 10 *Geo.* 2. S. P. —But where an attorney is plaintiff and ſues as ſuch, he has a right to lay his action in *Middleſex* in any caſe, and the *venue* cannot be changed. *E.* 7 *Geo.* 2. *Dent*, *an attorney*, v. *Lambert*, *Pract. Reg. C. P.* 418.—1 *Barnes's Notes* 339. —*Ibid.* 352. *Warden* v. *Norden*, *Hil.* 13 *Geo.* 2. S. P.

18. Treſpaſs againſt three defendants, *venue* changed on the motion of *two* only, for the defendant who does not apply to have the *venue* changed, may have been made a defendant merely to fix the *venue* in a wrong county. *T.* 10 *Geo.* 2. *Box* v. *Read et al'*, *Pract. Reg. in C. P.* 430.—*Rep. and Caſ. of Pract. in C. P.* 133. S. C.—1 *Barnes's Notes* 343. S. C. ſays, affidavit of *one* of the defendants held ſufficient to ground a motion to change the *venue*.

19. *Norfolk* in the margin, in the body of the declaration *venue* was laid at the city of *Norwich* in the county of the ſame city throughout

throughout, inquiry executed by the ſheriff of *Norwich* good, for the county in the margin will help, but not hurt. *Hil.* 10 *Geo.* 2. *Howſe* v. *Haſelwood*, 1 *Barnes's Notes* 345. *Ibid.* 346. *Sheers* v. *Bartlett*, *T.* 11 & 12 *Geo.* 2. S. P.

20. A ſerjeant at law not ſuing by a writ of privilege ſhall not have the benefit of his privilege to retain the *venue* in *Middleſex*, and the *venue* was changed. *Hil.* 11 *Geo.* 2. *Girdler*, *Serjeant at law*, v. *Matthews*, *Rep. and Caſ. of Pract. in C. P.* 145.—*Pract. Reg. in C. P.* 420. S. C. 1 *Barnes's Notes* 346. S. C. *Note*; plaintiff had ſued by original.

A ſerjeant at law hath a particular writ of privilege. *Brew' Judic'* 4. *Vidian's Entries*—*Herne* 203, A declaration for him. But if he does not make uſe of his writ of privilege, he waves his privilege; a Barriſter at law hath a right to ſue in *Middleſex*, but he hath no writ of privilege.

21. Motion on the laſt day of the term to change the *venue* too late, for plaintiff cannot have an opportunity of ſhewing cauſe. *Hil.* 12 *Geo.* 2. *Thompſon* v. *Rand*, *Pract. in C. P.* 426. *Ibid.* 427.

22. Defendant may move to change the *venue* after an imparlance, and before plea pleaded. *M.* 13 *Geo.* 2. *Anon. Rep. and Caſ. of Pract. in C. P.* 159.— 1 *Barnes's Notes* 350. *Blackſtock* v. *Payne* S. C.

23. Declaration amended on plaintiff's motion, by changing *venue* from *London* to *Middleſex*, after plea pleaded and iſſue joined, on payment of coſts, it being on a *remedial* law, and confined to *Middleſex*; in other caſes not uſual. 2 *Barnes's Notes* 4, 17, 385.

24. An action for words laid in *London*, motion to change the *venue* upon affidavit of the words being ſpoken in the town of *Southampton*, but denied, becauſe the court doth not uſe to change

change the *venue* into a city, or town and county within itſelf, without the conſent of the parties. *T.* 13 *Geo.* 1. *Gardiner* v. *Forbes*, *Rep. and Caſ. of Pract. in C. P.* 36.—*Earby* v. *Windows*, *Hil.* 5 *Geo.* 2. for the ſame reaſon a motion to change the *venue* from *Middleſex* to the city of *York*, was denied. *Ibid.*—*Pract. Reg. in C. P.* 429. S. C. *Robins* v. *Webber*, *Hil.* 1 *Geo.* 2. A motion to change the *venue* from *Middleſex* to the city of *Exeter*, was denied. *Rep. and Caſ. of Pract. in C. P.* 36.—*Lane*, *widow*, v. *Newman*, *Hil.* 6 *Geo.* 2. Motion to change the *venue* from *London* to *Exeter* denied, for *Cur'* will not change the *venue* to a city and county of itſelf without conſent. *Ibid.* 82.—*Cowling* v. *Reynoldſon*, *T.* 6 & 7 *Geo.* 2. The like motion was again for the ſame reaſon denied by the court. *Ibid.*—1 *Barnes's Notes* 336. S.C.—*Lutwidge* v. *Wilcox*, *T.* 10 *Geo.* 2. Motion to change the *venue* from *Cumberland* to *Briſtol*, or *Somerſetſhire*, the adjacent county, at plaintiff's election, denied. 1 *Barnes's Notes* 343.

Where the *venue* is changed an original is neceſſary. *Ibid.*

25. In an action againſt an attorney, the *venue* was changed from *Middleſex* into *Surry*, without coſts of a new bill. *M.* 12 *Geo.* 2. *Davies* v. *Gravean* attorney, 1 *Barnes's Notes* 348. —*Vide T.* 13 *Geo.* 2. *Winter* v. *Southam* an attorney. *Ibid.* 350.

26. Motion to change the *venue* from *Weſtmorland* to *Leiceſter*, on the laſt day of the term received, for the *venue* being in *Weſtmorland*, the cauſe cannot be tried till the ſummer aſſizes, plaintiff to ſhew cauſe on the firſt day of the next term. *Hil.* 14 *Geo.* 2. *Cumpſton* v. *Buckley*, *Pract. Reg. in C. P.* 427.

27. Motion

27. Motion to change the *venue* from *Worceſterſhire* to *Glouceſterſhire*, on the laſt day but one of the term, granted, unleſs plaintiff ſignify to the officer, that he will undertake to give material evidence, which if he will do, rule to be diſcharged. *Hil.* 14 *Geo.* 2. *Hill* v. *Wadley*, *Pract. Reg. in C. P.* 427.

28. *Venue* not to be changed where plaintiff may loſe a trial. *Hil.* 14 *Geo.* 2. *Atwood* v. *Kennedy*. *Ibid.* 428.

29. Motion to change the *venue* from *Yorkſhire* into the city of *York* denied. *Hil.* 15 *Geo.* 2. *Lewis* v. *Aſkham*, 2 *Barnes's Notes* 386.

30. *Venue* refuſed to be changed from *London* into *Kent*, the adjacent county, upon affidavit that the cauſe of action accrued within the city of *Canterbury*. *E.* 15 *Geo.* 2. *Davis* v. *Jordan*, 2 *Barnes's Notes* 387.

31. This action was brought by plaintiff an inn-keeper at *Appleby* in *Weſtmorland*, againſt defendant one of the knights of that ſhire, for a large demand of wine, *&c.* provided at the laſt election; defendant moved upon the common affidavit to change the *venue* from *Yorkſhire* into *Weſtmorland*, where the aſſizes are held but once a year; it appeared that one of the plaintiff's witneſſes was going to *Ireland*, and would not return for two years, and that plaintiff's

M. S. Rep. S. C. ſtates it thus: On the *defendant's* affidavit a rule was made to ſhew cauſe why the *venue* ſhould not be changed from *Yorkſhire* to *Weſtmorland*. The defendant in his affidavit ſwore, that the *plaintiff*'s cauſe of action (if any) aroſe in *Weſtmorland*, and that *York* was 200 miles from the *place* of his abode, and that he had *ſixty ancient witneſſes* which muſt be carried at a very great expence to *York*. Upon the ſhewing cauſe the *plaintiff* made an affidavit, that he is an inn-keeper at , and that *defendant* was a candidate at the laſt election, that he had his houſe to entertain his friends and relations, and that there was great profuſion of *wine* and *punch* during the election, which laſted *three* days. That after the election a bill of 500 *l.* was delivered by him to the defendant, and that the defendant refuſes

plaintiff's creditors, of whom he had bought wine, &c. were very pressing upon him. Upon these occasions the court acts according to discretion, and the general rules of justice and the

refuses to pay him; that he is a member for *Westmorland*, and has a large acquaintance.

That his tenants generally are upon the *petty* juries there; that one *Monsey*, who was his clerk of the cellar at that time, *was going to Ireland in April, and would stay a year.* That *several of his creditors threaten to sue him after the next* Lent *assizes.*

It was urged in behalf of the plaintiff that he would lose the term, there being no *Lent* assizes in *Westmorland*; and cited Lord *Shaftsbury* case, 1 *Vent.* 363. and *Salk.* 670. and said, that the changing of the *venue* was not *ex debito justitiæ*, and that the court would not change it out of a county which has an assize twice a year, into a county that has an assize but once a year.

Skinner Serjeant, urged in the defendant's behalf, that both parties lived in *Westmorland*; that it was true that the case in *Vent.* was such, but that the times ran hard on Lord *Shaftsbury*; that he had heard some judges say, there was no law in those days *(a)*; that he did not like precedents from those times; that if this prevails, no knight of the shire can ever try a cause in his own county: He must know the gentlemen of his county: He must be beloved by his freeholders. The defendant cannot be in a better condition at *York*, for here is privilege against them, a right which defendant ought to insist on, when a bill of this extravagant nature is delivered, and the election lasted but *three* days.

Bootle Serjeant, agreed it was not a matter *ex debito justitiæ*, but said *venues* have been changed from a county, where there are assizes twice a year, to a county where there is but one assize in a year; and said it had been granted on his motion in this court, but cited no case.

Willes Ch. Just. agreed it was not *ex debito justitiæ*, but *discretionary.* When I say *discretionary*, I would be understood to mean that we ought to act according to the general rules of law. I don't like Lord *Shaftsbury*'s *(b)* case, it shall never be a rule for me; I will not say there was no law

(a) *E.* 34 *Car.* 2.

(b) This was an action of *scandalum magnatum*, for saying that the Earl *was a traitor*, &c. The action being laid in *London* where the words were supposed to be spoken, it was moved in behalf of the defendant, that the *venue* might be changed *into some other county*; and affidavits were read, that the plaintiff had a great interest in the city, and an intimacy with the present sheriffs; so that the defendant could not expect an indifferent trial there, and therefore the court did think fit to take the cause out of *London*, and gave the Earl the election *of any other county*; but he refused to try it elsewhere, and would rather let the action fall. *E.* 34 *Car.* 2. The Earl of *Shaftsbury* v. *Cradock*, in *B. R. Vent.* 363. See *Salk.* 67.

in

the particular rules of practice in being. *Per cur'*: This action is laid in the next county to that where the action accrued. Had it been laid in *Middlesex* or any distant county, the court probably would not have obliged defendant to bring his witnesses (some of whom appeared to be aged and infirm) so far, but in this case it would be injustice to deny a trial at next *Yorkshire* assizes. *Venue* refused to be changed. *M.* 16 *Geo.* 2. *Rickaby* v. *Wilson, Esquire*, 2 *Barnes's Notes* 388.

in those days. It is a settled rule, we will not change the *venue* into *Poole, Hull,* or *Canturbury,* because *we don't know when the assizes will be held there*; we will not change it into the *city of Worcester* from the *county of Worcester*, because *the cause must be tried at the same place*. But I don't see why we may not from *Middlesex* to the *city of Worcester*, as well as from *Middlesex* to *London (a)*. In this case I will have no consideration about privilege, it is what I have nothing to do with. We should change a *venue* on motion either in *Mich.* or *Hil.* term *(b)*, if no inconvenience to the party. We ought not to mind what plaintiff swears about the defendant's interest, that would be running into Lord *Shaftsbury's* case, but what *he swears about his witness's going to Ireland*, and *his creditors threatning to sue him, is material.* It appears to me it will be not only an inconvenience, but matter of injustice, to hinder the plaintiff from trying the cause the next assizes.

Parker and *Burnett* agree, (*absente Fortescue Aland*, Justice) and *Burnett* said, that *a delay of justice was a denial of justice.* And as to Mr. *Wilson*'s influence there is nothing in it, for the more influence he has he will not care to stand trial for a just debt.

Willes, Chief Justice said, possibly some of the witnesses may live as near *York* as *Westmorland.* If the plaintiff had laid his action in *Middlesex* (as he might have done, it being a *transitory* action,) We would have changed the *venue*, for we would not have put the defendant to bring the witnesses an 100 miles. The rule to shew cause was discharged. *M. S. Rep.*— The practice is settled, that a *venue* cannot be changed into *Hull, Canterbury*, &c. because it is not known when an assizes will be held there, nor into the city of *Worcester* or *Gloucester*, out of the county at large, because the assizes for the city and for the county at large are held at the same place. In *Easter* or *Trinity* terms the *venue* may be changed into a city or county where the assizes are held but once a year, as *Bristol, Cumberland*, &c. In *M.* and *H.* terms there is no certain rule, but the court should change the *venue* then, if it could be done without manifest inconvenience. *Per cur'*, *in* S. C. 2 *Barnes's Notes* 388.

(a) The plaintiff's counsel had urged the rule to be, that the *venue* was never changed from a *county* to a *city*.

(b) It was understood that the *venue* was not to be changed in *Mich.* or *Hil.* term.

32. *Venue* changed though motion for rule to ſhew cauſe not made till laſt day of laſt term, declaration being delivered ſo late that defendant could not apply ſooner. *T.* 16 *Geo.* 2. *Haywood* v. *Wells*, 2 *Barnes's Notes* 387.

33. Action of covenant on deed for non-payment of rent for lands in *Kent*, laid in *Middleſex*, motion to change the *venue* denied. If *local* defendant will have advantage, if *tranſitory* the *venue* cannot be changed, the action being on a *ſpecialty*. *M.* 18 *Geo.* 2. *Bradley* v. *Adey*, 2 *Barnes's Notes* 390.

34. In caſe for deceit by warranting *an unſound horſe*. *Venue* changed on the common affidavit. *Hil.* 19 *Geo.* 2. *Everet* v. *Sanſum*, 2 *Barnes's Notes* 390.—In this caſe *cur'* held that the *venue* may be changed in all actions in their nature *tranſitory*, except in caſes of *privilege*, *ſpecialty*, *promiſſory notes* or bills of exchange. *Ibid.*

35. Action on the caſe brought on a cuſtom of the borough of *Leiceſter*, againſt defendant for exerciſing the trade of a watch-maker there, he not being a freeman, and not on a market or fair day, the *venue* was changed from *London* to *Leiceſter*, upon reading the declaration, *without the uſual affidavit*. Note; The borough of *Leiceſter* is within the county at large. There is a commiſſion of gaol-delivery every aſſizes for this borough, but no commiſſion of *niſi prius*. *T.* 19 & 20 *Geo.* 2. *Mayor*, &c. *of Leiceſter* v. *Green* alias *Smith*, *Special action on the caſe*, *Ibid.* 391.

36. *Venue* changed from *Middlesex* to *Monmouthshire* in an action against the late sheriff. But by consent the jury process to be returned by the coroners, the new under-sheriff having been under-sheriff to defendant. *Hil.* 29 *Geo.* 2. *Davies, widow,* v. *Parry, Esquire,* late sheriff of *Monmouthshire,* for an escape. *Supplement to* 2 *vol. Barnes's Notes, p.* 60.

37. *Venue* refused to be changed from *London* into *Essex,* defendant by a judge's order for time to plead having consented to rejoin *gratis,* and take notice of trial for the sitting in *London. T.* 28 *Geo.* 2. *Hunter* v. *Gray*; *Smith* v. *Gray, Supplement to* 2 *vol. Barnes's Notes, p.* 59.

Though having obtained an order for time to plead, generally speaking is no hindrance to the changing of a *venue,*

yet if defendant will consent to take notice of trial in the county where the action is originally laid, that consent shall bind him. Had the judge been informed of the defendant's intention to move to change the *venue,* he would have made the order without prejudice to such motion. *Ibid.*