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April 23 #
John Stanley

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THE
Present PRACTICE
OF THE
Court of Common Pleas,

WITH

Large NOTES and OBSERVATIONS, from
the best AUTHORITIES, and the RULES
of COURT.

In a METHOD intirely New.

To which are added,
Necessary PRECEDENTS, and a complete TABLE
to the Whole.

By JOSEPH HARRISON, late of
Lincoln's Inn, Esq; Author of *The Practice
of the High Court of Chancery*, in Two
Volumes.

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THE PRESENT
PRACTICE
OF THE

Court of Common Pleas.

THE court of Common Pleas is the King's Court, now held in *Westminster Hall*, but in *ancient* time it was *moveable*, as appears by *Magna Charta, cap. 11*. Upon the granting of which Charta by *Henry III.* the court of common pleas was settled in a place certain, *viz.* at *Westminster*, and therefore all the writs issuing out of this court since the granting of the above charter, are made returnable thus: "before our justices "at *Westminster*," whereas before the party was commanded to appear *coram me vel justiciariis meis*, without any addition of any place certain.

This court is the *lock* and *key* of the common law in common pleas, and therefore called the *Court of Common Pleas*, for in this court all *common* or *civil* pleas, as well *real*, as *personal* and *mixt*, are tried, according to the strict law of the kingdom; and by *Fortescue, cap. 50.* it seems to have been the only court for *real* (a) causes.

(a) Actions
real are such

actions whereby the demandant claims title to any lands or tenements, rents or commons, in fee simple, fee tail, or for term of life. Every action *real* is either *possessory*, i. e. of his own *possession* or *seisin*; or *ancestral*, i. e. of the *seisin* or *possession* of his ancestor. *Co. lib. 6. fol. 3.*

(a) Actions personal are such actions whereby a man claims

In all personal (a) and mixt (b) actions, this court and the court of king's bench have a concurrent jurisdiction.

debt, or other goods and chattels, or damage for them, or damages for wrong done to his person, and is properly that which in the civil law is called *Actio in personam*, which is brought against him who is bound by *covenant* or *default* to give or grant any thing. *Terms of the Law*, sub tit. *Actions personal*

(b) A mixt action is a suit given by the law to recover the thing demanded, and damages for the wrong done; as in *ass of novel diff.* which writ (if the disseisor make a feoffment to another) the disseisee shall have against the disseisor, and the feoffee, or other tenant, and thereby shall recover his seisin of the land, and his damages for the mesne profits, and for the wrong done him. And so is an action of *waste* and *quare impedit*. But an action of *detinue* is not called an action mixt, although by it the thing with-held is demanded, and shall be recovered if it may be found, and damages for the with-holding; and if it cannot be found, then damages for the thing and the detaining. But still an action of *detinue* is called only an action *personal*, because it should be brought only for goods and chattels or charters.

The jurisdiction of this court is general, extending itself throughout all *England*.

(c) Action is the form of a suit given by the law to recover a thing; as an action of debt, &c. or as it is in *Coke 8. f.*

151. a. an action is a right of prosecuting to judgment that

which is due unto any one *Actio est jus prosequendi in judic. quod alicui debetur.*

(d). The bills are in nature of petitions to the court, and express either the grievance and wrong which the plaintiff has suffered by the defendant, or else some fault by him committed against some law or statute of the realm.

of the court; also on original bills filed against members of parliament. *Vide* 12 & 13 *W.* 3. *cap.* 3.—Also on writs of *Habeas Corpus cum causa*, or *Certiorari* (a), removing a cause out of inferior courts of record. — On writs of *Recordari facias loquela* (b), *Pone* (c); *Accedas ad curiam* (d), or writs of false judgment (e), removing causes out of inferior courts not of record.

(a) *Certiorari* is a writ that lies to remove a record into a superior court from an inferior court of record, where the party supposes he may not have equal justice done him. (b) Commonly called a *resale*, taking its name from the first syllable of each word in the name of the writ, *viz.* *Recordari facias loquela*. This writ is to remove a cause out of an inferior court not of record, as a court of ancient demesne, hundred court or county court, into the king's bench or common pleas. See *F. N. B.* 70. b. (c) *Pone* is a writ by which a cause depending in the county court is removed into the court of common pleas. (d) This writ lies to remove a cause out of a court baron into the court of common pleas. (e) If a false judgment be given in a court not of record, as in a county court, hundred or court baron, the party injured may have a writ of false judgment returnable in the common pleas.

The court of common pleas punishes its own officers and ministers, and all other persons guilty of contempts against the rules and orders of the court.

This court consists of a chief justice, called the *Lord Chief Justice of the Common Pleas*, and three puisne judges, who, as well as the lord chief justice, are created by letters patent, (f) and (f) Their patents are *quamdiu se bene gesserint*. are as it were installed, or placed upon the bench by the *Lord chancellor* and *Lord chief justice of the court*, as appears by *Fortescue*, *cap.* 51. who expresses all the circumstances of this admission.

The rest of the officers of this court are these:

The *custos brevium*, who is the chief clerk or principal officer of this court, and holds his

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place by grant from the crown, and may execute his office by a deputy.

Three prothonotaries, who hold their offices for their respective lives, and are admitted by the chief justice for the time being.—Three clerks of the judgments, namely, one belonging to, and appointed by each prothonotary.—The three clerks of the dockets, namely, one belonging to and appointed by each prothonotary.—The three clerks of the reversals, namely, one belonging to and *verbally* appointed by each prothonotary.—The clerk of the treasury, who holds his place by *parol* appointment from the lord chief justice.—Three clerks of the jurats, or under clerks of the treasury, are admitted by the lord chief justice for the several counties, cities, and towns in their respective divisions, and hold their places for their respective lives.—A treasury keeper.—Seventeen filazers, who (except the filazer for *Monmouth*) are appointed for the several counties, cities and towns in their respective divisions, by grants from the chief justice for the time being, to hold their said offices for their natural lives as their freehold.—A clerk of the warrants, inrolments and estreats. This officer is appointed by the lord chief justice.—Clerk of the essoins is in the appointment of the lord chief justice, and has usually been granted for life.—Clerk of the juries. This office is in the *gift* and *nomination* of the *custos brevium* of this court.—The return office, and office of inrolment of writs for *finis* and *recoveries*, is in the nomination of the three *puisne* judges of the court, by virtue of a statute made 23 of *Eliz.*—Clerk of the king's silver; this officer is appointed by the
the

the lord chief justice of this court.—A chirographer; this officer holds his place by letters patent from the crown: he appoints a secondary to officiate in the said office; there is a register and record-keeper belonging to the said office, and the chirographer appoints certain clerks for the several counties in *England*.—Exigent; *quære*, by whom appointed.—Clerk of the *supersedeas* to the exigent. The present clerk is Mr. *Robert Morris*, who was admitted into the office by grant or deputation from his father Mr. *Henry Morris*, to hold to him and his heirs for ever.—Clerk of the outlawries is incident to the office of his Majesty's attorney general, and always executed by some person appointed by the attorney general for the time being.—The several offices of the prothonotary, secondary, clerk of the judgments, clerk of the dockets, exigent, clerk of the juries, filazer, and clerk of the reversals for the county of *Monmouth*, were by King *William III.* by letters patent under the great seal, granted to *Francis Gwynn*, Esq; who, or his representative, executes the same by deputy.—Seal office; the most noble Duke of *Cleveland* is seised in fee-tail of this office, which he executes by deputy.—Clerk of the errors; this officer is nominated by the lord chief justice for the time being, usually *verbally*, to hold during the pleasure of the chief justice.—Judges clerks.—The office of associate at *nisi prius* in *London* and *Middlesex*, is in the appointment of the lord chief justice. The office of associate for *London* and *Middlesex* hath been generally granted by parol, to hold during pleasure only.—The office of marshal at *nisi prius* in *London* and *Middlesex*, is in the appointment of the lord chief justice,

and has been time immemorial granted by *parol* appointment, to hold, during the pleasure of the lord chief justice.—Cryer at *nisi prius* in *London* and *Middlesex*; this office is in the gift of the lord chief justice for the time being, and hath been usually granted by *parol* appointment, to hold during pleasure.—Chief proclamator, *Heneage Walker*, Esq; hereditary proclamator of this court, granted to *John Walker*, Esq; the office of mareschal proclamator and barrier of this court, with all fees, &c. to hold to him and his heirs for ever.—There are four persons who act as cryers of the court, one of which is also court-keeper, and another porter of the court, which cryers, court-keeper, and porter, are deputies to the chief proclamator. The cryers, and court-keeper, and porter of the court are appointed by deputation from the chief proclamator.—Warden of the *Fleet*; he is appointed by letters patent to hold during pleasure.—Clerk of the papers and rules of the *Fleet* prison; this officer holds his place by grant or appointment of the warden of the *Fleet*.—There are two tipstuffs attendant on this court, who are admitted by deputation from the warden of the *Fleet*.—Commissioners for taking affidavits concerning matters in this court. These commissioners are appointed by the judges of this court, or any two of them, whereof the chief justice is to be one. *Stat. 29 Car. 2. chap. 5. s. 2.* Commissioners are also appointed in the same manner for taking bails in any suit in this court. *Vide 4 W. & M. chap. 4. s. 1.*

Observations on the Returns of Writs.

ALL writs issuing out of the common pleas, grounded upon original writs out of chancery, must be made returnable on general return days, as on the morrow of the *Holy Trinity*; but writs of attachment, of privilege and writs subsequent thereto, and writs grounded on bills filed against attornies, and such officers of the court as are intitled to the privilege thereof, or members of the house of commons, writs of *habeas corpus*, prohibitions, &c. must be made returnable on, and have continuance to a day certain in *full term*, viz. as on *Friday* next after the morrow of the *Holy Trinity*. But care must be taken that they be not made returnable on any of the following days, which are *dies non juridici*, viz. the feast of the purification in *Hilary* term, ascension day in *Easter*, and the feast of St. *John* the baptist, if it happen in *Trinity* term, unless it be the first day of that term.

There must be at least fifteen days between the teste and return of all original writs returnable in this court, and between the teste and return of all *ordinary* writs sued and procured upon the same, except where altered by the following acts of parliament.

An attachment of privilege, at the suit of an attorney, must also have fifteen days between the teste and return.

In all actions of debt, and other personal actions, actions of *ejectione firmæ* for lands or tenements, after issue joined to be tried by a jury, and after any judgment had or obtained, there shall not need to be fifteen days between

the teste and return of any writ of *venire facias*, *babeas corpora juratorum*, or *distringas juratores*, writ of *feri facias*, or writ of *capias ad satisfaciendum*, and the want thereof shall not be assigned for error; but not to extend to any writ of *capias ad satisfaciendum*, whereon an exigent after judgment is to be awarded, or to a *capias ad satisfaciendum* against the defendant, to make the bail liable. *Stat. 13 Car. 2. c. 2. s. 6, 7.*

Process. (a)

(a) Process are the writs and precepts that go forth upon the original. Vide *Terms of the law, tit. Process.*

Of suing out process.

CAPIAS *ad respondendum.*] Make a præcipe, which you must suit to the nature of your action, according to the following forms.

(A) *A præcipe for a common capias in trespass, where bail is not required.*

Middlesex. **C**APIAS for *A. B.* against *C. D.* late of the parish of _____ in the county of *Middlesex*, Gent. broke the clofe at *Westminster*.

G. K. (or G. K. agent
for F.) 1 Dec. 1757.

Ret. &c.

[*Vide p.* (A) for the form of the capias on the above præcipe.]

Præcipe's

Præcipe's where bail is required.

A præcipe in debt.

Middlesex. Command *A. B.* late of *Westminster* in your county, Esq; otherwise called *A. B.* of *Westminster* in the county of *Middlesex*, Esq; (a) that he render to *C. D.* 200*l.* which he owes him, and unjustly detains.

(a) On a latin bond the alias dict' (if inserted) must be in Latin, thus: Command *John Doe*, late of, &c. otherwise called *Johannem Doe*,

E. F. (the attorney)
— Dec. 175 —. affidavit for 100*l.*

Ret. &c.

de, &c. (as in the bond) *generosum*, or the declaration will be bad; and the plaintiff upon the trial will be nonsuited. But there is no occasion to put in the *al' dict'*, it being merely a description of the bond. *T. 6 & 7 Geo. 2. Church v. Jason, Bart. Pract' Reg. in C. P 322. Rep and Cas. of Pract' in C. P. 91. S. C.* If an *al' dict'* be inserted in a declaration upon a specialty, it must agree *literally* with the deed, or the declaration will be bad, even on *non est factum*. *Ibid. 1 Barnes's Notes 162. S. C. and per cur' an al' dict'*, if set out at all, must be set out in the same language as in the deed, or will otherwise be erroneous. *Ibid.*—*Al' dict'* may be and is better left out; so adjudged in this court in Lord Chief Justice *Eyre's* time, in an action upon a bail bond. *Darby v. Minshull.*

[Vide p. (B) For the capias on the above præcipe.]

Præcipe in debt against two defendants.

Middlesex. Command *A. B.* late of in your county, taylor, that he render to *C. D.* 30*l.* which he owes him, and unjustly detains.

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Command *E. F.* late of, &c. that he render to the said *C. D.* 56*l.* which he owes him, and unjustly detains.

S. T.

Ret. &c.

— *Jan.* 175 —.

Affidavit against $\left\{ \begin{array}{l} A. B. \text{ for } 30 \text{ } l. \\ C. D \text{ for } 56 \text{ } l. \end{array} \right.$

On all *præcipes's quod reddat*, if the sum exceed 40*l.* a fine is payable to the king in the following proportions:

	<i>l.</i>	<i>s.</i>	<i>d.</i>
From 40 pounds to 100 marks,	0	6	8
From 100 marks to 100 pounds,	0	10	0
From 100 pounds to 200 marks,	0	13	4
From 133 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> to 166 <i>l.</i> 13 <i>s.</i>			
4 <i>d.</i>	0	16	0
From 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> to 200 <i>l.</i>	1	0	0
And so consequently for every 100 marks more,	0	6	8
And for every 100 <i>l.</i> more	0	10	0

If you would avoid the fine, make out a *præcipe* for a *capias* in trespass, with an *acetiam* in debt, thus:

(C) *Middlesex.* **C**APIAS for *A. B.* against *C. D.* late of the parish of *St. Martin in the Fields* in your county, brewer. Broke the close at *Westminster*, and also in a certain plea of debt upon demand for 80*l.*

J. S. by *S. T.*

Ret. &c.

— *Dec.* 175 —.

Affidavit for 40*l.*

[*Vide p.* (C) for the form of the *capias* on the above *præcipe*.]

(D) *Præcipe*

(D) *Præcipe in trespass, with an acetiam in case upon promise.*

Middlesex. C A P I A S for *A. B.* against *C. D.* late of the parish of *St. James* in the liberty of *Westminster* in your county, Spinster. Broke the close at *Westminster*; and also in case upon promise for 60 *l.*

J. T.

Ret. &c.

— *June, 175—.*

Affidavit for 30 *l.*

[*Vide p.* (D). for the form of the *capias* on the above *præcipe.*]

Præcipe in case against two defendants.

London. C A P I A S for *A. B.* against *C. D.* late of *London*, mercer, and *E. F.* late of *London*, Esq; trespass; and also against the said *C.* for 100 *l.* upon promise, and also against the said *E.* for 40 *l.* upon promise.

Ret. &c.

A præcipe in assault.

Lincoln. C A P I A S for *A. B.* against *C. D.* late of _____ in your county, taylor, in a plea of trespass and assault. :

Ret. &c.

If you would have bail upon a dangerous assault and battery, an affidavit must be made of the fact at large, whereupon a judge will make an order for holding defendant to bail in such sum as on the circumstances of the case he shall think reasonable, and then you make
out

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out a præcipe for a common capias with an
acetiam.

London. CAPIAS for *A. B.* against *C. D.*
late of *London*, surgeon. Broke the
close at *London*; and also in trespass and assault,
to the damage of the said *A.* 200 *l.*

J. D. Ret. &c.
— July 175—.

Bail by order, on affidavit for 100 *l.*

Præcipe in covenant.

Middlesex. CAPIAS for *A. B.* against *C. D.*
late of *Westminster* in your
county, gentleman, otherwise called (as in
the indenture) in a plea that he perform to the
said *A.* the covenant made between them, ac-
cording to the force, form and effect of a cer-
tain indenture made between them.

Ret. &c.

A præcipe in account as receiver.

Middlesex. CAPIAS for *A. B.* against *C. D.*
late of, &c. that he render to
the said *A.* his reasonable account for the time
in which he was receiver of the money of the
said *A.* &c.

Ret. &c.

As bailiff.

*As before, to ——— for the time in which
he was bailiff for the said A. in H. &c.*

If as bailiff and receiver.

THEN for the time he was his bailiff in
H. and receiver of the money of the said
A. &c.

A præcipe in annuity.

Essex. **C**ommand J. P. late of — in the
county aforesaid, gentleman, that he
render to C. D. 60*l.* which are in arrear to him
for a certain annuity of 30*l.* which he owes
him and unjustly detains, &c.

Ret. &c.

Carry the præcipe to the proper filazer, and
also the affidavit of the debt, if the action be
bailable (a). Affidavit of the debt may be
made before any judge of the court or commis-
sioner, or before the officer who issues the writ,
or his deputy (b). Pay for oath 1*s.* *Vide*
made and filed of the cause of action. *Stat.* 12 *Geo.* 1. c. 29. 5 *Geo.* 2. c.
27. 21 *Geo.* 2. c. 3. Notwithstanding plaintiff makes an affidavit of
his debt or other cause of action, yet the matter of bail is examinable by
the court. Affidavit made of the debt, but by mistake not filed, defendant
arrested, costs ordered to be paid by plaintiff, but attachment against him
denied; defendant consented not to bring any action. *Hil.* 9 *Geo.* 2. *Ware*
v. Racket, *Rep. & Ca. of Pract. in C. P.* 125. (b) Affidavit to
hold to bail, or of *service of process*, where only a common appearance is re-
quired, may be sworn before plaintiff's attorney, being a commissioner.
Rule made *E.* 13 *Geo.* 2. Tho' by the general rule and practice of this
court, affidavits taken before attornies (as commissioners) wherein they were
concerned for the parties in whose behalf such affidavits were made, have
been deemed insufficient.—Objected for the plaintiff, that the affidavits
ex parte defendantis, were sworn before J. C. and A. F. as commissioners,
who were at that time sworn to be clerks or agents to *Rash*, defen-
dant's attorney. *Per cur.* The general rule extends only to attorneys them-
selves; those commissioners are not sworn to be agents in this case. Objec-
tion over ruled. It was said, but not sworn, that they were *menial* ser-
vants, which the court seemed to think would have been a sufficient objec-
tion. *E.* 20 *Geo.* 2. *Cockledge, one, &c. v. Richwood.* 2 *Barnes's Notes* 37.
Stat.

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Stat. 12 Geo. 1. c. 29. 5 Geo. 2. c. 27. 21 Geo. 2. c. 3. The filazer will make out the *capias*, pay him (if he finds stamps) 4 s. 2 d. *viz.* for the *original* on which the *capias* is grounded 1 s. filing the same 4 d. *capias* 10 d. duty 2 s. pay at the seal office 7 d. — You may put *four defendants* in one writ, but there must be but *one plaintiff* unless it be a *joint* action.

If the action is bailable, you insert a proper *ecetiam* (a) in the writ. — The sum sworn to must be indorsed thereon. *Stat. 12 Geo. 1. cap. 29. 5 Geo. 2. cap. 27. 21 Geo. 2. cap. 3.*

(a) Vide p. 9.

The attorney's name who sues out the writ, if bailable, must also be *subscribed* or *indorsed* on the writ, and if *not* bailable, then his name must be *subscribed* or *indorsed* on the copy. *Stat. 2 Geo. 2. c. 23. s. 22. Vide 12 Geo. 2. c. 13. s. 4.* — The day and year, when a writ to *arrest the body* was sued out, must also be set down on such writ. *Vide Stat. 5 & 6 W. & M. c. 21. s. 3. and 9 & 10 W. 3. c. 25. s. 42.*

If the defendant cannot be arrested on, or served with a copy of the *first* *capias*, as the case shall be, and you don't propose to outlaw him, you sue out a *capias* by *continuance*; pay the filazer 2 s. 10 d. *viz.* for *capias* by *cont'* 10 d. duty 2 s. and for every *post term.* 4 d. sealing 7 d. and after that another *capias* by *cont'*, &c. — Note; the *præcipe* for the *ca.* by *cont'*, is the same as for the *first* *capias*, only instead of saying, "Capias for A. B. &c." you say, "Capias by *cont'*, for A. B. &c." but the writ itself is exactly the same as the *first* *capias*, without any distinction of *alias* or *pluries*, as in the king's bench.

NOTES.

N O T E S.

1. If the cause of action does *not* require bail, you sue out a common *clausum fregit*, and take out a *capias* thereon, and plaintiff may in such case declare in any county, or for any cause of action, as the cause shall require. *Vide Rep. of Ca. of Pract. in C. P.* 75.—But if the defendant lives within the Cinque Ports, you must sue out and arrest defendant upon, or serve him with a copy (as the case shall be) of a *Test. Ca.* directed to the constable of *Dover Castle*; for the sheriff of *Kent* has no jurisdiction within the Cinque Ports. 2 *Barnes's Notes* 341.

2. *Capias ad respond' ret' tres Mich. Teste* July 14, the 9th instead of the 10th of the king *irregular*, and proceedings staid, no cause being shewn. *M. 10 Geo. 2. Taylor v. Nichols*, 1 *Barnes's Notes* 299.

3. Notice on process to be for the Effoin-day tho' *Sunday*, that being the real return day. *Vide Ca. of Pract' C. P.* 105. *Vide* also the rule of court, *Hil. 7 Geo. 2.*

4. Motion to stay proceedings against an heir, alledging that an heir ought to be proceeded against by summons, and could not be arrested upon a *clausum fregit*. The three prothonotaries declared, that formerly there was no other way of proceeding against an heir but by summons, &c. but that of late years the practice had been otherwise, and that an heir might be arrested on a *clausum fregit*; and so held by the *whole* court, and that he need not be named in the writ as heir. *Hil. 12 Ann.*
Anon.

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Anon. Rep. and Cases of Practice in C. P.
 3.

5. A *capias ad respondendum* was quashed, because tested out of term; and therefore void. *E. 7 Geo. 2. Bennet v. Sampson, Pract. Reg. C. P. 436.* 1 *Barnes's Notes* 295. S. C. Defendant had no other remedy to take advantage thereof but by motion, because he can't have oyer of the writ, nor will it appear upon the record in case of a writ of error. *Ibid.*

6. Motion that the writ of *capias ad respondendum* might be quashed, because there were not fifteen days between the teste and return of the writ. Rule to shew cause discharged; for *per cur'* this is matter of *error*, and not irregularity. *T. 10 Geo. 2. Williams v. Faulkner, Pract. Reg. C. P. 437.* 1 *Barnes's Notes* 298. S. C. *Vide Pract. Reg. C. P. 438. Hil. 11 Geo. 2. Wafs v. Cornet*, like motion; *cur' advisar' vult*; but before the court gave any opinion, plaintiff moved that the writ might be quashed, in order to have the benefit of the next term. Note; defendant had not appeared, nor had plaintiff for him. 1 *Barnes's Notes* 73. S. C. Note; the rule was to shew cause why proceedings should not be stayed; but *per cur'* it should have been to shew cause why the writ should not have been *quashed*. The defendant cannot have oyer of the *capias*, and therefore cannot take any advantage by pleading. *Per cur'*. *Ibid.*

7. But *cur'* quashed an attachment of privilege for want of fifteen days between the teste and return, they considering it in nature of an original writ. *T. 11 & 12 Geo. 2. Hayward an attorney v. Denison.* 1 *Barnes's Notes* 301. Q. Whether this might not have been
 taken

taken an advantage of by plea in abatement, or by writ of error. *Ibid.* This quere seems to be Mr. Barnes's. *Pract. Reg. in C. P.* 438. S. C.

8. The *capias ad respond.* was made returnable before the king's justice, instead of justices, at *Westminster*; and there were six days only instead of fifteen between the *teste* and *return*. Proceedings staid *with costs*. T. 22 & 23 Geo. 2. *Holt, jun. v. Hawkins.* 2 Barnes's Notes 338.

9. Defendants were sued in their corporate capacity by common *capias ad respondendum*, upon affidavit of service, plaintiff entered an appearance *secundum stat.* and entered declaration in the office, reciting that defendants were attached to answer, (which cannot be); motion to set aside the *ca.* &c. objecting that defendants ought to have been sued by *pone*, and *distringas*. *Per cur'*: Defendants being sued in a corporate capacity, the *capias* is null and void. It was agreed, that had defendants themselves appeared, the objection had been waved. Hil. 15 Geo. 2. *Langley v. the Bailiffs and Burgesses of East Redford,* 2 Barnes's Notes 328.

10. Date of the writ omitted, penalty for the omission 10*l.* on the officer, *per Stat. W.* 3. proceedings staid. T. 21 & 22 Geo. 2.

*The forms of capias's on the præcipes A. B.
C. and D. Page*

*The form of a common capias in trespass
on the præcipe, Page (A).*

(A) **G**EORGE, &c. To the sheriff of
Middlesex, greeting. We command
you, that you take C. D. late of the parish of
—— in your county, Gent. if he shall be
found in your bailiwick, and keep him safely,
so that you may have his body before our
justices at *Westminster*, on &c. (return) to
answer A. B. in a plea wherefore with force
and arms he broke the close of the said A. at
Westminster, and did other injuries to him, to
his great damage, and against our peace; and
have there this writ. *Witness*, Sir John Willes,
Knight, at *Westminster*, the —— day of ——
in the —— year of our reign.

Under this writ the notice.

Mr. C. D. you are served with, &c.

*The form of the capias on the præcipe in
debt. Page (B)*

(B) **G**EORGE the Second, &c. To the
sheriff of *Middlesex*, greeting. We
command you, that you take A. B. late of *West-*
minster, in your county, Gent. otherwise called,
&c. if he shall be found in your bailiwick, and
keep him safely, so that you may have his
body before our justices at *Westminster*, on, &c.
to answer C. D. of a plea that he rendered to
the

the said C. D. 200*l.* which he owes him, and unjustly detains, as it is said; and have there this writ. Witness, &c.

Indorse

E. F. (the attorney)

— Dec. 175 —.

Affidavit for 100*l.*

The form of the capias upon a præcipe in trespass, with an acetiam in debt. Page (C).

GEORGE the Second, &c. To the Sheriff of *Middlesex*, greeting. We command you that you take C. D. late of the parish of *St. Martin in the Fields*, in, &c. brewer; if he shall be found in your bailiwick, and keep him safely, so that you may have his body before our justices at *Westminster*, on ——— to answer A. B. of a plea, wherefore with force and arms he broke the close of the said A. at *Westminster*, and did other wrongs to him, to the damage of the said A. and against our peace, and also that the said C. answer to the said A. according to the custom of our court of the bench, in a certain plea of debt, upon demand, for 100*l.* and have there this writ. Witness, &c.

The form of the capias upon a præcipe in trespass, with an acetiam in case upon promise. (Vide page (D))

GEORGE the Second, &c. To the Sheriff of *Middlesex*, greeting. We command you that you take, &c. (*as before*); and also that the said C. D. may answer the said

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A. B. according to the custom of our court of the bench in a certain plea of trespass on the case, upon promise, to the damage of the said *A.* 60*l.* and have there this writ. *Witness, &c.*

J. T.

— June, 175—.

Affidavit for 30*l.*

Of suing out a *Test. capias ad respondendum.*] If the action isailable, and the defendant lives not in the county wherein you intend to try the cause, you must make out a *test.* into the county where defendant lives, in which cases only a *test. capias* is necessary, unless defendant lives within the *Cinque Ports*; for in such case tho' the action is *not*ailable, yet you must serve him with a copy of a *test. capias* directed to the constable of *Dover* castle. *Vide* p. 22. note 4.

The *test. capias* must always be made out by the filazer of the county where plaintiff intends to try the cause; as suppose the defendant lives in *Kent*, and plaintiff would try the cause in *London*, then you make out a *præcipe* in the following form *on one piece of paper.*

London. C A P I A S for *A. B.* against *C. D.*
late of — in the county of *Kent*,
oilman. Broke the close at *London.*

Ret. on the *Octave*
of *St. Hilary.*

Kent. T E S T' *capias*, and also for 100*l.*
upon promise.

Affidavit for 50*l.*

E. F. — Dec. 1757.

Ret. on the *Octave*
of the *Purification.*

(Note;

(Note; *The above præcipe will serve for a test. non omittas, only instead of saying test. capias, and also, &c. you say non omittas test. and also, &c.*)

Take the above *præcipe* to the filazer for London, pay him for *test. capias* (if no *capias* has been *actually* sued out. before) 7s. pay at the Seal-office for sealing the *test. capias* 1s. 2d.

But if you make out a *capias*, and before it is executed the defendant goes out of the county into which it was directed, then you make out a *test.* by continuance into the county where he is gone; pay the filazer for *test.* by continuance 4s. 10d. sealing 7d.—Note; in the *præcipe* you say *test. capias* by continuance, &c.

N O T E S.

1. Defendant must file *special* bail with the filazer of that county into which the original *capias* was directed, and who must make out the *testatum*, which we will suppose (as above) to be the filazer for London, and not with the filazer for the county where he was arrested, *viz. Kent*; for if he does, the plaintiff may nevertheless proceed on the bail bond. *Vide Rep. and Cas. of Pract.* 44.

2. And in order to find out the proper filazer, defendant must apply to the under sheriff of the county where he was arrested, for an *extract* or copy of the writ. You generally pay for the *extract* or copy 6d.

3. The plaintiff must declare in the county from whence the *test. capias* issued, and where

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special bail is filed, otherwise the bail will be discharged.

4. Rule absolute to stay proceedings on process directed to the sheriff of *Kent*, served at *Hastings* within the *Cinque Ports*, without costs. The sheriff of *Kent* has no jurisdiction within the *Cinque Ports*; the writ should have been a *test. capias*, directed to the constable of *Dover* castle. *Hil. 24 G. 2. Box v. Culmer*, 2 *Barnes's Notes* 341.

5. *Currer*, the father, plaintiff's attorney, in favour of his son, *Currer jun.* filazer of *Suffolk*, and in prejudice of the filazer of the county of *Kent*, tho' plaintiff and defendant both dwelt in *Kent*, where the cause of action arose, and had never any dealings together in *Suffolk*, sued out a *test. capias* from *Suffolk* into *Kent*, out of his son's office, in the name of *Mulliner*, an attorney, instead of a *capias* into *Keut* from the proper filazer. *Cur'* held this to be *unwarrantable* and *irregular*, and set aside the proceedings, with costs to be paid by *Currer*, sen. to both parties; *C. Valentine*, a bailiff, complained of by defendant, denied the charge; and as to him, the rule to shew cause why an attachment, &c was discharged. *Skinner* and *Poole* for plaintiff and the two *Currers*; *Prime* and *Draper* for defendant; *Wynne* for *C. Valentine* the bailiff. *E. 21 Geo. 2. Valentine v. Hawkins*, 2 *Barnes's Notes* 336.

The form of a test. capias ad respondendum.

GEORGE the Second, &c. To the Sheriff of Kent, (a) greeting. We command you that you take C. D. late of ——— in your county, oilman, if he shall be found in your bailiwick, and keep him safely, so that you may have his body before our justices at Westminster, on ——— to answer A. B. of a plea wherefore with force and arms he broke the close of the said A. at London, and did other injuries to him, to the great damage of the said A. and against our peace. And also that the said C. answer the said A. according to the custom of our court of the bench, in a certain plea of trespass upon the case on promise, to the damage of the said A. of 100*l.* and whereupon our sheriffs of London returned to our said justices at Westminster at a certain day now past, that the said C. was not found in their bailiwick; whereas it is testified in our said court that the said C. doth lie hid and run from place to place in your county; and have there this writ. *Witness, &c.*

(a) If the defendant lives within the Cinque Ports then the *test.* must be directed "To the constable of our castle of Dover, or his deputy there, greeting;" and if the action is notailable you must serve defendant within the Cinque Ports with a copy of the *testatum* (leaving out the *acetiam*.) under which *test.* must be wrote an *English*

notice for defendant to appear, &c. as in other cases.

Of suing out a *non omittas capias ad respondendum*, and *non omittas test.*] If defendant lives, or is to be found in a liberty into which the Sheriff cannot enter, you must sue out a *non omittas*. Make a *præcipe*, carry it to the proper filazer, pay him 8*s.* 6*d.* sealing 1*s.* 2*d.*— For a *non omittas test.* you pay to filazer 11*s.* 10*d.* sealing 1*s.* 9*d.*

N O T E S.

1. Motion to quash a *non omittas capias ad respondendum*, for that it recited a mandate to have been issued by the sheriff to the bailiff of a liberty, without naming what liberty, but leaving a blank for it. Objection held good *per cur'*, and that the proper way to take advantage of the defect is by motion; but bail having been put in before a judge, the objection comes too late. *M. 17 Geo. 2. Mallom v. Gent, 2 Barnes's Notes 332.*

2. By a writ of *non omittas* out of the court of King's Bench, the sheriff may enter any liberty, for the writ is, *Quod non omittas propter aliquam libertatem in com. tuo quin capias, &c. 5 Co. 92.*

Attachment of privilege.] *Vide* Proceedings by attornies, p.

The form of a non omittas capias ad respondendum.

GEORGE the Second, &c. To the sheriffs of L—, greeting. We command you that you do not omit by any reason of any liberty of the liberty of the rape of D. in your county; but that you take A. B. late of, &c. if he shall be found in your bailiwick, and that you keep him safely, so that you may have his body before our justices at Westminster on ——— to answer C. D. of a plea wherefore with force and arms he broke the close of the said C. at ——— and did other injuries to him, to the great damage of the said C.

C. and against our peace; and also that the ^{Acetiam.} said A. may answer the said C. according to the custom of our court of the bench in a certain plea of debt upon demand for 30 l. and whereupon you returned to our justices at *Westminster* at a certain day now past, that the bailiff of the aforesaid liberty, whom you commanded by virtue of our said writ to you thereupon directed, to take the said A. gave you no answer thereto; and have there, &c.

Of serving copy of process.] When an action does *not* require bail, defendant is to be *personally* served with a copy of the process, and upon every copy of such process shall be written an *English* notice of the intent and Meaning of such service;—5 s. is allowed for making and serving a copy of the process, and no fee for the notice. *Stat. 5 Geo. 2. c. 27.* Note; this act was made perpetual by *Stat. 21 Geo. 2. c. 3.*

In particular franchises and jurisdictions, the proper officer there shall execute such process. *Stat. 5 Geo. 2. c. 27.* Vide *p. 27. note 7.*

N O T E S.

1. Process against baron and feme, baron only served, plaintiff appears for both, held good service. *E. 8 Geo. 2. Juncomb v. Love & ux. Pract. Reg. in C. P. 351.* 1 *Barnes's Notes* 293. *Buncombe v. Love, &c. S. C.* Service on the baron only is good in lieu of arrest. *Ibid.* It is not necessary to serve the wife; on serving the husband, plaintiff may appear for both *secundum statutum*, *E. 12 Geo. 2. Collins v. Shapland & ux.*

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Et ux. *Pract. Reg. in C. P.* 351.—*Barnes's Notes* 303. S. C.

2. Proceſs againſt two executors, both muſt be ſerved before you can proceed, or you may proceed to outlaw the executor that cannot be ſerved. T. 8 Et 9 *Geo. 2.* *Worley v. Bull and another executors, Pract. Reg. in C. P.* 351.

3. Defendant was ſerved with a copy of the original, plaintiff appeared *ſecundum ſtatutum*, and delivered declaration. *Cur'* held this a bad ſervice, and ſtaid proceedings. M. 11 *Geo. 2.* *Peter v. Remer, Pract. Reg. in C. P.* 342.—*Ibid.* ſame page. M. 13 *Geo. 1.* *Smith v. Anderton*, S. P. defendant ſhould have been ſerved with copy of the *capias*, and not the original; for *per cur'* defendant ſhould have been ſerved with a copy of ſuch proceſs, as the ſheriff, before the making of the late act (12 *Geo. 1.*) could have arreſted the defendant upon. Judgment ſet aſide. *Ibid.*—*Rep. and Caſ. of Pract. in C. P.* 31. *Smith v. Anderton*, S. C. ſays, a copy of a ſpecial original was ſerved on defendant, and that the plaintiff proceeded thereon according to *Stat. 12 Geo. 1. c. 29.* but that all was ſet aſide by the court, for a copy of the *capias* ſhould have been ſerved.

4. On a *teſt.* unto *Durham*, the Defendant muſt be ſerved with a copy of the biſhop's mandate to the ſheriff, and not with a copy of the *teſt.* for *per cur'* the proceſs ſerved upon the defendant muſt be ſuch proceſs as he could have been arreſted upon, if the *Stat. 12 Geo. 1. c. 29.* had not been made, and that the Act had not altered the law in that particular, and therefore defendant ſhould have been ſerved with the biſhop's mandate. M. 1 *Geo. 2.* *Beach v. Smith, Pract. Reg. in C. P.* 343.—*Rep. and Caſ.*
of

of *Pract. in C. P.* 38. S. C.—Held otherwise in the following case.

5. *Test. capias* into *Lancashire*, a county palatine; defendant is not to be served with a copy of the chancellor's mandate, for *per cur'* since the *Stat. 5 Geo. 2. c. 27.* process to be served is the process out of the *superior* court; and so it has been determined in *B. R.* The case of *Beach v. Smith* in this court, was before the said *Stat. 5 Geo. 2. c. 27.* *Byers v. Whitaker, Pract. Reg. in C. P.* 344.—*Rep. and Cas. of Pract. in C. P.* 119. S. C. 1 *Barnes's Notes* 293. S. C. *Cur'* held, that the *test. capias* is the process to be served, and not the chancellor's mandate, upon reading the *Stat. 5 Geo. 2.* which is explanatory of *Stat. 12 Geo. 1.* By the last act the affidavit of the service of process is to be sworn before a judge of the court from whence process issued, or a commissioner appointed by such court, which must be intended of the courts of *Westminster*, none other can appoint such commissioner. Before the *5 Geo. 2.* this court was of opinion that the process to be served must be the process whereby defendant might have been arrested before the act *12 Geo. 1.* *Beach v. Smith, M. 1 Geo. 2.* But since the *Stat. 5 Geo. 2.* to explain *12 Geo. 1.* the court of King's Bench and this court have held that the first process must be served. *Ibid.*

6. Process not served by the sheriff's officer, but by the attorney or his clerk, good service within the meaning of the act. *Hil. 13 Geo. 1.* *Delafield & al' v. Jones, Pract. Reg. in C. P.* 345.

7. Defendant was served with a copy of process directed to the sheriff of *Suffolk*, within the liberty of *Bury St. Edmunds*, and held good. *Hil.*

Hil. 7 Geo. 2. Hall v. Whilby, Pract. Reg. in C. P. 345. Rep. and Cas. of Pract. in C. P. 96. Hall v. Bilby, S. C. Tho' the Stat. 5 Geo. 2. c. 27. says, "that in particular franchises and jurisdictions the proper officer shall execute the process;" yet the court held, that tho' the process was not served by the proper officer in this case, yet it was well served, for the statute does not make such service of process void, nor would an execution executed in such franchise, tho' not by the proper officer, be void; but the statute only intends to save the right to such officers, who may, if they are injured, take such remedy as they shall be advised, but such service is no ways impeached by the statute. Ibid.—1 Barnes's Notes 290. S. C. The act only preserves and saves the jurisdiction of particular liberties, the person injured must bring his action, the court cannot stay proceedings. Ibid.

8. Notice for defendant to appear on process must be for the effoin-day of the return, for *per tot. cur'* the Stat. 12 Geo. 1. gives four days for defendant to enter his appearance, before plaintiff can for him; and the constant practice upon that statute hath been to compute the four days from the effoin-day. The statute of 5 Geo. 2. adds four days more, in all eight days; if the notice to appear be for the appearance day, and defendant has eight days from thence to appear, he will have twelve, which the statute never intended. *T. 6 & 7 Geo. 2. Alsop v. Bagot, Pract. Reg. in C. P. 346. Rep. and Cas. of Pract. in C. P. 92. S. C. Resolved per cur', that on the copy of the process which is served on the defendant, notice should be given to appear on the effoin-day, and not on the appearance day.—Notice should be for the effoin-day, tho' a Sunday. Hil. 7 Geo. 2. Jenner v. Oatridge, Pract.*

Pract. Reg. in C. P. 346. Same term, *Green v. Watkins*, S. P. *Cur'* on consideration, and advising with the prothonotaries, held notice for Monday wrong where the effoin-day was on the Sunday. *Ibid.* 347—*Rep. and Cas. of Pract. in C. P. S. C.* The notice ought to be given to appear on the effoin-day, whether Sunday or not, the *Stat. 5 Geo. 2. c. 27.* expressly directing the same—*Jenner v. Williamson*, Hil. 7 Geo. 2. S. P. *Rep. and Cas. of Pract. in C. P.* 97.—Notice to appear on Sunday, being the effoin or return day, held good notice *per cur'*, *E. 7 Geo. 2. Lloyd v. Beeston*, *Rep. and Cas. of Pract. in C. P.* 100.—In notices to appear to be served upon defendants, pursuant to *Stat. 5 Geo. 2. c. 27.* the day of the return of such process must be inserted, altho' it appears to be upon a Sunday. *Rules and Orders in C. P. Hil. 7 Geo. 2.*

9. *Capias* tested 22d of August, returnable *tres Mich.* was served in September, with notice under copy to appear on the 20th of October, without saying *next*. Notice bad, proceedings set aside. *M. 12 Geo. 2. White v. Washington*, *Pract. Reg. in C. P.* 347.

10 Upon a defective Notice the plaintiff may apply at any time before judgment (a), (a) *Interlocu- per cur'*. *Ibid.*—Defendant need not apply to stay proceedings for any fault in the service of the process, until notice be given of the declaration being left in the office, &c. *Per cur'* in *Jemmet v. Voyer*, *ibid.* 355—If defendant applies to the court after notice of the declaration, and before interlocutory judgment signed, it is time enough. *Ibid.* For, until serving of the notice of the declaration, defendant cannot tell whether plaintiff will proceed or no. *Rep. and Cas. of Pract. in C. P.* 105. in S. C.

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11. A Mistake in the process is cured by plaintiff's entering an appearance, which has always been looked upon to be as effectual for that purpose, as if the defendant had entered the appearance; *per cur'*, *sed vide p.* — But it will be too late to apply after interlocutory judgment is signed; *per cur'*. *Hil. 8 Geo. 2. in Chalken v Janson, Rep and Cas. of Pract. in C. P. 115.* — After judgment signed it is too late to complain of irregularity of process. 2 *Barnes's Notes* 211.

12. In the process served upon the defendant he was named *Claypham*, but in the notice under process he was named *Cliffham*. *Cur'*: The name in the notice ought to follow the name in the writ. Proceedings staid. *E. 8 Geo. 2 Simpson v. Claypham, Pract. Reg. in C. P. 348.*

13. Notice to appear must be given on service of process, tho' the writ be *special*, and debt above 10*l.* *M. 11 Geo. 2. Atwood v. Meredith, executor in case. Pract. Reg. in C. P. 349.*

14. Process served at six o'clock in the afternoon of the day of the return. Insisted that the court sat long on the day of the return; *per cur'* the process is well served, there is no fraction of a day. *E. 1 Geo. 2. Mathews v. Partridge, Pract. Reg. in C. P. 358.* — Process served at seven o'clock at night on the day of the return, defendant moved to stay proceedings, and would have it *presumed* that the court was risen when the process was served, and consequently not good service. *Cur'*: He that moves to have proceedings stayed for *irregularity*, must make the *irregularity completely appear*. If you had ascertained the time of the rising of the court, and it had appeared that the process was served
after

after the court was risen; we would have considered further. No rule. *Hil. 5 Geo. 2. Hayne v. Cane, MS. Rep.—Pract. Reg. in C. P. 352. S. C.*—Process served *after* the rising of the court on the return-day is irregular; *per cur.* *Vide Rep. and Cas. of Pract. in C. P. 52.*—Process served on the return-day at ———, at five o'clock in the afternoon, with notice to appear that day, which was the return-day, (20th of *January*), on which day the proclamation for the effoins had been made, and the judge was gone out of court before noon, so the return was expired. Proceedings stayed; *Cur'* declaring that defendant ought to have a reasonable time to appear after service, which is the plain intention of the statute directing the notice, and that the notice ought to be served before return-day. *Hil. 16 Geo. 2. Foot v. Hume 2 Barnes's Notes 330. Hil. 29 Geo. 2. Ashley the younger v. Mackarby and another.* Proceedings staid; because the copy of the process was served on the return-day at three o'clock in the afternoon. *Supplement to vol. 2. Barnes's Notes, p 53.*

15. The writ need not be shewn at the time of service of the copy, *per cur'*. (*Vide* the acts to prevent vexatious arrests, 12 *Geo. 1.* and 5 *Geo. 2.*) *Hil. 12 Geo. 2. Panchard v. Woolley, 1 Barnes's Notes 222.—Pract. Reg. in C. P. 385. S. C.*

16. Process against several defendants, in the copy served upon the defendant *Standish*, the other defendants were not named. *Cur'*: This is wrong; a compleat copy of the whole process must be served. *T. 7 & 8 Geo. 2. Cutliffe an attorney v. Standish, Pract. Reg. in C. P. 354.—1 Barnes's Notes 292.* S. C. says the affidavit of service of process was as follows, *viz.* “that
“depo-

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“deponent served defendant with a copy of
“the writ, &c. at the plaintiff’s suit, except
“what related to other defendants.” Held
not sufficient and proceedings staid.

17. Defendant skulked and concealed himself, and was in a public office with the doors locked; the plaintiff’s attorney saw him thro’ the key-hole of the door, and thereupon told him a-loud that he had a copy of a writ for him, put the copy thro’ the crevice of the door, and told him what the paper was. *Cur’*: This good service. *T. 7 & 8 Geo. 2. Smith v. Wintle, Pract. Reg. in C. P. 354.*—*1 Barnes’s Notes 292. S. C.*

18. Procefs served without any notice to appear, &c. void, and proceedings staid. *E. 7 Geo. 2. Cort v. Turner, Rep. and Cas. of Pract. in C. P. 100.*

19. Procefs served by a bailiff that could neither read nor write, not good; for *per cur’*, The statute *12 Geo. 1. c. 29.* never intended that procefs should be served by illiterate persons, because it directs, “that affidavit should be made of the service of the procefs.” *E. 13 Geo. 1. Delafield v. Jones, Rep. and Cas. of Pract. in C. P. 34.*

20. The attorney’s name was not put to the copy of the procefs served, as the act *2 Geo. 2. c. 23. s. 22.* requires. *Per cur’*: The act does not concern the parties so as to make the procefs void, but only the attorney who sued it out, who might be censured for not pursuing the directions of the act. Motion to stay proceedings denied. *T. 7 & 8 Geo. 2. Blackball v. Gould, Rep. and Cas. of Pract. in C. P. 102.*—*Pract. Reg. in C. P. 441. S. C.* and adds that it was so determined in this court. *T. 5 Geo. 2.*
Warner

Warner v. Reeve.—1 *Barnes's Notes* 296. T. 7 & 8 Geo. 2: *Blackball v. Gould*. Motion to stay proceedings; because no attorney's name set to the writ; denied. Cites *Warnell v. Revell* and *Foswicks v. Jay*, T. 5. *Perkin v. Baker*; Hil. 5 Geo. 2.—1 *Barnes's Notes* 295. Hil. 9 Geo. 2. *Anon.* Motion to stay proceedings, no attorney's name being set to the copy of the process served upon defendant; but denied, plaintiff is not in the fault but the attorney.—But afterwards in T. 16 Geo. 2. *Chapman v. Ryall and others*. Motion to stay proceedings, no attorney's name being set upon the copy served on A. one of the defendants; as required *per Stat.* 12 Geo. and proceedings were staid; for *per cur'* the statute is compulsory, and for defects in notices to appear subscribed to copies of process served, nothing is more frequent than to stay the proceedings; and where the defect is in the copy of the process, the reason is the same. Tho' the writ itself be right, yet the copy served is defective, and proceedings must be stayed.—There is nothing in *Stat.* 5 Geo. 2. c. 22. s. 5.—*Stat.* 12 Geo. 2. c. 23. s. 22. or any other subsequent statute, whereby the *Stat.* 12 Geo. is altered or repealed in this particular. 2 *Barnes's Notes* 329.

21. Process was served June 16, dated 26, held to be irregular, and proceedings staid. T. 10 Geo. 2. *Humphreys v. Mitchell*, 1 *Barnes's Notes* 298.

22. A. sued out a special original, damages 50 l. served a copy thereof, and proceeded as if a *ca. ad respond.* with notice to appear, had been served. Judgment set aside with costs, and further process staid; for *per cur'*, plaintiff might have proceeded by *pone* and distress, or

taken a *capias* on his original, which he pleased; but service of a copy of the original in this manner amounts to nothing more than notice of the debt; process to be served according to the late statute must be process against the person. *M. 11 Geo. 2. Peter v. Reignier administrator, 1 Barnes's Notes 300.*

23. Motion to stay plaintiff's proceedings, copy of the process served, not being directed to the sheriff of any county, but denied *per cur'*: Because defendant cannot take advantage of this as an *irregularity*; if the writ be vicious, advantage must be taken thereof in another manner. *Hil. 7 Geo. 2. Chance v. Russel, 1 Barnes's Notes 291.*

24. Process was not served upon defendant, but upon another person; insisted that altho' the process might be served upon a wrong person, yet an appearance being now entered, defendant was in court, and the mistake was cured. *Cur'*:

(a) An appearance by defendant cures all errors and defects in process.

The appearance being entered by the plaintiff (a) according to the statute by no means cures the mistake. Proceedings staid. *T. 8 & 9 Geo. 2. Westall v. Finch, 1 Barnes's Notes 294.*

2 Barnes's Notes 136, 142, 239, 344.

25. *Capias ad respond.* bore teste 7th July, returnable 27th of *October*, and was dated 25th *October* 1742, a copy was served with notice to appear on the 27th of *October next*, which must refer to the time when served, and consequently must intend *October* 1753. The Notice should have been to appear on the 27th of this instant *October*, or *October* 1742, and not *October next*; the statute designed to make certain the time for defendant to appear by the Notice.

Notice. Proceedings staid. *M.* 16 *Geo.* 2.
Parker v. Edwards, 2 *Barnes's Notes* 240.

26. Copy of process served in *June* with Notice to appear at the return, being the 15th day of *June*, without saying (next) or the year (1747). Proceedings staid. *T.* 21 *Geo.* 2.
Wingfield v. Beard, alias *Farmer*, 2 *Barnes's Notes* 336.

27. Special original sued out into *Lincolnshire*; defendants appeared; plaintiff declared in *Middlesex*; defendants refusing to accept the declaration, it was left in the office and taken out and paid for by defendants agent. Plaintiff sued out a new original in *Middlesex*. *Cur'* held the taking the declaration out of the office to be a waiver of the former proceedings, and discharged the rule to shew cause why proceedings in *Middlesex* should not be staid. *E.* 16 *Geo.* 2.
Marquand v. The Mayor of the Borough of Boston in Lincolnshire, 2 *Barnes's Notes* 331.

28. An infant, tho' served with process with notice to appear by attorney, is compellable to appear by guardian. *M.* 12 *Geo.* 2. *Gladman v. Bateman*, 2 *Barnes's Notes* 334.

29. Copy of process delivered in a letter, held to be good service, by defendant's opening the cover and taking out the copy; and that there is no occasion to shew the original at the time of service. *T.* 24 *Geo.* 2. *Boswell v. Roberts*, 2 *Barnes's Notes* 340.

30. Proceedings staid, process being directed to the sheriff of *Kent*, instead of *test. ca.* to the constable of *Dover* castle. 2 *Barnes's Notes* 341.
Vide p. ca.

31. Copy of process being tendered defendant at his house, and he refusing to accept it, held leaving it there was good service. *T.* 26 &

The present Practice of the

27 Geo. 2. *Wood v. Dodgson*, 2 *Barnes's Notes* 225.

32. If defendant complains of any irregularity in the *process* or *notice*, he must annex the copy to his affidavit.

33. *Process* delivered *without the filazer's* name being put thereto good, for *per cur'*, the act 2 Geo. 2. c. 23. does not require it. T. 7 & 8 Geo. 2. *Morley v. Johnson*, *Rep. and Cas. of Pract. in C. P.* 106.

Of executing process where bail is required.

GIVE the writ to a sheriff's officer, who will get a warrant thereon. Pay in *Middlesex* 4*d.* *Essex, Surry* and *Kent*, 6*d.* a warrant from the high bailiff 2*s.* 4*d.* in other counties sheriff's warrant usually 2*s.* 6*d.* upon which the officer will arrest the defendant.

N O T E S.

1. The name of the attorney to be subscribed to every writ for arresting the body, execution and warrant thereon; and if such attorney shall not be the attorney immediately retained by the plaintiff, then *also* with the name of the attorney so immediately retained. *Stat. 2 Geo. 2. c. 23. s. 22.* But by the *Stat. 12 Geo. 2. c. 13, s. 4.* the not subscribing the attorney's name on a warrant doth not vitiate the *writ*, provided the writ whereon such warrant is made out be regularly *subscribed* or *indorsed* according to the *Stat. 2 Geo. 2.*

2. Tho' no attorney's name be set to the sheriff's warrant, as required by the act 2 Geo. 2. yet *cur'* will not stay proceedings; for *per cur'*
the

the *warrant* is not void; the act of parliament is *directory* only, the sheriff is blameable, but the party must not suffer for his default. Rule to shew cause discharged. *Hil. 12 Geo. 2. Lagget v. Watkins, 1 Barnes's Notes 303.—Pract. Reg. in C. P. 441. S. C. 2 Barnes's Notes 327. S. P.*

3. Arrests and service of process, after the rising of the court, on the return-day, are irregular. *Rep. and Cas. of Pract. in C. P. 53.*

4. Rule for the bailiff of the dutchy of *Lancaster* to return the sheriff's mandate on a *fi. fa.* discharged, the warrant having been directed to officers of plaintiff's nomination, and at his peril, and not to the officers of the bailiff of the dutchy. *M. 17 Geo. 2. Gentleman v. Bright, 2 Barnes's Notes 331.*

5. Defendant was protected by a public minister, and the protection registered in the sheriff's office according to the statute: A *ca. ad respond.* was delivered to the sheriff of *Dorsetshire*, who durst not execute by reason of the protection and the penalty in the act. A treasury rule to return the writ discharged. *Per cur', M. 17 Geo. 2. Wright v. Obedon, 2 Barnes's Notes 332.*

6. Rule for the late sheriff of *Devonshire* to return a writ of *capias* discharged, the writ not having been delivered to the under sheriff 'till a year after it was returnable. *T. 25 & 26 Geo. 2. Potter v. Colsworthy, 2 Barnes's Notes 341.*

7. The under sheriff of *Hampshire* shut himself up, and could not be *personally* served with a rule to return the writ of *capias ad respond.* Rule that leaving a copy at his house should be good service. *M. 23 Geo. 2. Richardson v. Bailey, 2 Barnes's Notes 31.*

Common Appearance.

WITH whom to be entered.] Defendant being served with a copy of the process, must enter his appearance with the officer from whom the writ issued; as upon a *capias*, &c. with the *filazer*; and upon an *attachment of privilege*, &c. with the *prothonotary* (a). You pay at the prothonotary's 3 s. 10 d. at filazer's 2 s. 6 d. for one defendant, viz. 1 s. 6 d. for the king's duty, and 1 s. for entering the appearance. — Where several defendants are sued *jointly*, 2 s. 6 d. for the first defendant, and 4 d. for every other defendant. — If sued *separately* 2 s. 6 d. every defendant.

(a) Appearances are to be duly entered with the proper officer. s. Rule M. 1654. f. 13.

When to be entered.] By defendant, according to the *Stat. 5 Geo. 2. c. 27.* in eight days (b), *exclusive* of the return-day, i. e. if the writ be returnable on the octave of *St. Hilary*, viz. the twentieth of *January*, plaintiff cannot enter an appearance for defendant till the twenty-ninth of *January* (c). But if defendant does not appear in time, then plaintiff may enter an appearance for him according to the statute, affidavit of having served process *personally* on defendant being first made and filed. — The affidavit may be sworn before a *judge*, commissioner (altho' attorney for plaintiff. *Vide Rule E. 13 Geo. 2.*) or proper officer for entering common appearances, or his deputy, which affidavit is to be filed *gratis*. *Vide Stat. 12 Geo. 1. c. 29.* — *5 Geo. 2. c. 27.* — and *21 Geo. 2. c. 3.* Note; the affidavit must be filed in the office where the appearance is entered.

(b) By the *Stat. 12 Geo. 1. c. 29.* it was only 4 days.

(c) *Vide Pract. Reg. in C. P. 33 Hil. 7 Geo. 2. Bosanquet and others v. Parcb.*

If defendant is an infant, he must appear by guardian within the time above-mentioned, and for that purpose may attend a judge of this court

court with his guardian, and pray that he (*A. B.*) may be admitted his guardian, which *A. B.* consenting to, the judge's clerk draws up the admission, and the judge signs it, and then it is filed with the *proper* filazer, *i. e.* the filazer of the county from whence the process issued. But if an infant, defendant, lives at some distance from *London*, he may get a petition on double-six penny stamp paper, drawn up, directed to one of the judges of this court, setting forth, that he is an infant under the age of twenty-one, *viz.* of such an age, and that he is sued in such a cause, and therefore prays that *A. B.* may be assigned his guardian, and *A. B.* writing on the petition his consent to be guardian for the infant, and an affidavit being made of their signing the petition, and annexed thereto, the judge's clerk writes the admission, and the judge signs it, and then the admission is filed with the *proper* filazer. But if defendant does not appear by guardian in the time allowed by the rules of the court, plaintiff must procure an affidavit of the service of the process, and that defendant is an infant, and that he hath not appeared, upon which the judge (without your taking out a summons) will make an order, that unless the infant appears within so many days after *personal* service of the order, plaintiff may assign *John Doe* for guardian, and enter appearance for defendant; and upon affidavit of the service of this order, the judge will make the order absolute, and then an admission is drawn up and filed as aforesaid. But this admission procured by the plaintiff is only to bring the defendant into court, for before such defendant shall be admitted to *plead*, he must get himself admitted

by guardian, who is to defend his suit for him, otherwise his *plea* will not be received.

N O T E S.

1. By the *Stat. 12 Geo. 1. c. 29.* if the defendant did not appear at the return of the process, or within *four* days after, plaintiff, upon affidavit, &c. might enter a common appearance for him; and under this statute it was the practice for plaintiff's attorney to enter the defendant's appearance the next day after the appearance-day of the return of the writ. Vide *Rep. and Cas. of Pract. in C. P. 47. Pract. Reg. in C. P. 32.*—But now by *Stat. 5 Geo. 2. c. 27.* the defendant (a copy of the process in *English* having been served, as by the said act is directed) shall appear at the return of the process, or within eight days after such return. Vide *Rep. and Cas. of Pract. in C. P. 95.*—Note; plaintiff cannot appear for defendant till the ninth day. *Pract. Reg. in C. P. 32, 33.*—*1 Barnes's Notes 164. Ibid. 170.*

2. If plaintiff enters an appearance for the defendant before the time defendant has to enter his appearance is expired, defendant must complain of this irregularity before [interlocutory] judgment is signed. Vide *Rep. and Cas. of Pract. in C. P. 92.*——*Pract. Reg. 32.*—*1 Barnes's Notes 164.*

3. When an attorney undertakes to *appear and plead* for defendant, *cur'* will compel him to *appear*; but, after doubt, it was agreed that a plea must be demanded in writing. *M. 5 Geo. 2. Holiday v. Scot, Rep. and Cas. of Pract. in C. P. 65.*—An attorney undertaking is bound to *appear*; and his not having done so, shall

not

not prejudice the plaintiff so as to set aside his interlocutory judgment. *M. 6 Geo. 2. Theedam v. Jackson, Pract. Reg. in C. P. 26.*—1 *Barnes's Notes* 157. S. C.

4. Defendant, altho' he be not an attorney, yet if he undertakes to *appear*, is compellable thereto. *Per Chief Justice and Fortescue*; but *Price* thought it was never carried so far as to oblige a defendant on his own undertaking. *Denton* absent. *Hil. 5 Geo. 2. Parsons v. Whitley, Pract. Reg. in C. P. 26.*

5. In an action against baron and feme, if only the wife be arrested, she shall be discharged on a common appearance; but if *both* be arrested, *both* shall be held to bail. *Rep. and Cas. of Pract. in C. P. 117.*—S. C. *in Pract. Reg. in C. P. 65.*—1 *Barnes's Notes* 59.

6. Where the plaintiff's attorney enters an appearance for the defendant pursuant to the statute, and gives notice of declaration being *filed* to defendant, he is not obliged to take notice of any attorney that may *afterwards appear* to be concerned for defendant, and therefore may sign interlocutory judgment without calling on defendant's attorney for a plea. *E. 8 Geo. 2. Jones v. Wilkinson, Rep. and Cas. of Pract. in C. P. 116.*—*Vide Ibid. 50. Morris v. Parry, M. 2 Geo. 2.*—*Pract. Reg. in C. P. 29. Maurice one, &c. v. Barry, M. 2 Geo. 2, S. C.* says, that if defendant fails of entering his appearance in time, and the plaintiff enters it for him pursuant to the statute, he may proceed upon the rule of *M. 1 Geo. 2.* notwithstanding the defendant employs an attorney afterwards, and the plaintiff knows such attorney. *Ibid. 31. Caüter v. Fockham, Hil. 5 Geo. 2. S. P.*—The like

like resolution, *Shrigley v. Malher*, M. 7 Geo. 2.
Ibid.

Special bail on cepi corpus.

WHEN it is to be put in.] If defendant be arrested in *London* or *Middlesex*, he must put in special bail in four days (exclusive after the *appearance* day of the return of the writ) or the bail-bond may be assigned.—And if defendant be arrested in any other city or county, then in *eight* days, exclusive of the appearance day. Rule *Hil. 9 Ann.*

But if the last day of the said times happen on a *Sunday*, bail may be put in the next day.

Two people put in bail in feigned names, and because there were no such persons, they could not be prosecuted for personating bail on the *Stat. 21 Jac. 1. c. 26.* so the court ordered them and the attorney to be set in the pillory, which was done accordingly. *T. 6 Geo. 1. Anon. in C. B. Str. 384.*

How to put in bail in town.] Go to the proper (a) filazer, if it is filazer's bail, *i. e.* if the filazer issued out the writ, and he or his clerk will attend the court or judge to take the recognizance of bail, which in *London* and *Middlesex* is done by an entry in the filazer's book (b), and not by a bail piece, which entry he will afterwards draw up in proper form, if there be occasion to sue the bail on their recognizance (c).
 (a) Great care must be taken to apply to the proper officer in whose office the bail ought to be entered*; for if the bail be entered in a wrong office, the plaintiff may nevertheless proceed on the bail bond.
 (b) Entry of bail in a filazer's book ordered to be amended *nisi*, M. 6 Geo. 2. *Faggot v. Van Thiennen, Rep. and Cas. of Pract. in C. P. 74.* 1 *Barnes's Notes* 44. S. C. Recognizance of bail amended and made agreeable to the writ the same term, between the same parties. *Pract. Reg. in C. P. 74.—Ibid* 15. E. 11 Geo. 2. *Magrath v. Corning*, S. P.
 (c) See the form of the entry, p. * The officer from whose office the writ issued is the proper officer. Expence

Expence out of pocket of putting in bail before a judge.—Bail-piece 2 s. filazer in some counties 6s. judge's clerk in term time 5 s. in vacation 12 s.

If the writ issued out from the prothonotary's office, then it is called prothonotary's bail, and the prothonotary's clerk will attend the court or judge, to take the bail, and will afterwards draw up the entry in proper form, if there be occasion to sue the bail on their recognizance.

If the *filazer* cannot attend, the recognizance may be taken in his absence on stampt parchment, at the judge's chambers, upon bringing a true abstract of the writ. *Hil. 8 Geo. 2.* By the former rule, *T. 1 W. & M.* filazer's bail could not be taken in the absence of the filazer. You may have an abstract of the writ from the sheriff's office. You generally pay 6 d.

If you put in special bail at the judge's chambers in the absence of the filazer or prothonotary, you must get a special bail-piece from your stationer, which is a piece of parchment stampt with a double twelve-penny stamp.

Make an entry of the recognizance thereon in the following manner :

London. CAPIAS against *A. B.* late of *London*, taylor, at the suit of *C. D.* for 100*l.* upon promise, returnable on the morrow of the *Holy Trinity*.

Affidavit for 50*l.*

Bail *T. W.* of *Brook Street*, in the parish of *St. Andrew, Holbourn*, in the county of *Middlesex*, taylor.

S. S. of *Pall-Mall*, in the parish of *St. James*, in the liberty of *Westminster* and county of *Middlesex*, gentleman.

The defendant bound in 100*l.*
Each of the bail in 50*l.*

Taken and acknowledged the ——— day of — — &c. conditionally, before

C. J. attorney for the defendant.

If the defendant be arrested on a *test.* from *London*, or any other county, into *Kent*, the above entry will do, *mutatis mutandis*, for special bail is taken on the *capias*.—Bail-piece amended by the instruction for the writ. *E. 11 Geo. 2. Magrath v. Comming, Pract. Reg. in C. P. 15.*

If the defendant be not present to enter into the recognizance, then the bail are bound in double the sum indorsed on the writ; but if he is, then the bail are only bound in the sum indorsed, and the defendant in double the sum.

Of putting in bail in the country.] The judges of this court, or any two of them, whereof the chief justice to be one, may empower such persons, other than common attorneys or solicitors,

solicitors, as they shall think fit, in *England, Wales, or town of Berwick upon Tweed*, to take recognizance of bail in any action or suit depending in this court, which recognizance shall be of the like effect as if taken *de bene esse* before any judge of the court. *Stat. 4 W. & M. c. 4. s. 1.*

Any judge of assize in his circuit may take recognizance of bail, which shall be transmitted to one of the judges of this court, and received by him without oath of the due taking thereof. *Same Stat. s. 3.*

Before any bail shall be taken by virtue of the said act 4 *W. & M. c. 4. a true copy (a)* of the writ on parchment, to which the defendant is to put in bail, shall be brought to the commissioner before whom such bail is to be taken, and thereupon the recognizance or bail-piece shall be fairly *ingrossed (b)*, in this or the like form.

(a) I believe that an abstract of the writ on the bail-piece will be sufficient, and that the form *p. mutatis mutandis*, is the

form now used by commissioners.

(b) The commissioners generally

write the recognizance in a common hand.

The bail *A. B.* of _____ in the county of _____, Gent. and *C. D.* of the same place, Gent.

J. S. attorney for the defendant.

The defendant in 20*l.*
Each of the bail in 10*l.*

Taken and acknowledged the _____ day of _____ in the year of our Lord _____ conditionally, before me *G. D.* one of the commissioners, &c.

The

The condition of the recognizance.

YOU (naming the defendant if present) do acknowledge to owe unto the plaintiff 20*l.* and you (naming the bail) do severally acknowledge to owe unto the plaintiff the sum of 10*l.* a-piece, to be levied upon your several goods and chattels, lands and tenements, upon condition that if the defendant be condemned in the said action, he shall pay the condemnation money, or render himself a prisoner to the *Fleet* for the same; and if he fails so to do, you (naming the bail) do undertake to do it for him.

By the rule 5 *W. & M.* the commissioner for taking the recognizance of bail is entitled to 2*s.* and no more. *Stat. 4 W. & M. c. 4.* If the defendant be not present, then the bail are usually bound in double the sum indorsed on the writ, otherwise only single. *Vide p.*

Affidavit of the due taking such bail must be made (*Stat. 4 W. & M. c. 4.*) either before some judge of this court, to whom the bail-piece shall be transmitted, or before a commissioner authorized to take affidavits in this court. *E. 5 W. & M.*—Which affidavit is to be annexed to the bail-piece.

Every commissioner is to have a book for entering the names of the defendant, and his bail, and of the plaintiff, as in the bail-piece, and the time of taking thereof; and the name of him by whom such bail shall be transmitted, which book plaintiff's attorney may search. Rule *E. 5 W. & M.*

Notice of putting in bail.] Immediately after putting in bail before a judge, notice there-
of

of in writing must be given to the plaintiff's attorney or agent, that he may enquire into the sufficiency of the bail.

The form of the notice.

A. B. against C. D.

S I R,

TAKE notice that *E. T.* of, &c. (naming the street, &c. particularly, as in the bail-piece, or proper officer's book) and *S. S.* of, &c. were this day put in as bail above for the defendant in this cause, before Mr. Justice

Your's, &c.

To Mr. *J. M.*
attorney for plaintiff.

R. S. attorney
for defendant.

— day of —, 1758.

If bail be put in before a commissioner, notice thereof must be given by defendant's attorney to plaintiff's attorney within *four* days after the *caption*. Rule *Hil.* 13 *Geo.* 1.—*not practised.*

How to put in bail on a test. capias.
Vide p.

BAIL taken by a commissioner when to be transmitted.] If bail be taken by a commissioner *within* the distance of forty miles from the cities of *London* and *Westminster* (a) then the same is to be transmitted to a judge of this court, to be by him allowed, within ten days

(a) Note; the rule of *Hil.* 6 *Geo.* 1. mentions only *London*.