days after the taking thereof.——And if taken *above* forty miles from *London* and *Weſtminſter*, then within twenty days after the *caption*, unleſs all the judges ſhall be on their circuits, and then as ſoon as any one of them ſhall return to *London*. *E.* 5 *W.* & *M.* and *Hil.* 6 *Geo.* 1.

When the bail-piece is to be filed after tranſmiſſion.] After the bail-piece is tranſmitted, it muſt be forthwith filed with the proper officer, (*i. e.* either filazer or prothonotary, as the caſe ſhall be) to be by him entered upon record, otherwiſe it ſhall be as no bail, and the plaintiff is at liberty to proceed on the ſheriff's bond as if no ſuch bail had been put in; and the defendant, in caſe he be admiſſible to plead to the original action, ſhall not be admitted ſo to do, unleſs he firſt pay the *full* coſts to the plaintiff for the proſecution on the bail-bond, and plead as of the time when the bail ſhould have been duly entered. Rule *Hil.* 6 *Geo.* 1.

Bails taken before commiſſioners in the country, and tranſmitted to, and allowed by a judge of this court, ſhall be delivered to the judge's clerk, who ſhall allow the ſaid bail, which clerk ſhall *take* (*a*) the fees due to the proper officer for the entry thereof, and ſhall forthwith deliver the ſaid bail to be filed, and pay the ſaid fees to ſuch proper officer. Rule *M.* 13 *Geo.* 1.

(*a*) The fees are now left with the proper officer.

Bail taken before commiſſioners in the country ſhall be tranſmitted, and filed with the proper officer, according to the Rule *Hil.* 6 *Geo.* 1. and no ſuch bail ſhall be *received* or *filed* unleſs tranſmitted within the reſpective times appoint-

ed

ed by the ſaid rule, *without leave of the court (a)*. Rule *M.* 6 *Geo.* 2.

(a) If bail taken before commiſſioners be not filed in time, application muſt be made to the court, the judges in the treaſury will not give leave to file the bail-piece, the rule of *M.* 6 *Geo.* 2. ſaying "it ſhall not be filed *without leave of the court.*"

## *Excepting againſt bail.*

IN what caſes.] In all caſes wherein bail-bonds are taken, and the *ſame* bail is put in above, plaintiff may except againſt it *(b)*. Rule *M.* 6 *Geo.* 2.

*(b)* Before the making of this Rule the plaintiff could not except againſt ſuch bail. *Vide Rep. and Caſ. of Pract. in C. P.* 61.

## NOTES.

1. Bail to the ſheriff, being bail above, may be excepted againſt, and for want of *addition* or *juſtification* plaintiff may take an aſſignment of the bail-bond. *Hil.* 7 *Geo.* 2. *Ormond, aſſignee of the ſheriff*, v. *Griffith*, 1 *Barnes's Notes* 51.

2. Where the ſame bail are put in above as to the ſheriff and excepted to, taking an aſſignment of the bail-bond is not a waiver of the exception. The aſſignment does not admit the ſufficiency of the bail, the ſheriff may be inſufficient, and then if plaintiff cannot proceed on the bail-bond, he has no remedy. *E.* 15 *Geo.* 2. *Claxton, aſſignee of the ſheriff*, v. *Hyde, and his bail*, 2 *Barnes's Notes* 63.

When bail cannot be excepted againſt.] Bail cannot be excepted againſt after declaration delivered, unleſs it be delivered *de bene*.—A de-

mand of a plea is a waiver of the exception, tho' declaration be delivered *de bene eſſe*. *Vide* the note 1. this page.

## NOTES.

1. Plaintiff excepted againſt the bail, and for want of a juſtification in time proceeded upon the bail-bond. A declaration was delivered in the *original* action, after the time for putting in bail expired, as a declaration *de bene eſſe*. *Per cur'*: This no waiver of the exception. Proceedings *on the bail-bond not to ſtay*. But held the *demand of plea* to be a waiver of the exception; 'tis admitting defendant to be in court, and in a condition to plead, and for this reaſon proceedings were ſtayed on the bail-bond. *T.* 16 & 17 *Geo.* 2. *Liſter* v. *Wainhouſe*, 2 *Barnes's Notes* 66.

2. Exception againſt the bail. Declaration delivered, but not *de bene eſſe*, therefore defendant inſiſted that plaintiff had accepted the bail: But it appearing that by a judge's order, ten days time had been given defendant to perfect bail, plaintiff to declare without prejudice, defendant to rejoin *gratis*, and to take notice of trial for the laſt ſitting within laſt *Michaelmas* term, in conſequence of which order iſſue was joined, the cauſe entered, made a *remanet*, and tried at the ſitting laſt *Michaelmas* term, when plaintiff had a verdict; the rule to ſhew cauſe why plaintiff ſhould not ſtrike out the exception againſt the bail was diſcharged. *E.* 25 *Geo.* 2. *Mayo* v. *Weaver*, 2 *Barnes's Notes* 90.

3. Defendant became bail to the ſheriff for the appearance of *W. R.* at the return of the writ. Afterwards, without any compleat juſtification, plaintiff delivers his declaration *generally*, and

and proceeded to iſſue, trial and judgment, and then brings this action; to which defendant pleaded *comperuit ad diem*; and in order to maintain this plea, *cur'* was moved for leave to ſtrike out the exception on the bail-piece, that it might be filed, inſiſting that the declaring *generally* was a waiver of the exception. *Cur'*: Let them ſhew cauſe. *Hil.* 12 *Geo.* 2. *Anon. MS. notes.*—*Rep. and Caſ. of Pract. in C. P.* 155. *Walſh, aſſignee of the ſheriff of Middleſex*, v. *Haddock*, S. C. ſays, bail was filed above, but excepted to, and that exception entered on the bail-piece.

Within what time bail muſt be excepted againſt when put in before a judge.] If bail be put in before a *judge*, exception muſt be entered in twenty days after notice of putting it in, and not afterwards.

## NOTE.

Bail put in before a judge before the arreſt and return of the *capias*, and notice thereof given to plaintiff's attorney, who notwithſtanding arreſted defendant on the *capias*; and he being in cuſtody, moved for a *ſuperſedeas*. On ſhewing cauſe, it appearing that plaintiff had not excepted againſt the bail within twenty days after notice thereof, *Cur'* held that the bail ought to ſtand, and rule for a *ſuperſedeas* was made abſolute.—*Hil.* 12 *Geo.* 2. *Huggins* v. *Bambridge*, 1 *Barnes's Notes* 82.—*Pract. Reg. in C. P.* 50. S. C.

Within what time bail muſt be excepted againſt if put in before a *commiſſioner*.] Exception in ſuch caſe is to be made within twenty days after the bail-piece is tranſmitted,

and notice to the plaintiff or his attorney of taking thereof (a). Rule 5 *W. & M.*

(a) The rule 5 *W. & M.*

says, That the plaintiff's attorney shall be at liberty to repair to the commissioner's book for the names of the bail, to the end that he may enquire of the sufficiency of them, and if they are found insufficient, he may except against them within twenty days after the said bail is transmitted, and notice to the plaintiff or his attorney of the taking thereof: And in that case the defendant must either put in better bail, or the cognizors of such bail must justify themselves in open court, either by affidavit taken before such commissioner that took the said bail, or by oath made in court, or before one of the judges of the said court.

How to except against bail.] Exception against bail is made in *London* and *Middlesex*, in the filazer's or prothonotary's bail-book, or on bail-piece; but in other counties on the bail-piece with the commissioner *before* it is transmitted, and *afterwards*, in the filazer's or prothonotary's book, or on the bail-piece, as the case is.

## NOTES.

1. Exception to bail put in before a judge, must not only be entered in the filazer's book, or on the bail-piece, but notice of it must be given in writing to defendant's attorney, or it is not sufficient. Proceedings on bail-bond stayed. *M.* 15 *Geo.* 2. *Satchwell* v. *Lawes*, 2 *Barnes's Notes* 61.—*Ibid.* 83. *E.* 23 *Geo.* 2. *Goswell, one, &c.* v. *Hunt*, both entry and notice are necessary, *per cur'*. Exception must be entered in the bail-book, or upon the bail-piece, for no exception by notice is good without that is first done. *Hil.* 13 *Geo.* 1. *Rep. and Cas. of Pract.* 33.—*Ibid.* 55. *M.* 3 *Geo.* 2. *Busby* v. *Walker*, S P. declared *per cur'* to be the standing rule of Practice.——

*Pract.*

*Pract. Reg. in C. P.* 77. Exception to bail muſt be marked on the bail-piece, as well as notice thereof in writing muſt be given to defendant.

2. If the ſame bail be put in above which the ſheriff took, the plaintiff may except againſt them. Rule *M.* 6 *Geo.* 2. tho' before this rule he could not, but muſt have proceeded againſt the ſheriff. *Vide Rep. and Caſ. of Pract. in C. P.* 61.

Notice of exception.] To be given in writing by plaintiff's attorney to defendant's attorney or agent.

*The form.*

*C. D.* againſt *E. F.*

SIR,

I HAVE excepted againſt the bail put in for the defendant in this cauſe,

Your's, &c.
*C. P.* by *S. S.*
attorney (or agent)
for the plaintiff.

To Mr. *C. D.*
attorney for the defendant in the above cauſe.

*June* 1758.

*Perfecting bail.*

WIthin what time defendant muſt perfect his bail.] The bail, if excepted to, muſt juſtify in four days after notice of exception, or other bail muſt be added (*a*), who will juſtify within that time, without waiting for plaintiff's excepting to them, for he is not bound to except to additional bail. *Pract. Reg. in C. P.* 81. *E.* 10 *Geo.* 2. *Gregory* v. *Gurden*, 1 *Barnes's Notes* 69. S. C. And in default of

(*a*) Expence out of pocket of adding bail, filazer 5*s.* 4*d.* judge's clerk 2*s.*

juſtifying as aforeſaid, plaintiff may proceed on the bail-bond. *Vide* Rule *T.* 3 & 4 *Geo.* 2.

*N. B.* This rule muſt be underſtood to mean when exception is made, and *notice* thereof is given *in term*, for if *exception* and *notice* thereof is in *vacation*, and plaintiff will not be ſatisfied with a juſtification before a judge, the bail muſt juſtify within the firſt *four* days of the next term. *Vide* 2 *Barnes's Notes* 82. See alſo 1 *Barnes's Notes* 79.—*Pract. Reg. in C. P.* 78.

Notice of juſtification.] Two days notice of juſtification in all caſes muſt be given, *exclusive* of the day it is given; as if notice be given on a *Monday*, the bail may juſtify on the *Wedneſday*. *Sunday* is not to be reckoned as one of the two days. Notice on the *Saturday* to juſtify on the *Monday* is bad, it muſt be *Tueſday*. *Vide* 2 *Barnes's Notes* 60.

The defendant's attorney muſt give notice of *adding* or *juſtifying*, or *both*, as the caſe ſhall be.

*Notice of juſtifying bail.*

*A. B.* againſt *C. D.*

SIR,

TAKE notice that *E. F.* of, &c. and *G. H.* of, &c. (as in the bail-piece) the bail put in for the defendant in this cauſe, will juſtify themſelves in open court on *Saturday* next *(a)* as bail for the ſaid defendant.

*(a)* Don't ſay "or ſo ſoon after as counſel can be heard," as in other notices.

Your humble ſervant,

*R. S.*

attorney for the defendant.

To Mr. ——, attorney for the plaintiff.

— day of — 1758.

*Notice*

*Notice of bail added, and of juſtifying.*

*A. B.* againſt *C. D.*

SIR,

C. S. of *&c.* oilman, was this day before Mr. Juſtice ——, added to the bail already put in for the defendant in this cauſe; and on *Saturday* next the ſaid *C. S.* and alſo *A. B.* one of the bail before put in for the ſaid defendant in this cauſe, will juſtify themſelves as bail in open court.

Your humble ſervant,

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

*R. L.*
attorney for the
defendant.

— day of — 1758.

Affidavit muſt be made of the ſervice of the notice of juſtification.

*The form thereof.*

*A. B.* againſt *C. D.*

SIR,

I. L. clerk to Mr. *J. P.* attorney for the defendant in this cauſe, maketh oath, that he this deponent did on *Wedneſday* laſt, being the —— day of —— inſtant, ſerve Mr. —— the attorney for the plaintiff in this cauſe, with the notice hereunto annexed, by delivering a true copy of the ſaid notice to the ſaid Mr. ——.

*J. L.*

Sworn, *&c.*

## N O T E S.

1. *Cur'* declare that after this term the defendant ſhould give notice of juſtifying bail two days before the day of juſtification, and that they would not indulge the defendant with any further time, it being an artifice to defeat the rule for obliging defendants to juſtify their bail in four days after exception taken, and is plainly getting two days. *E.* 12 *Geo.* 2. *Teale* v. *Caeſbyre*, *Pract. Reg. in C. P.* 80.

2. *Per Cur'*: Two days notice of juſtification is the general rule in all caſes. *Mich.* 15 *Geo.* 2. *Elton* v. *Manwaring*. *Thomas* againſt *the ſame*, 2 *Barnes's Notes* 90. The defendant was in cuſtody in *Monmouthſhire*. *Vide Ibid.* 83.

3. Additional bail ſtruck off upon juſtifying the bail firſt put in. *Mich.* 6 *Geo.* 1. *Huſdays* v. *Boys*, *Rep. and Caſ. of Pract. in C. P.* 17.

4. Motion to change one of the bail, he being a material witneſs, an affidavit was produced of notice, that *A. B.* would be added, and at the ſame time would juſtify. But *cur'* would not receive the motion, becauſe the new intended bail was not actually added before the motion to juſtify. The defendant may add to a compleat bail without leave of the court. *Hil.* 6 *Geo.* 2. *Pinfold* v. *Eaſtbet*, *Pract. Reg. in C. P.* 80.

Where the bail muſt juſtify.] Bail put in *before a judge* muſt juſtify in perſon, and can't juſtify by affidavit. *Pract. Reg. in C. P.* 81. *M.* 7 *Geo.* 2. *Wingfield* v. *Goodrick*.—1 *Barnes's Notes* 57. *Hil.* 8 *Geo.* 2. *Cremer* v. *Bulman*. Juſtification of bail at a judge's chambers held not

not ſufficient, and plaintiff may proceed on the bail-bond.—Juſtification before a judge is no juſtification but by plaintiff's conſent. *Hil.* 23 *Geo.* 2. *Fowlis*, Eſq; v. *Groſvenor*, 2 *Barnes's Notes* 82.—Bail reſiding in the country, who had entered into a recognizance before a judge in town, on exception ſent up an affidavit of ſufficiency, and were permitted to juſtify by that affidavit, without attending *perſonally*. No oppoſition on plaintiff's part. *E.* 23 *Geo.* 2. *Hooper* v. *Comings*, 2 *Barnes's Notes* 84. Defendant may put in bail before a judge, and juſtify at the ſame time *de bene eſſe*, and for want of an exception within twenty days, the bail will become abſolute. 2 *Barnes's Notes* 84. *E.* 23 *Geo.* 2. *Price and another* v. *Street.*

But bail taken *before a commiſſioner* may juſtify themſelves in court by affidavit taken before ſuch commiſſioner, unleſs they live in *London* or *Weſtminſter*, or within ten miles thereof. *Stat.* 4 *W.* & *M.* *c.* 4. *ſ.* 2.

Tho' bail taken before a judge muſt juſtify in court, yet by conſent of plaintiff's attorney they may juſtify before a judge at his chambers. —You generally pay plaintiff's attorney 6*s.* 8*d.* for his *conſent* and *attendance.*

How to juſtify bail in court.] Get the proper officer to attend with the *bail-book* or *bail-piece.*—Have the bail ready in court. Move by a ſerjeant to juſtify by oath in court. Give the ſerjeant the affidavit of ſervice of notice.

But if the bail be taken before a commiſſioner, and they juſtify themſelves by affidavit taken either before a judge of this court, or the commiſſioner that took the bail, the affidavit may be read in court for juſtification. *E.* 5 *W.* & *M.*

Note;

Note; when bail is taken in the country, an affidavit of justification is usually annexed to the bail-piece, and then exception is seldom taken; but if it be, the affidavit of justification may be produced either in court, or by consent, before a *judge* at his chambers, for justification.

When defendant's attorney or agent gives notice to plaintiff's attorney or agent of the bail being put in, 'tis usual, to prevent exception, to send him a copy of the affidavit of justification along with the notice.

The expence out of pocket of justifying bail in court. Affidavit of notice 2 *s.* 6 *d.* serjeant's fee 10 *s.* 6 *d.* filazer 5 *s.* 4 *d.* secondary 1 *s.* Cryers 2 *s.* 6 *d.* In all 1 *l.* 1 *s.* 10 *d.*

## NOTES.

1. Motion to justify bail too late, the cause having been tried, and final judgment given. *T.* 5 *Geo.* 2. *Palmer* v. *Elton*, *Pract. Reg. in C. P.* 79.

2. Motion to justify bail too late, because the bail had pleaded *comperuit ad diem*, and the plaintiff had replied. *Per tot. cur'*, *T.* 5 *Geo.* 2. *Ellis* v. *Manwaring and others.* *Ibid.* 79.

3. Affidavit of justification by bail, "that "they were severally worth the sum where- "in they were bound by their recogni- "zances, after all their *just* debts paid and "satisfied," held to be insufficient, not being in common form; the word *just* ought to be omitted. *E.* 8 *Geo.* 2. *Harriman* v. *Clegg*, 1 *Barnes's Notes* 58.

Justifying

Juſtifying bail before a judge by conſent.] Get the proper officer to attend at the judge's chambers, pay him for attending 3 *s.* 4 *d.* Have the bail there. Pay at the judge's chambers 2 *s.*

## NOTES.

1. Juſtification before a judge is no juſtification but by plaintiff's conſent, 2 *Barnes's Notes* 82.—But the bail may juſtify before a judge *de bene eſſe*. *Vide* next caſe.

2 Plaintiff ſerved *Cooper*, late ſheriff, with a peremptory rule, to bring in defendant's body in court within ſix days, whereupon defendant within that time put in bail, and juſtified before a judge *de bene eſſe*, and for want of an exception within twenty days, the bail became abſolute. Plaintiff inſiſted, that tho' no exception was taken, yet the bail ought to have been perfected by juſtification in court (which is bringing in the body) within the ſix days limited by the rule. But *cur'* held otherwiſe. Rule on the late ſheriff to ſhew cauſe why an attachment diſcharged. *E.* 23 *Geo.* 2. *Price and another*, v. *Street*, 2 *Barnes's Notes* 84.

Of filing ſpecial bail.] On bail being put in before a judge, or tranſmitted from a commiſſioner, it is immediately filed with the filazer or prothonotary, as the caſe is.

## NOTES.

## N O T E S.

1. The court will give time to rectify a miſtake of filing bail in a wrong office, as where plaintiff had ſued out a *teſt.* attachment of privilege from *Middleſex* into *Yorkſhire*, and bail was taken as in a country cauſe, and filed with the filazer of *Yorkſhire* by miſtake; and in order to give defendant an opportunity to rectify that miſtake, defendant moved for ten days time to put in bail, and that upon putting in good bail, payment of coſts, pleading the general iſſue, and taking notice of trial within term, proceedings on the bail-bond might be ſtaid, which was ordered accordingly. *Hil.* 7 *Geo.* 2. *Garnet* v. *Heaveſide*, 1 *Barnes's Notes* 51.

2. The judges in the treaſury refuſed to order a bail-piece to be filed, twenty days being lapſed ſince the caption, the words of the general rule being, that ſuch bail-pieces ſhall not be filed without leave of the court.—— Court was afterwards moved upon the affidavit of defendant's agent, that he received the bail-piece in due time, but that it was omitted to be filed by his clerk's neglect. *Cur'* ordered the bail-piece to be received and filed. *T.* 7 & 8 *Geo.* 2. *Aucher* v. *Hamilton*, 1 *Barnes's Notes* 55.

*The*

*The form of a bail-piece where a priſoner in the* Fleet *is charged in cuſtody with a declaration holding him to bail, purſuant to the rule* Hil. 8 Geo. 2.

*Michaelmas* Term, &c.

*Pacey.*

*London.* DEclaration againſt *W. P.* late of *London*, Gent. to anſwer *G. S.* in a plea of treſpaſs upon the caſe, and ſo forth, to the damage of the ſaid *G.* of 20 *l.*

By oath for 10 *l.* 10 *s.*

The bail are { *A. D.* of, &c. Gent. and *C. D.* of, &c. Eſq;

*T. P.* attorney for defendant.

Each of the bail in 21 *l.*

Taken, &c. to be perfected hereafter before ———.

This is prothonotary's bail, and the bail-piece muſt be immediately filed with him. Upon the bail's juſtifying, and a rule of court thereupon made, the prothonotary will ſign a *ſuperſedeas.*

Caſes

## Cases of practice relating to special bail in general.

1. *In what cases special bail is* not *required; in what cases it is; and in what cases it is discretionary.*
2. *What affidavits have been held sufficient to hold a defendant to special bail of course,* et econt.'
3. *Where the bail was bound* jointly *and* severally *in* 140 l. *verdict for* 300 l. *each held to pay* 140 l.
4. *Striking out bail.*
5. *Of putting in bail before an arrest, and after final judgment.*
6. *Cases relating to justifying bail.*
7. *Sheriff cannot take bail on an attachment for contempt.*
8. *How to put in bail to save the advantage of pleading in* [redacted] *Abatement*

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*In what cases special bail is* not *required; in what cases it is; and in what cases it is discretionary.*

NO special bail in slander, except in slander of title, and then to be left to the discretion of the judges. Rule *M.* 1654. *Vide* 1 *Barnes's Notes* 80.

Nor

Nor againſt heirs (*a*), executors, or admi- (*a*) *Vide* p.
niſtrators. *Ibid.*

In all caſes where the defendant comes in by *cepi corpus*, be it in debt, detinue, treſpaſs for goods, action upon the caſe (except ſlander), ſpecial bail is to be given if the debt or damages amount to 20*l.* except it be againſt an heir (*b*), executor or adminiſtrator. Rule *M.* 1654, *ſ.* 12.—*Trin.* 24 *Eliz.* *Vide* 1 Barnes's Notes 80. (*b*) *Vide* p. pl. 4.

No bail of courſe in battery, conſpiracy, falſe impriſonment, without ſpecial motion and order. Rule *M.* 1654. (*c*) (*c*) A judge at his chambers will order ſpecial bail if he thinks fit.

Nor in privilege, except for fees and diſburſements, as an attorney of this court, and then bail at the diſcretion of the court, in ſuch caſe where in a ſuit by a common perſon, ſpecial bail is not required.

*N. B.* Now by the *Stat.* 12 *Geo.* 1. *c.* 29. bail in no caſe, unleſs affidavit be made of the debt, *&c.* and then 10*l.* holds to bail.

No ſpecial bail where the defendant appears upon the ſummons, attachment, or diſtreſs, or by *ſuperſedeas quia improvide*, or renders himſelf upon the exigent. Rule *M.* 1654.

In all cauſes of removal, be it by *habeas corpus*, privilege, or *certiorari*, ſpecial bail ought to be given. *M.* 1649.

Bail to be put in before the ſuing out a *ſuperſedeas* on any *capias.* Rule *T.* 24 *Eliz.*

In debt on a penal ſtatute, defendant is not to be held to ſpecial bail.

Neither is bail required on a bail-bond, or recognizance of bail, for that would be to have bail *ad infinitum.*

No

*Vide* Barnes's Notes 80.

No bail in Covenant unless for payment of money, or damages ascertained by affidavit.

In debt, *assumpsit*, trover, covenant by *acetiam*, bail is of course.—In trespass, detinue, and special action on the case, or of covenant, at discretion. 1 *Barnes's Notes* 80.

(a) *Vide* p. ca.

For words [unless slander of title *(a)*] or a *quitam*, or a fine, penalty, or amerciament, no bail. 1 *Barnes's Notes* 80, 81.

No bail on an action of debt upon a judgment against a prisoner discharged by *superseders* for want of prosecution. Rule *Hil.* 8 *Geo.* 2. *in C. P.*

(a) Vide *Stat.* 11 & 12 *W.* 3. *c.* 9. *s.* 2. Note; by this statute no special bail shall be in *Wales* under 20 *l.*

No bail in county palatines under 20 *l. (a)*. *E.* 15 *Geo.* 2. *Rayner* v. *Brough*, 2 *Barnes's Notes* 62.—*Vide* 1 *Barnes Notes* 62. *E.* 8 *Geo.* 2. *Lord Molineux* v. *Charles*, S. P. but *cur'* took time to consider of it.

*Prax. Reg. in C. P.* 63. S. C. *Cur'* would not discharge defendant on a common appearance, as it would be determining the cause on the motion.

Defendant held to bail by Lord Chief Justice's order, on affidavit of criminal conversation with plaintiff's wife, tho' defendant afterwards applied to Lord Chief Justice, and *cur'*, upon affidavits made by defendant and plaintiff's wife that plaintiff's death was reported, and that she had married defendant as her second husband. *M.* 7 *Geo.* 2. *Hadderweek* v. *Calmur*, 1 *Barnes's Notes* 47.

Where there can be no bail without a special order of a judge, defendant has a right to apply to the court to discharge the order, if not well founded. 1 *Barnes's Notes* 48.

Special bail on affidavit of entring plaintiff's ground, and taking away and spoiling hop-poles, and treading down his hop-plants, to the damage

damage of 20 *l.* without a judge's order, for *per cur'* the plaintiff is the proper perſon to ſwear to his damages, by the act of parliament. *T.* 7 & 8 *Geo.* 2. *Cooke and others* v. *Sankey*, 1 *Barnes's Notes* 55.—*MS. notes*, S. C. *Cur'* declared, that tho' it was reaſonable to have a judge's order in battery, there was none in this caſe.—*Rep. and Caſ. of Pract. in C. P.* 106. S. C. ſays, the *Stat.* 12 *Geo.* 1. *c.* 29. did not diſtinguiſh actions. *Pract. Reg. in C. P.* 64. S. C.

Special bail in covenant on affidavit that plaintiff was damnified 100 *l.* by defendant's refuſing to dance upon the ſtage according to articles, plaintiff having ſworn to a certain damage. *E.* 8 *Geo.* 2. *Fleetwood, patentee of Drury-Lane play-houſe*, v. *Poitier*, 1 *Barnes's Notes* 58.

2 *Barnes's Notes* 94. *E.* 26 *Geo.* 2. *Reynoldſon* v. *Blades*, in the treaſury. Plaintiff ſwore that defendant covenanted to pay him 315 *l.* for the purchaſe of land; that he had been always ready to convey the eſtate on payment of the purchaſe money, but defendant refuſed, whereby plaintiff ſwears himſelf damnified 40 *l.* Common appearance ordered. No previous application to a judge. Damages uncertain. Old caſes, *Fleetwood* v. *Poitier*, &c. are not to be followed, where damages can be reduced to a certainty, as in covenant for payment of money, or where a tenant covenants with his landlord to pay a certain ſum for every acre of land he plows up, or the like, plaintiff is intitled to bail, otherwiſe not, eſpecially without a judge's order previous. 'Tis not reaſonable that defendant ſhould be held to bail for ſuch damages as plaintiff fancies he has ſuſtained, and is pleaſed to ſwear to.—So in an action on bond to ſave harmleſs, plaintiff muſt ſwear *poſitively* and *certainly*, how, and for how much he is damnified, the court cannot take it by implication. *Hil.* 27 *Geo.* 2. *Whitfield* v. *Whitfield.*

*A.* ordered to pay *B.* 100 *l.* in a court in *France*, which ſentence was annulled by the parliament of *Paris*. *A.* not to be held to bail here. *Hil.* 10 *Geo.* 2. *Debalſe* v. *Mackenſie*, 1 *Barnes's Notes* 68.

Defendant ſuperſeded by ſurprize, without plaintiff's knowledge, may be arreſted again for

the ſame debt. *M.* 7 *Geo.* 2. *Wballey* v. *Martin*, 1 *Barnes's Notes* 50.

Plaintiff *non ſuited* in debt on bond, may arreſt defendant in a *new* action on ſame bond. *E.* 10 *Geo.* 2. *Harris* v. *Roberts*, 1 *Barnes's Notes* 69.

Mr. Juſtice *Comyns* had ordered bail for 200 *l.* in an action for a malicious proſecution for forgery, upon plaintiff's affidavit Motion for an appearance; and it appearing that plaintiff was not acquitted of the indictment upon the merits, but upon a flaw, and no precedent being produced of an order for bail in ſuch an action as this, (tho' for falſe impriſonment there was) the rule to ſhew cauſe why a common appearance was made abſolute. *E.* 11 *Geo.* 2 *Ruſſel* v. *Gately*, 1 *Barnes's Notes* 74. *Rep. and Caſ. of Pract.* 148. S. C. *Pract. Reg. in C. P.* 66. S. C.

Plaintiff had made affidavit that defendant had ſeized and detained his ſhip to his damage, and held defendant to bail. *Per cur'*: The damages in this caſe are uncertain, and plaintiff is not intitled to bail without a judge's order. Rule for common appearance and *ſuperſedeas* made abſolute. *M.* 12 *Geo.* 2. *Le Writ* v. *Tolcher*, 1 *Barnes's Notes* 79.

Defendant held to bail by a judge's order, in an action for meſne profits after judgment in ejectment againſt the caſual ejector by default, diſcharged by plaintiff's conſent on common appearance, the *acetiam* being *in caſe* inſtead of *treſpaſs* only. *M.* 15 *Geo.* 2. *Treberne* v *Greſſingham*, 2 *Barnes's Notes* 59. It was obſerved *per cur'*, that theſe actions for meſne profits (which are grown very faſhionable) tend to create double expence. Why ſhould not plaintiff be ready at the trial of the ejectment, to give his damages, which

Motion in Treaſury for bail in an action for meſne profits, after a recovery in ejectment upon the leſſor of the plaintiff's affidavit, that the meſne profits amounted to 89 *l.* Bail ordered for

for 80 *l.* This is a cauſe of action which is bailable, or not, at the diſcretion of the court, or a judge. *M.* 13 *Geo.* 2. *Hunt* v. *Hudſon & al'*, 1 *Barnes's Notes* 88.

which may be recovered in that action, without bringing a ſecond for meſne profits. The true rule as to the time from which meſne profits are to be recovered, ſeems to be where judgment is againſt the caſual ejector, from the time of the delivery of declarations to the tenants in poſſeſſion, or from the time of an actual demand of poſſeſſion proved, where judgment is againſt the tenants in poſſeſſion (or the landlord defending in their ſtead) from the ouſter admitting by the common conſent rule; but in neither caſe from the demiſe, which may be laid back at plaintiff's pleaſure. *Ibid.*

Action for 50 *l.* penalty given by act of parliament, for defendant's practiſing as an attorney, not being duly admitted. Rule to ſhew cauſe why common appearance and *ſuperſedeas* abſolute. This is for a fine or amerciament, and is in nature of a *qui tam.* *Hil.* 12 *Geo* 2. *Whittingham* v. *Coghlan*, 1 *Barnes's Notes* 81.

*A.* diſcharged at the ſeſſions on the fugitive act, not to be held to bail. *Hil.* 12 *Geo.* 2. *Liſle* v. *Jenyns*, 1 *Barnes's Notes* 82.

Plaintiff's teſtator had executed a letter of licence to defendant for five years, which were not expired at the time, defendant was arreſted and held to bail at plaintiff's ſuit. Motion for a common appearance denied. *Cur'* being of opinion, that entring into the queſtion about the letter of licence (which could not amount to more than a releaſe) was entring into the merits of the cauſe. *Hil.* 7 *Geo.* 2. *Birch, executor*, v. *Douglaſs*, 1 *Barnes's Notes* 52.

Action upon a leaſe dated in 1727 for two years rent due ſince the year 1733, when defendant became a bankrupt. Defendant, on producing his certificate allowed, confirmed and

inrolled, was allowed to enter a common appearance, neither the poſſeſſion nor the legal intereſt of the eſtate being in defendant. *E.* 8 *Geo.* 2. *Cantrel, adminiſtrator,* v. *Graham,* 1 *Barnes's Notes* 61.

Bail muſt be put in on an action of debt on a judgment, tho' bail before put in on a writ of error. Note; no bail was given in the *original* action. No inſtance where bail put in on writ of error has been held ſufficient to excuſe bail in an action of debt on judgment. *M.* 10 *Geo.* 2. *Weyman* v. *Weyman,* 1 *Barnes's Notes* 65.

If a feme covert be arreſted, and the marriage is clearly made out, *cur'* will order a common appearance; but in this caſe defendant appeared to have acted as feme ſole for twelve years, which makes the matter doubtful.

Feme covert not to be held to bail when her huſband is not arreſted. *E.* 8 *Geo.* 2. *Blick* v. *Halpenn & ux',* 1 *Barnes's Notes* 59.—The reaſon is, that if the wife was to be held to bail, it would be in the power of the huſband to ſet up a ſham action againſt her, and keep her in continual impriſonment; *ſecus,* if the huſband and wife had been both taken, in that caſe both ſhould be held till bail be given for both: The reaſon is, that otherwiſe a woman might marry a priſoner, and thereby being free from impriſonment herſelf, defraud her creditors. *Ibid.*

Defendant held to bail in an action for the penalty of 100*l.* for not delivering goods of 300*l.* value, within a certain time, purſuant to agreement in writing. *M.* 14 *Geo.* 2. *Kettelby* v. *Woodcock,* 2 *Barnes's Notes* 56.

In an action on a judgment in an inferior court, bail required here, tho' bail was filed in the

the original action below. *M.* 18 *Geo.* 2. *Davies, executor*, v. *Leckie*, 2 *Barnes's Notes* 71.

Infant liable to the debts of his wife of *full* age, and may be held to bail. *E.* 18 *Geo.* 2. *Paris* v. *Stroud and his wife*, 2 *Barnes's Notes* 72.

The producing a duplicate of defendant's diſcharge as a fugitive, held ſufficient to intitle him to a common appearance, and affidavits on plaintiff's part, to ſhew that defendant was not abroad beyond the ſeas the firſt of *January* 1747, refuſed to be read. This ſhould have been objected at the ſeſſions. It may be pleaded, but cannot be entered into on the queſtion of bail or no bail. *E.* 22 *Geo.* 2. 2 *Barnes's Notes* 81. *Ibid.* 85. *Baxter* v. *Overton*, *Hil.* 24 *Geo.* 2. S. P. Defendant diſcharged on entring a common appearance; and having put in bail before a judge, the bail-piece was ordered to be vacated; defendant being conſidered as in cuſtody of his bail, and his perſon being by the ſtatute to be diſcharged.—*Ibid.* 88. *M.* 25 *Geo.* 2. *Norton* v. *Lutwidge*, S. P.

Defendant producing his certificate as a bankrupt, diſcharged on a common appearance. *M.* 23 *Geo.* 2. *Knight* v. *Remy*, 2 *Barnes's Notes* 82.

Bail in an action of debt on judgment diſcharged, there being bail in the *original* action, and plaintiff therefore not intitled to bail on the judgment *(a)*. *T.* 25 & 26 *Geo.* 2. *Garth* v. *Green*, 2 *Barnes's Notes* 93.

*(a)* If there was bail in the original action, then no bail is required in the action upon the judgment; but if no bail in the original action, then bail is to be put in where the debt is above 10*l* (the money recovered) and an affidavit made thereof. *Hil.* 13 *Geo.* 1. *Jackſon* v. *Ducket*, *Rep. and Caſes of Pract. in C. P.* 32.----S. C. *Pract. Reg. in C. P.* 54.

Common appearance denied, the matter alledged being improper to be diſcuſſed on a motion. *E.* 27 *Geo.* 2. 2 *Barnes's Notes* 96.

Defendant being a ſeaman, in actual ſervice of the king, was arreſted and held to bail in the palace court; he removed the action by *habeas corpus*, and was diſcharged by this court on a common appearance *ſecundum Stat.* 1 *Geo.* 2. *c.* 14. the debt being under 20*l.* Objection that defendant had abſented two days after the time of leave given. But *cur'* held, that the ſervice continues whilſt defendant's name remained in the ſhip's books. *Hil.* 18 *Geo.* 2. *Studwell* v. *Bunton*, 2 *Barnes's Notes* 71.

On a bottomry-bond for payment of money *inter alia*, *cur'* inclined to think defendant ſhould give bail. *E.* 13 *Geo.* 1. *Deflower* v. *Tutt*, *Rep. and Caſ. of Pract. in C. P.* 34.

Soldier. An out-penſioner of *Chelſea* college held to bail, not being a ſoldier within the meaning of the ſtatute 5 *Geo.* 2. *c.* 2. for preventing mutiny and deſertion. *M.* 6 *Geo.* 2. *Bowler* v. *Owens*, *Rep. and Caſ. of Pract. in C. P.* 77.

Soldier. A Soldier held to bail on an action of debt, upon a judgment for above 10*l.* tho' the original debt was under 10*l.* The *Stat.* 5 *Geo.* 2. for preventing mutiny, *&c.* intended the debt that was due at the time of holding to bail, and this being an action of debt on a judgment for upwards of 10*l.* tho' the original cauſe of action did not amount to ſo much, is not within the intent of the act. *E.* 6 *Geo.* 2. *Nichols & al'* v. *Wilder*, *Rep. and Caſ. of Pract. in C. P.* 89.—1 *Barnes's Notes* 311. S. C. *Cur'* were of opinion, that the debt which they were to conſider was the ſum recovered by the judgment, and that defendant muſt be held to bail.—

*Pract.*

*Pract. Reg. in C. P.* 60. S. C.—The ſame point was determined upon conſideration and looking into the ſoldier's act, in *Hil.* 5 *Geo.* 2. *inter Bilſon* v. *Smith*, *Pract. Reg. in C. P.* 50. 1 *Barnes's Notes* 311. *Rep. and Caſ. of Pract. in C. P.* 89. *Pract. Reg. in C. P.* 59. But ſince, by the *Stat.* 13 *Geo.* 2. for preventing mutiny and deſertion, the *original* debt muſt be 10 *l.* Vide *Pract. Reg. in C. P.* 61.

Bail in an action of account. *Pract. Reg. in C. P.* 9.

Attorney, if he undertakes to file ſpecial bail, is bound to do it, tho' there be no affidavit filed of the debt. *E.* 9 *Geo.* 2. *Jones* v. *Leighton, Bart. Pract. Reg. in C. P.* 50.

Bail in debt on a judgment, if *no* bail in the *original* action; *aliter*, if bail in the original action. *Vide p.* 69.

If a writ of error be brought on a judgment, and bail be put in on the writ of error, and pending the writ of error, an action of debt be brought on the judgment, the defendant in ſuch action ſhall be held to bail, *if there was no bail in the original action*; for though it may be ſaid the bail on the writ of error is a ſecurity for the plaintiff's demand, yet it is to be obſerved that there may be accidents whereby ſuch bail will not be liable, as that the writ may abate by the death of the chief juſtice, or the like. *Anon. MS. Rep.*

An action of debt was brought upon a judgment after a writ of error, and bail put in thereupon; but no bail was given in the original action; and the queſtion was, whether bail being put in upon the writ of error, defendant ought to be held to bail in the action on the judgment. Urged for defendant, that according

to the courſe of the court, where bail is given in the original action, no bail is required in the action on the judgment, and the bail in error, who are bound for debt and coſts, and cannot ſurrender the principal, are a better ſecurity than bail in the original action. *Per cur'*: No inſtance can be ſhewn, where bail put in on a writ of error has been held ſufficient to excuſe bail in an action of debt on judgment. Defendant was held to bail It was ſaid by *Chapple* for plaintiff, who quoted *Cooper* and *Price*, *Sid.* 294. *Hickman and Corbel*, 2 *Keb.* 52 & 70, that in caſe the writ of error ſhould be *nonpros'd* for want of tranſcribing the record, the bail would not be liable; but the law is otherwiſe, and the bail being bound to proſecute the writ of error with effect, are liable in caſe of a *nonpros.* *M.* 10 *Geo.* 2. *Weyman* v. *Weyman*, 1 *Barnes's Notes* 65.

No attorney of *this* or *any other court* to be bail in any ſuit or action depending in this court. *M* 6 *Geo.* 2. Former rules *T.* 24 *Eliz* *ſ.* 8. *Mich.* 1654. *ſ.*

2 *Barnes's Notes* 79. *Bamfield*, *Eyre* v. *Chaffey*. *E.* 20 *Geo* 2. *In error.* No ſheriff's officer, bailiff, or *other perſons concerned in the execution of proceſs*, ſhall be bail in any action in this court. *M.* 6 *Geo.* 2. Objected to one of the bail, that he was a palace court officer, but over-ruled. The above rule to *prevent ſheriff's officer, &c.* from being bail, extending only to proceſs of this court, whereon defendants having been bailed by the officers who arreſted them, were greatly impoſed on, and abuſed. Afterwards *M.* 29 *Geo.* 2. *Filewood* v. *Smith*, the court exploded the doctrine of this caſe, which was determined in the abſence of the Lord Chief Juſtice, and rejected the palace-court officer's bail. They held that the rule extends to all bailiffs, officers, and others concerned in the execution of proceſs. The rule was made for the benefit of plaintiffs, and not merely to prevent impoſitions and abuſes on defendants. *Supplement to 2. vol. Barnes's Notes, p. 9.*

Hired

Hired bail committed. *Pract. Reg. in C. P.* 73.

2. *What affidavits have been held sufficient to hold a defendant to special bail of course, et econt.*

AFfidavit that defendant is indebted to plaintiff as administrator in 40*l.* by promissory note given by defendant to plaintiff's intestate, as plaintiff believes, and as appears by note in plaintiff's custody, to which he refers. *Fortescue* J. had ordered a common appearance. Motion to discharge the order. *Cur'*: Let the judge be re-attended. *E.* 10 *Geo.* 2. *Parrot, administrator*, v. *Smith*, 1 *Barnes's Notes* 70.

Affidavit to hold to bail made by a third person, must be *positive*, except in cases of an executor, where *belief* is sufficient. *M.* 14 *Geo.* 2. *Manning* v. *Williams*, 2 *Barnes's Notes* 58. *Vide ibid.* 65.—Affidavit by a third person, that defendant was indebted, as appeared by a stated account, attested by the consul at *Oporto*, insufficient; but made good by a subsequent one of defendant's acknowledging the account. *M.* 23 *Geo.* 2. *Swarbreck* v. *Wheeler*, *Ibid.* 81.

Affidavit by a third person, that defendant was indebted as appeared by a stated account, insufficient, but made good by a subsequent

Affidavit by plaintiff's attorney that there is a bond, that money appears due, and that defendant a year and a half ago acknowledged the debt, and offered to compound. The first part of the affidavit was held defective, but the latter proving the acknowledgment of the debt, sufficient to hold to bail. *E.* 12 *Geo.* 2. *Darch* v. *Parry*, 1 *Barnes's Notes* 84.

one of defendant's acknowledging the stated account. *M.* 22 *Geo.* 2. *Swarbreck* v. *Wheeler*, 2 *Barnes's Notes* 81.

Affidavit

Affidavit that defendant was indebted if the ship *Suſſex* was not unavoidably loſt, *prima facie* ſufficient, otherwiſe there could be no bail in bottomry-bonds; but affidavits were read on both ſides controverting the fact, whether the loſs of the ſhip was unavoidable or not. *M.* 14 *Geo.* 2. *Manning* v. *Williams*, 2 *Barnes's Notes* 58.

Affidavit that defendants were indebted to plaintiff *jointly* in 13*l.* *Capias* was indorſed in like manner to hold them to bail; the *acetiam* was againſt them *ſeverally*, and they were arreſted and *ſeverally* held to bail. *Cur'*: The affidavit is not ſufficient to hold defendants to bail *ſeverally*, *T.* 10 *Geo.* 2. *Bett* v. *Goodman and another*, 1 *Barnes's Notes* 64.

Plaintiff offered to produce ſupplemental affidavits to prove that defendant had confeſſed the debt, and that he intended to fly into *Ireland*. But *per cur'*: This woman cannot be a witneſs in any caſe; and as there is not a ſufficient affidavit to found the proceſs, that defect cannot be ſupplied. *Ibid. Pract. Reg. in C. P.* 49. S. C.

Affidavit to hold to bail, made by plaintiff's wife, who being convicted of pocket-picking, was tranſported; and afterwards being convicted of returning from tranſportation, received ſentence of death. Theſe matters appearing from record, ſhe was looked upon as an infamous woman, and no credit given to her affidavit. Rule abſolute for common appearance. *M.* 12 *Geo.* 2. *Nicholls* v. *Dallybunty*, 1 *Barnes's Notes* 78.

On defendant's affidavit that he believed the whole debt would appear by indorſement on the bond to be paid, a common appearance entered, plaintiff not producing bond. *M.* 10 *Geo.* 2. *Shaw*, *Bart.* v. *Hawkins*, 1 *Barnes's Notes* 66.

One of the plaintiffs, in order to hold defendant to bail, made an affidavit that defendant was indebted to plaintiffs 1300*l.* as appeared

ed by an account under the bankrupt's hand. Note; the bankrupt was living. *Cur'* thought a *positive* affidavit of the debt neceſſary, unleſs it had appeared that the bankrupt refuſed to make the ſame. *Hil.* 16 *Geo.* 2. *Tribe and others, aſſignees, &c. of a bankrupt's effects*, v. *Pratt*, 2 *Barnes's Notes* 65.

*Where the bail was bound* jointly *and* ſeverally *in* 140l. *verdict for* 300l. *each held to pay* 140l.

IN an action of treſpaſs and aſſault to the damage of 500 *l.* a judge ordered bail for 140 *l.* and defendant being preſent at the taking of bail, his bail were bound *jointly* and *ſeverally* in 140 *l.* Verdict for 300 *l.* Each bail to pay 140 *l.* *E.* 11 *Geo.* 2. *Calveraq and his wife* v. *De Miranda*, 1 *Barnes's Notes* 74.

In an action of aſſault and battery the plaintiffs procured a judge's order to hold defendant to bail for 140 *l.* whereupon the defendant became bound in 280 *l.* and the bail *jointly* and *ſeverally* in 140 *l.* the plaintiffs had a verdict for

1 *Barnes's Notes* 74. *E.* 11 *Geo.* 2. *Calveraq and his wife* v. *De Miranda*, ſeems to be S. C. This was an action of aſſault to the damage of 500 *l.* bail ordered and taken ſeverally for 140 *l.* Verdict for 300 *l.* Each bail to pay 140 *l.* For *cur'* were of opinion, that as the damages in the writ were laid 500 *l.* here is no fraud upon the bail, the recognizance is ſeparate as well as joint, and in its nature a judgment; the award of the court thereupon is, that plaintiff have execution, therefore ſo far as the penalty of each recognizance will go, it is juſt and equitable the ſame be applied towards ſatisfaction of the conſideration money, for payment whereof, and not of any particular ſum, the condition is. The practice of the *King's Bench* had been mentioned, but the proceedings there by bill, where bail is taken without any particular penal ſum, differ widely from the form of proceedings here, and muſt be governed by the *acetiam billæ*, otherwiſe bail might be defrauded. *Ibid.*

300 *l.*

300 *l.* and brought ſeparate actions on the recognizance againſt the bail. The bail moved the court, that on payment of one ſum of 140 *l.* and coſts, proceedings might be ſtayed, and compared this to an action on a bond; but the plaintiffs inſiſted that there is a difference, for in a bond the condition is to pay the money, and if one obligor pays it, the other ſhall be diſcharged, for the condition is complied with; but in a recognizance the condition is not ſatisfied till the damages recovered be paid, or the defendant ſurrendered. And it was held, that the bail being jointly and ſeverally bound, the action againſt them could not be diſcharged unleſs the condition of the recognizance was performed, *viz.* that the defendant ſhould pay what was recovered, or ſurrender himſelf to the *Fleet*. *Calveraq & ux'* v. *Pinhero*, *Mich.* 12 *Geo.* 2. *MS. Rep.*

## *Striking out bail.*

BAIL denied to be ſtruck out of bail-piece, tho' another was added in his ſtead, who was ready to juſtify; affidavit that he is a material witneſs, not having been made. *E.* 8 *Geo.* 2. *Young* v. *Wood*, 1 *Barnes's Notes* 61.

Additional bail ordered to be ſtruck out, where put in without defendant's knowledge, on purpoſe to have defendant in his power to ſurrender him. *M.* 6 *Geo.* 1. *Huſday* v. *Boyes*, *Rep. and Caſ. of Pract. in C. P.* 17.

Motion againſt a bailiff for retaking the defendant on a *Sunday* that had given inſufficient bail. *Cur'* ſeemed to be of opinion that he might retake defendant on a freſh purſuit. But in this caſe bail was put in above, and no regular exception

ception entered, which ought to have been done; ſo an attachment was granted againſt the bailiff. *Hil.* 13 *Geo.* 1. *Rayner* v. *Stamp*, *Rep. and Caſ. of Pract. in C. P.* 33.

## *Of putting in bail before an arreſt, and after final judgment.*

BAIL before a judge cannot regularly be put in before an arreſt without plaintiff's conſent, for if voluntary bail were ſufficient to prevent an arreſt, defendant might put in ſham bail, and thereby elude the writ, and the proceſs muſt be loſt; but it may be put in before the return of the writ after an arreſt. *E.* 13 *Geo.* 2. *Huggins* v. *Bambridge*, 1 *Barnes's Notes* 85.—*Pract. Reg. in C. P.* 51. S. C.

Bail cannot be put in after final judgment, the recognizance of bail plainly imports that it muſt be entered into before a defendant be condemned in the action. *T.* 16 & 17 *Geo.* 2. *Jackſon* v. *Knight*, 2 *Barnes's Notes* 67.

## *Caſes relating to juſtifying bail.*

DEfendant committed to the *Fleet*, for endeavouring to bribe the plaintiff's attorney not to appear againſt the bail on their juſtifying. *E.* 6 *Geo.* 2. *Hefelton* v. *Liſter*, *Eſq*; *Rep. and Caſ. of Pract. in C. P.* 88.

*Sheriff*

### *Sheriff cannot take bail on an attachment for contempt.*

*Ibid.* 14. *M.* 4 *Geo.* 1. *Field v. Walford.* No bail-bond to be taken upon an attachment for a contempt out of *Common Pleas*, by the opinion of all the judges. *Pract. Reg. in C. P.* 53. S C. ſays it was an attachment for contempt, in not paying coſts. A ſheriff cannot take bail upon an attachment for a contempt, but a judge may. *Pract. Reg. in C. P.* 325. *Vide Pract. Reg. in C. P.* 54.

DEBT on a ſheriff's bond taken on an attachment out of *Chancery*. Upon demurrer, *cur'* held that the ſheriff cannot take a bail-bond upon an attachment for a contempt. *E.* 7 *Geo.* 2. *Waddington* v. *Titch*, *Rep. and Caſ. of Pract. in C. P.* 100. *Pract. Reg. in C. P.* 54. S. C.

### *How to put in bail to ſave the advantage of pleading in abatement.*

WILLIAM SMITH, *Gent.* defendant in the original action, was ſued by the addition of *clerk*, and entered into a bail-bond by that addition. Bail above was put in within due time for "*William Smith*, *Gent.* who "was arreſted by the name and addition of "*William Smith*, *clerk*," and plaintiff having excepted againſt the bail, they juſtified in court. Plaintiff declared *de bene eſſe* in the original action, and defendant pleaded in abatement within time. Plaintiff took the plea out of the office, ſtaid proceedings near twelve months, and then filed a bill, as aſſignee of the ſheriff, againſt *Thomas Smith*, *Gent.* an attorney, one of the bail in the bail-bond, inſiſting that defendant in the original action was eſtopped from pleading in abatement, that the bail put in as above, is no bail for *William Smith*, *clerk*; and that defendant

fendant ought to be left to his plea of *competuit ad diem.* The court thought the application by motion proper, and that the original defendant was not eſtopped from pleading in abatement by the bail-bond, which muſt *prout* the writ. That the manner he purſued of putting in bail is the conſtant regular method, and the only way to ſave the advantage of pleading in abatement. Rule abſolute to ſtay proceedings with coſts. *E.* 17 *Geo.* 2. *Smithſon, Bart. aſſignee, &c.* againſt *Thomas Smith, Gent. an attorney,* 2 *Barnes's Notes* 70.

## *Of ſtaying proceedings on bail-bond.*

IF bail-bond be regularly aſſigned, and put in ſuit, the proceeding may be ſet aſide on paying coſts, on application before the rule to plead be out, by motion of court, or judge's ſummons, if the plaintiff be not thereby delayed of a trial, or of obtaining judgment againſt the principal. But before application the defendant muſt put in and juſtify bail in the original action, and give notice thereof to the plaintiff's attorney.

Where proceedings on a bail-bond are ſtaid upon conſent that it ſhall ſtand as a ſecurity for the plaintiff, if he recovers in the original action, it is always intended, and ſhould be ſo expreſſed, that judgment be given upon the bail-bond, and that only execution thereon ſhall be ſtaid, and without ſuch conſent the court will not ſtay proceedings upon the bail-bond where the plaintiff has been delayed of a trial; but if ſuch delay is through his own neglect it is otherwiſe.

Where

Where the defendant dies before judgment could be obtained againſt him in the original action, the court will ſtay proceedings on the bail-bond; but if the defendant lives ſo long after the arreſt, that if he had put in bail in time, the plaintiff could have obtained judgment and execution againſt him, the court will not ſtay proceedings on the bail-bond. In like manner if the defendant becomes a bankrupt, and obtains his certificate, the court will ſtay proceedings on the bail-bond.

## NOTES.

Vide *Rep. and Caſes of Pract. in C. P.* 43.

1. Bail-bond to be taken in double the ſum ſworn to. But *cur'* ſeemed to think the ſheriff had done wrong in taking the bail-bond in more than double; and gave the defendant leave to plead the *Stat.* 12 *Geo.* 1. *c.* 29, on payment of coſts. This was a motion on ſaid ſtatute to ſet aſide a judgment on a bail-bond. The plaintiff had ſworn his debt to 28 *l.* The ſheriff took a bail-bond in 68 *l.* which was 12 *l.* more than double the ſum ſworn to. *M.* 3 *Geo.* 2. *Male, aſſignee of the ſheriff of London,* againſt *Mitchell, Pract. Reg. in C. P.* 67.

2. Debt on a bail-bond may be brought by an executor of the aſſignee of the ſheriff, for the ſtatute for the amendment of the law deſigned a benefit to the plaintiff, and not a prejudice, and there are no negative words in the ſtatute. *Hil.* 3 *Geo.* 2. *Nott* v. *Stevens, Ibid.* 68.

1 *Barnes's Notes* 81. *Hil.* 12 *Geo.* 2. *Lloyd* v. *Painter,* proceed-

3. Special bail being put in and juſtified, proceedings upon the bail-bond were ſtaid upon payment of coſts, receiving a declaration in the original action, pleading the general iſſue, and taking

taking ſhort notice of trial, for the laſt ſitting in term. *M.* 8 *Geo.* 2. *Orpwood* v. *Banniere*, *Ibid.* 70.

ings on bail-bond ſtaid on payment of coſts, accepting a declaration in the original action, pleading the general iſſue, and taking notice of trial within term, and the bail-bond to ſtand for ſecurity, plaintiff having been delayed of trial. Objected, that plaintiff had delayed himſelf, for he might have declared *de bene eſſe*. But *per cur'*: There is no neceſſity for ſo doing.---*Ibid.* 86. *E.* 13 *Geo.* 2. *Ward, an attorney*, v. *Alderton*. Bail being juſtified in court, defendant moved after the laſt ſittings to ſtay proceedings on the bail-bond, upon payment of coſts. Plaintiff inſiſted, that the action being in *Middleſex*, and the writ returnable firſt return, plaintiff had been delayed of trial, and the bail bond ought to ſtand as a ſecurity; but it appearing that no declaration in the original action had been delivered *de bene eſſe*, or otherwiſe, plaintiff has delayed himſelf, and proceedings ſtaid upon payment of coſts.

4. Action in *Middleſex*, writ returnable firſt return of the term, the bail-bond was aſſigned. Defendant put in bail and juſtified, and then moved after the laſt ſitting within term, that proceedings on the bail-bond might be ſtaid on payment of coſts. Plaintiff inſiſted that he had been delayed a trial, and therefore the bail-bond ought to ſtand as a ſecurity; but it appearing that plaintiff, by not having delivered a declaration *de bene eſſe*, or otherwiſe, had delayed himſelf, the motion was granted. *E.* 13 *Geo.* 2. *Ward, an attorney*, v. *Alderton*, *Ibid.* 71.

5. Proceedings on bail-bond denied to be ſtaid on payment of coſts, plaintiff having been delayed of trial, and defendant and his bail refuſing to conſent that the bail-bond ſhould ſtand for plaintiff's ſecurity. Defendant inſiſted, that plaintiff not having delivered his declaration *de bene eſſe*, had delayed himſelf; but the writ in the original action being returnable laſt term, that objection will not hold. 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. *E.* 16 *Geo.* 2. *Seaber* v. *Powell*, 2 *Barnes's Notes* 66.

6. After plaintiff had been delayed of a trial, defendant juſtified bail, and obtained a judge's order to ſtay proceedings on the bail-bond, upon payment of coſts, *&c.* and conſenting that the bail ſhould ſtand as plaintiff's ſecurity. Plaintiff recovered judgment in the original action, and then renewed his proceedings, and declared on the bail-bond. Defendant pleaded *comperuit ad diem*, which *cur'* ſet aſide, and gave plaintiff leave to enter judgment on the bail-bond immediately, but ſtayed execution for a week. It is always intended, and ought in theſe caſes to be expreſſed, that judgment be given, and execution only ſtaid. *T.* 13 & 14 *Geo.* 2. *Otway* v. *Cockayne*, 2 *Barnes's Notes* 56.

By an old rule, attornies of this court are ordered not to bring actions in other courts, and the ſtatute directing

7. Proceedings on a bail-bond taken on a *capias ad reſpond.* ſued out of this court, ſet aſide with coſts, by conſent of plaintiff and his attorney, plaintiff's attorney having put it in ſuit in *B. R. Cur'* thought this proceeding unwarrantable. *Hil.* 17 *Geo.* 2. *Francis* v. *Taylor*, *Ibid.* 67.

the aſſignment of bail bonds, gives the court, after ſuch bonds are put in ſuit, an equitable juriſdiction to ſtay proceedings, and to let a defendant in to try the merits of the original action upon reaſonable terms; which juriſdiction cannot be exerciſed, unleſs the original action, and the proceedings upon the bail bond, were in the ſame court. *Ibid.*

8. Judgment in action on bail-bond, ſigned two days after plaintiff's death, and the ſuit thereby abated, plaintiff gave defendant time to plead, and died before that time expired. The bail-bond was put in ſuit by the executor of the late plaintiff deceaſed, and defendant applied

plied to ſtay proceedings. The *capias* in the original action was returnable *tres Mich.* and plaintiff might have had jndgment in his life-time, if defendant had not made default, by not putting in bail above. Proceedings ſtaid in the original action, and on the bail-bond on payment of 43 *l.* agreed to be the debt and coſts in the original action, and in this action. No coſts in the firſt action on bail-bond, wherein there was no default by defendant. *Hil.* 19 *Geo.* 2. *Nutkins, executor,* v. *Wilkins,* 2 *Barnes's Notes* 73.

Proceedings on a bail-bond ordered to be ſtaid on payment of coſts, it appearing that the *plaintiff* in the original action died before judgment could be recovered therein.

9. Proceedings on bail-bond ſtaid; it appearing that the *defendant* in the original action died before judgment could have been obtained thereon againſt him. *M.* 21 *Geo.* 2. *Caſtell* v. *Grave, one, &c.* on a bail-bond. *Ibid.* 79.

*T.* 10 *Geo.* 2. *Willoughby, adminiſtrator of Lady Jenkins,* v. *Rhodes,* 1 *Barnes's Notes* 63.

10. Proceedings not ſtaid where plaintiff might have proceeded againſt defendant in the original action to trial, and to have had judgment and execution in his life-time, if ſuch defendant had put in bail in the original action in time. *M.* 22 *Geo.* 2. *Evening* v. *Spoarman,* 2 *Barnes's Notes* 80.

11. Writ returnable laſt *Michaelmas* term, bail was taken before a commiſſioner in the country, notice thereof given to plaintiff's attorney there, and bail-piece tranſmitted to *London* to defendant's agent; he incautiouſly filed it with the filazer, who received it, without firſt being allowed by a judge. Plaintiff lay by till after laſt aſſizes, and then took an aſſignment of, and put the bail-

bond in ſuit. *Cur'* ordered the filazer to attend a judge for his *allocatur*; gave plaintiff leave to except againſt the bail, and ſtayed proceedings on the bail-bond upon payment of coſts. Urged that plaintiff had been delayed, and loſt a trial; but ſuch delay is through his own laches, he might have put bail-bond in ſuit much earlier than he did. *E.* 24 *Geo.* 2. *Hutchinſon* v. *Hardcaſtle*, 2 *Barnes's Notes* 85.

12. Proceedings on bail-bond ſtaid, defendant in the original action having become a bankrupt, and obtained his certificate. *M.* 25 *Geo.* 2. *Saunders, Eſq; late ſheriff*, v. *Spincks*, *ibid* 89.

13. Verdict for plaintiff on bail-bond, *cur'* gave leave to file bail in the original action, on payment of coſts, and conſenting that plaintiff might take judgment on the bail-bond to ſtand as a ſecurity for what he ſhould recover. Note; the original action was for fees, *&c.* and defendant in the original action made an affidavit, that he never, in his own ſeparate capacity, employed plaintiff as his attorney. *E.* 10 *Geo.* 2. *Birch, an attorney*, v. *Graves*, 1 *Barnes's Notes* 70.

14. Bail-bond in a country cauſe not to be put in ſuit till eight days, *excluſive* of the appearance day of the return of the writ, are expired. *M.* 12 *Geo.* 2. *Downes* v. *Nichols*, *Pract. Reg. in C. P.* 69.—1 *Barnes's Notes* 76. S. P.

15. The ſheriff cannot take a bail-bond on an attachment for contempt iſſued out of C. P. or on an attachment out of Chancery. *Vide Rep. and Caſ. of Pract. in C. P.* 14, 100.

16. Defendant, a member of the laſt parliament, having been arreſted and held to bail before

before the expiration of forty days *(privilege claimed by the commons)* next after the diſſolution, applied to have the bail-bond delivered up. By conſent rule abſolute for delivering up bail-bond, on entring common appearance. *E.* 27 *Geo.* 2. *Barnard* v. *Mordaunt, Eſq*; *Supplement to* 2. *vol. Barnes's Notes p.* 8.

17. Defendant put in bail 25th of *May* (two days before the end of laſt term;) the day after the term (28th *May)* plaintiff excepted againſt the bail, and for want of juſtification before a judge, took an aſſignment of, and proceeded on the bail-bond. Afterwards defendant gave notice to juſtify his bail in court on the firſt day of this term, which he did, and then applied for ſtay of proceedings on the bail-bond. Rule abſolute without coſts. *T.* 27 *Geo.* 2. *Lovibond* v. *Faikney, Supplement to Barnes's Notes p.* 8.

See 2. vol. *Barnes's Notes* p. 82. *Fowlis, Eſq*; v. *Graſvenor*, S. P. *p.* 173. *De Revoſe, executor,* v. *Hayman,* contra.

18. Defendant, after a judge's order for time to put in and perfect bail, put in bail, and ſurrendered himſelf to the *Fleet* in diſcharge of his bail. Plaintiff's attorney proceeded upon an aſſignment of the bail-bond; but the court held ſuch proceedings to be wrong. Before a ſurrender defendant is delivered to his bail, and ſuppoſed to be in their cuſtody; by the ſurrender the cuſtody is altered, and defendant is in priſon; the worth and ſubſtance of the bail, who by the ſurrender are diſcharged, is totally immaterial. Rule abſolute to ſet aſide the proceedings on the bail-bond without coſts. *Hil.* 29 *Geo.* 2. *French* v. *Knowles, Supplement to Barnes's Notes p.* 10.

## *Of Bringing in the body.*

IF the plaintiff does not approve of the bail taken by the ſheriff, he may give the ſheriff a rule to return the writ, and on his returning a *capi corpus*, he may give him a like rule to bring in the body, and in default thereof may have an attachment againſt him.

Rules for the ſheriff to bring in the body of a priſoner taken upon a proceſs iſſuing out of a filazer's office, to be given by ſuch filazer. Rule *T.* 2 *W. & M.*

If any ſheriff, under-ſheriff, or his deputy, or any other officer, having the return of any proceſs iſſuing out of this court, or of any precept or warrant thereupon, ſhall neglect or refuſe to return the ſame within ſix days after ſervice of a rule of this court for that purpoſe, ſuch ſheriff, under-ſheriff, *&c.* ſhall be liable to pay the coſts occaſioned by ſuch neglect, to be taxed. Rule *Hil.* 8 *Geo.* 1.

## NOTES.

1. If the ſheriff returns that the defendant *non eſt inventus* in his bailiwic, when he had really arreſted him, an action may be brought againſt him for a falſe return.

2. 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. *M.* 23 *Geo.* 2. *Richardſon* v. *Bailey*, 2 *Barnes's Notes* 31.

3. Bail taken by ſheriff were then good, but afterwards became inſufficient, he muſt put in good bail. 1 *Barnes's Notes* 80.

4. Sheriff muſt put in bail on rule to bring in the body in ſix days, elſe muſt pay coſts. 1 *Barnes's Notes* 80. Where a ſheriff takes a bail-bond, by the rule to bring in the body, is meant perfecting bail above; but where a defendant remains in cuſtody for want of bail, plaintiff muſt declare againſt him in cuſtody of the ſheriff, or if he would remove him to the *Fleet*, he muſt do it by *habeas corpus ad reſpondend.* The court never expects a ſheriff to bring the defendant's body into court by virtue of the common rule. *Supplement to* 2 *vol. Barnes's Notes p.* 51.

5. Rule to bring in body ſhall be diſcharged if defendant hath continued in cuſtody ſince arreſt; otherwiſe if eſcape. 1 *Barnes's Notes* 27, 284.

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

7. A treaſury rule for ſheriff of *D.* to return the writ diſcharged, defendant being protected by a publick miniſter, and the protection regiſtered in his office. *M.* 17 *Geo.* 2. *Wright* v. *Obeden*, 2 *Barnes's Notes* 332. Note; the ſheriff durſt not execute the *capias* by reaſon of the protection and penalty in the act.

8. Service of rule for attachment againſt ſheriff, good on under-ſheriff. 1 *Barnes's Notes* 293.

## *Of surrender of principal in discharge of bail.*

WITHIN what time the bail may surrender the principal when plaintiff proceeds against them by action of debt, &c.] If an action of debt be brought upon the recognizance against the bail, the bail may surrender the principal on the *quarto die post* of the return *sedente curia*, but not after the court is risen. *Vide* Rule *M.* 1654. *s.* 12.

## NOTES.

1. If plaintiff proceeds by action of debt, the writ must be served four days before the return.

2. In an action of debt upon a recognizance against the bail, the plaintiff need not sue out a *special* writ; a *clausum fregit*, with an *acetiam in debito super demand.* is sufficient. For *per cur'*: An *acetiam in debito* is an action of debt within the meaning of the rule. *M.* 1654. *s.* 12.

But that defendant (*i. e.* the bail) must be *arrested* (*a*) at least four days before the return of the writ, so that he may have time to render the principal. *M.* 6 *Geo.* 1. *Wright* v. *Dixon*, *Rep. and Cas. of Pract. in C. P.* 18.—In the case of *Davies* v. *Carter et al'*, *E.* 4 *Geo.* 2. pursuant to this resolution, proceedings against bail were staid, because they were not *served* with process till the day of the return. *Ibid. Pract. Reg. in C. P.* 11. *Wright* v. *Dixon*, *M.* 6 *Geo.* 1. *Acetiam* in debt against bail upon a recognizance as good as by *præcipe* in debt.—*Ibid.* 83. *E.* 2 *Geo.* 2. *Flanegan* v. *Adey*. In debt on a recognizance of bail,

(*a*) *Arrested* in the original.

bail, *cur'* declared that the writ muſt be *ſerved* four days before the return, and that defendant ought to have as much advantage on an action of debt upon the recognizance as upon a *ſcire facias*. — The like determination, the proceſs being ſerved on the return-day *in caſu Draper* v. *Carter and another, bail of Cooper*, *E.* 4 *Geo.* 2. *Ibid.*—2 *Barnes's Notes* 87. Bail ſerved with proceſs two days only before the return, tho' four are requiſite, proceedings were ſtaid.

3. The courſe of the court in an action of debt upon a judgment, pending a writ of error in the original action, is not to ſtay proceedings till the writ of error is determined, unleſs the defendant will give judgment, and execution to ſtay till the writ of error is determined. But if an action be brought on a recognizance of bail, pending a writ of error in the original cauſe, it is otherwiſe, for the court in ſuch caſe will ſtay proceedings in ſuch cauſe without the bail giving judgment, for after judgment the bail will be barred from ſurrendering the principal. *Vide* the next caſe.

4. In an action on the recognizance againſt bail, error being brought in the original action, plaintiff was allowed to proceed to judgment, but execution ſtaid till error determined. *T.* 9 *Geo.* 1. *Covert* v. *Allen*, *Rep. and Caſ. of Pract. in C. P.* 24. But afterwards in the caſe of *Newman* v. *Butterſworth*, *Hil.* 8 *Geo.* 2. proceedings were ſtaid on an action againſt the bail upon the recognizance, a writ of error being depending in the principal action, for if the plaintiff ſhould obtain judgment, the bail could not ſurrender the principal.—But if an action be brought againſt the *principal* on the judgment, the plaintiff may proceed to judgment tho'

tho' a writ of error be depending. *Ibid.* 112. —*Pract. Reg. in C. P.* 82. S. C.—1 *Barnes's Notes* 56. S. C. ſays, The bail ought not to be precluded from ſurrendering the principal; *ergo* all proceedings ſtaid pending the writ of error.—No action of debt againſt bail pending a writ of error in the principal action. *E.* 12 *Geo.* 2. *Deriſly, an attorney,* v. *Delande, Pract. Reg. in C. P.* 83.—1 *Barnes's Notes* 83. S. C. 1 *Barnes's Notes* 59. *E.* 8 *Geo.* 2. *Clarke* v. *Baker,* S. P.

5. *Cur'* held that in an action of debt upon a recognizance, the bail have, 'till the riſing of the court on the *appearance-day* of the writ, to render the defendant. *M.* 8 *Geo.* 1. *Wright* v. *Dingley, Rep and Caſ. of Pract. in C. P.* 23. But cannot afterwards. *Pract. Reg. in C. P.* 20. —The ſurrender muſt be *ſedente curia* on the *quarto die poſt* of the return of the writ. *T.* 7 & 8 *Geo.* 2. *Maſon* v. *Brute,* 1 *Barnes's Notes* 56.

6. Plaintiff after a *ca. ſa.* returned againſt the principal filed a bill in an action of debt 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 before the return inſtead of four. On ſhewing cauſe why proceedings againſt *Wall* and *C. D.* ſhould not be ſtaid, *cur'* held that the prooceedings 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

in time. *T.* 24 & 25 *Geo.* 2. *Wilſon and others* v. *Lafortune*, 2 *Barnes's Notes* 87.

Within what time the bail may ſurrender the principal when plaintiff proceeds againſt them by *ſcire facias.*] If the plaintiff proceeds by *ſcire facias* againſt the bail, then in caſe of one *ſcire facias* returned *ſcire feci*, the bail may ſurrender the principal before or upon the *appearance-day* of the return of the *ſcire facias*; and in caſe of two *ſcire facias's* with *nihils* returned, the ſurrender muſt be before or upon the *appearance-day* of the return of the ſecond *ſcire facias ſedente curia. Vide* Rule *M.* 1654. *ſ.* 12.

## NOTES.

1. *Præcipes* for writs of *ſcire facias* to be entered in the prothonotary's office on the remembrance. Rule *T.* 10 *Geo.* 2.

2. Declared to be the opinion of this court, and of the court of K. B. and ſettled as law, that no render was good unleſs made before the riſing of the court on the appearance-day of the *ſcire facias* returned *ſcire feci*, or of the ſecond *ſcire facias* returned *nihil*, and all arreſts made and proceſs ſerved after the riſing of the court on the return-day are irregular. *T.* 2 & 3 *Geo.* 2. *Vanderiſh & al'* v. *Waylet*, *Rep. and Caſ. of Pract. in C. P.* 53—*Pract. Reg. in C. P.* 86. S. C. ſays, it was an action of debt on a recognizance of bail, the writ was returnable *quinden. Paſ.* on the appearance-day after the riſing of the court, the defendant was ſurrendered at a judge's chambers. *Per tot cur':* This is a bad ſurrender, and bail are liable.—In the caſe of *Bacon* v. *Bruce*, *T.* 7 & 8 *Geo.* 2. *cur'* held, that

that a render after the riſing of the court upon the laſt day allowed for rendering the defendant was void. See *Rep. and Caſ of Pract in C. P.* 53, *in a note.*—The render muſt be *ſedente curia* on the appearance-day of the return of the ſecond *ſcire facias. Hil.* 11 *Geo.* 2. *Hanſley* v. *Page,* 1 *Barnes's Notes* 72.

3. Motion to ſet aſide a *fieri facias* againſt the bail, defendant having ſurrendered, *&c.* it appearing by the affidavit that the ſecond *ſcire facias* was returnable *cro. Mart'* (*Nov.* 12,) and that defendant ſurrendered *Nov.* 10, the appearance-day of the return.

4. There need not be fifteen days between the teſte and return of each of the *ſcire facias's* againſt bail, but only fifteen days between the teſte of the firſt and the return of the ſecond *ſcire facias. Hil.* 8 *Geo.* 2. *Price and Selby* v. *Lewis and others, Rep. and Caſ. of Practin C. P.* 114. *Pract. Reg. in C. P* 377. S. C.

*Concerning a* capias ad ſatisfaciendum *againſt the principal, in order to found proceedings againſt the bail.*

A *CAPIAS ad ſatisfaciendum* to make bail liable muſt have fifteen days between the teſte and return, and muſt lie in the ſheriff's office four days *excluſive* before the return.

## NOTES.

1. *Ca ſa.* againſt the principal lodged with the ſheriff four days incluſive too ſhort. Note; the writ was left with the ſheriff *Feb.* 6. returnable *Feb.* 9. and held to be returnable a day

day too ſoon; and proceedings againſt the bail ſtaid. *E.* 7 *Geo.* 2. *Merret* v. *Montfort*, 1 *Barnes's Notes* 53.—*Cur'* held, that in order to charge the bail, a *ca. ſa.* againſt the principal muſt be left in the ſheriff's office four days before it is returnable. *E.* 13 *Geo.* 1. *Laycock* v. *Arthur*, *Rep. and Caſ. of Pract. in C. P* 34.

2. If the defendant dies *after* a *ca. ſa.* returnable, tho' before either a *ſcire facias* or an *action of debt* be brought againſt the bail, they are bound, and are not relievable, for after the *ca. ſa.* returned the recognizance is forfeited by law, and all further time allowed for ſurrendering the principal, is merely *ex gratia*, and where there is a poſſibility of ſurrendering the principal, which by his death is become impoſſible.

3. The recognizance is forfeited immediately after a *ca. ſa.* is returned. *Hil.* 25 *Geo.* 2. *Whitehead, adminiſtrator of Reevely*, v. *Gale, bail for Stewart*, 2 *Barnes's Notes* 91, 92.

4. *Ca. ſa.* returnable at a time when a writ of error is depending, is not a ſufficient foundation to proeeed againſt the bail.

## Scire facias *againſt bail, in what county to be brought.*

MOTION to ſet aſide a *ſcire facias* againſt bail in *London* upon a recognizance taken in *Serjeants Inn, Fleet Street, London*, and recorded at *Weſtminſter*. *Cur'* were of opinion that the *ſcire facias* might iſſue either into *London* or *Middleſex*; but it was ſaid that in caſe of a recognizance taken in *B. R.* the entry is *coram domino rege apud Weſtm'*, and therefore muſt be in *Middleſex* only. *M.*

See *Salk.* 564, 600, 659. *Caſes in Law and Eq.* 290.

13 *Geo.* 1. *Cock* v. *Green*, *Rep. and Cas. of Pract. in C. P* 31.

*Capias* issued into *York*, a *test. capias* into *Middlesex*, and a *scire facias* against bail into *York*, and judgment thereon, and test' execution into *Middlesex*. Motion to set aside the judgment, because the *scire facias* ought to have been where the bail or recognizance is entered on record; and in this case the *scire facias* issued into *York*, whereas it ought to have issued into *Middlesex*, the bail being recorded at *Westminster*. *Sed cur' advisare vult*. *E.* 2 *Geo.* 2. *Dalton* v. *Teasdale*, *Ibid.* 52.

*Scire facias* against bail may be in *Middlesex*, (record of the recognizance being at *Westminster*) or in the county where the caption of the recognizance appears to be on record, if in any other county except *Middlesex*. *Hil.* 17 *Geo.* 2. *in casu Pickering and wife* v. *Thomson*, *bail for Miller*, 2 *Barnes's Notes* 167.

Where the caption of the recognizance is in an another county, and is afterwards inrolled in *Middlesex*, *scire facias* may be in *either* county; but where the caption appears by the record to be in *Middlesex*, the *scire facias* must be in *Middlesex* also, and not elsewhere. *M.* 20 *Geo.* 2. *Follet* v. *Trill and Bowen*, *bail for Powell*, 2 *Barnes's Notes* 74.

## *Additional cases relating to surrender of principal in discharge of bail*, &c.

Render of Principal, &c.

ON motion it was ordered, that the particular hour of the day on which the defendant surrendered himself in discharge of his bail should be specified by the filazer in the entry of the surrender, in order that it might appear whe-

whether the ſurrender was made *ſedente curia*, or not. *E.* 9 *Geo.* 2. *Ling* v. *Woodyer*, *Rep. and Caſ. of Pract. in C. P.* 129.—1 *Barnes's Notes* 62. S. C.

Render entered in judge's book (on motion) ordered to be ſtruck out, defendant refuſing to pay the fees, for it is not a compleat ſurrender till it be entered on record. *T.* 10 *Geo.* 2. *Huckle* v. *Ambroſe*, *Rep. and Caſ. of Pract. in C. P.* 131.—*Pract. Reg. in C. P.* 87. All renders are ſuppoſed to be actually made in court, the act of the judge at his chambers is only a warrant to the filazer for making the entry of the ſurrender upon the roll. It was incumbent upon *C.* (one of defendant's bail, and who ſurrendered) to pay the fees. His obtaining this entry in the bail-book without paying the fees, is a fraud and impoſition upon the judge and his clerk.—1 *Barnes's Notes* 62. S. C. ſays, *Price* the tipſtaff refuſing to take charge of the defendant (the fees not being paid) he went at large, and that *Price* afterwards applied to vacate the ſurrender, and that *C.* was ordered to ſhew cauſe, and that upon ſhewing cauſe the *reddidit ſe* on the bail-piece was ordered to be ſtruck out. Cites *Fariſley* 77. 2 *Keble* 2.

Tho' plaintiff has loſt a trial, yet bail may ſurrender, where plaintiff proceeds againſt the ſheriff. 1 *Barnes's Notes* 47.—*Pract. Reg. in C. P.* 85. S. P.

The defendant was ſurrendered by his bail to the *King's Bench* inſtead of the *Fleet*. Bail-bond not to be diſcharged. *E.* 7 *Geo.* 2. *Low* v. *Ravel*, 1 *Barnes's Notes* 52.

Motion to ſet aſide *fieri facias* againſt the bail, defendant having ſurrendered, *&c.* It appeared

appeared by the affidavit that the ſecond *ſcire facias* was returnable *cro. Mart' Nov.* 12. and that defendant ſurrendered *Nov.* 15. the appearance-day of the return. *Per cur':* The affidavit is defective, it doth not appear that defendant ſurrendered *ſedente curia* on the appearance-day of the return of the ſecond *ſcire facias*, which if he does not, the ſurrender is out of time. No rule. *Hil.* 11 *Geo.* 2. *Hanſley* v. *Page*, 1 *Barnes's Notes* 72.

Principal ſurrendered, and afterwards was charged in execution by plaintiff. Bail diſcharged on application. ——— againſt *Ewer*, 1 *Barnes's Notes* 57.

Bail cannot ſurrender the principal before the return of the writ; but it having been done by miſtake, he was brought into court by *habeas corpus*, and rendered *de novo* *M.* 15 *Geo.* 2. *Newton* v. *Lewis*, 2 *Barnes's Notes* 61.

Husband and wife arreſted for a debt due from the wife *dum ſola*, bail put in for both, and both rendered to the *Fleet*, the wife diſcharged on common appearance. *E.* 19 *Geo* 2. *Lawford* v. *Gardiner and his wife*, 2 *Barnes's Notes* 74.

Defendant cannot render himſelf, unleſs bail perfected in time. *E.* 25 *Geo.* 2. *Mayo* v. *Weaver*, 2 *Barnes's Notes* 90.

*Scire facias* againſt bail.

In *ſcire facias* againſt bail, ſetting forth, *altho' plaintiff recovered judgment* without averring *he did recover*, ſufficient.—So tho' recognizance was *at the ſuit of J. M.* and the judgment was *J. M. the younger*, good on demurrer. *T.* 10 & 11 *Geo.* 2. *Matravers the younger* v. *Adlam and Brown*, 1 *Barnes Notes* 310.

Two *ſcire facias's* returned *nihil* againſt bail, who had rendered the principal after judgment quaſhed,

quaſhed, becauſe the *ca. ſa.* againſt principal, and the firſt *ſcire facias* were teſted on one and the ſame day, *viz.* 23 *October* laſt. *E.* 18 *Geo.* 2. *Wilcox* v. *Proſſer & al'*, 2 *Barnes's Notes* 72.

Exoneratur. Leave to enter an *exoneratur* on the recognizance, defendant pending the action, having become a bankrupt and obtained his certificate allowed and confirmed. *E.* 24 *Geo.* 2. *Ray, and others*; v. *Huſſey*; 2 *Barnes's Notes* 87. —*N. B.* This had been done in *B. R.*; 'tis a new practice, introduced to diſcharge the bail in a ſummary way, without putting them to the trouble and charge of ſurrendering the principal, as formerly; tho' by the bankrupt act 5 *Geo.* 2. power is given to the judge to order the bankrupt, after ſuch ſurrender, to be diſcharged. *Ibid.*

Render not good till bail be perfected. *Vide Gwinnell* v. *Procter*, this *page*, *poſt*.

Plaintiff may at any time after appearance, and before plea, move to quaſh a *ſcire facias* without paying of coſts. *M.* 8 *Geo.* 2. *Pool* v. *Broadfield*, *Rep. and Caſ. of Pract. in C. P.* 109.—1 *Barnes's Notes* 308. S. C. *Pract. Reg: in C. P.* 378. S. C.—*Rep. and Caſ. of Pract. in C. P.* 74. S. P.—*Vide Stat.* 8 & 9 *W.* 3. *c.* 11.

Of ſtaying proceedings againſt the bail. Summons to ſtay proceedings on bail-bond, on ſuggeſtion that defendant had ſurrendered. It appeared that exception was taken to the bail, and that the render was made before juſtification, ſo that the ſame was irregular, and did not warrant the ſuggeſtion in the ſummons, wherefore *cur'* ſet the ſame aſide. *M.* 4 *Geo.* 2. *Gwinnell* v. *Procter*, *Rep. and Caſ. of Pract. in C. P.* 58.—Render not good till bail be per-