MILBURN *verſus* DELPRATT, *December* 2. 1782.

AND

IDEM *verſus* EUNDEM.

TWO writs of *extent;* the firſt was quaſhed becauſe the *levy* was *more* than the debt. Mr LEWIS offered to ſhew farther reaſons from the record, but deemed ſuperfluous:—It was quaſhed with *coſts*.

The other was quaſhed, becauſe marked for *more coſts* than due, including coſts of the writ of extent itſelf. The whole overcharge was about L. 9.

JACOBS *verſus* ALLAN, Replevin.

THE plaintiff, a *mulatto*, made the common affidavit of *poſſeſſion* three months before in the defendant. BROWNE objected to his affidavit becauſe a *mulatto*, and white perſon affected. But the Court held him competent in this, and (perhaps) ſome other caſes.

Duke and Ducheſs of CHANDOIS *adverſus* FEARON et UX.

December 10.

From the COURT of ERROR.

THIS was a *motion* on a rule to produce in *this* Court the entry of the *affirmance* of the judgment, or a copy of the proceedings had in the Court of Error *niſi cauſa*.

Affidavits from Mr *Mure*, clerk of the *Court of Error*, and of Mr *Jones* his head clerk, who generally acts, were read, by which it was ſet forth, that the Court had made an order againſt delivering the proceedings to *Fearon*, till ſecurity ſhould be given in L. 10,000, to be accountable for *meſne profits* in the event of *reverſal* in England.

Mr BROWNE ſuggeſted, That the order was made by the *Governor* and *Council*, not ſitting in their capacity of *Court* of *Error*. He cited the caſes of *Lord Knollis*, whoſe peerage was queſtioned,

Salk.

Salk. 509; and denied the legality of an order of the *Court* of *Error* to the preſent effect, even if founded on the *King's* inſtructions. As to the *practice* in former caſes, he ſaid it aroſe from the deſire of thoſe acting as *Attorney-General* to ſupport the *King's* inſtructions.

A great deal was ſaid by him and the other counſel about the practice in *England* of B. R. where the record *itſelf* is remitted; but here a *tranſcript* of the *proceedings* goes to the *Court of Error*; beſides, it ſeems to make nothing in the preſent point.

He urged ſtrongly, that the order under the *King's* inſtructions to demand bail is contrary to law, and cannot bind, 4 *Bac.* 171; 2 *Rolle Ab.* 164; 4 *Co. Inſt.* 200. Under this laſt authority he queſtioned the right by which the *Court of Error* here is conſtituted. He reprobated the caſes in *Penny's* time, becauſe he was Attorney-General. *Doe*, on the demiſe of *Roſs* verſus *Beckford* in 1758, was a caſe of *non pros*; *Palmer* and *Hanlon* was ſo likewiſe; he admitted, however, one caſe in point, though an Attorney-General was concerned, that of *Cuſſans* and *Gregory*.

Mr REDWOOD on the ſame ſide controverted the authority of the *Court* of *Error*, *Lilly's Entries*, 213. 222. 238. 271. 353. 254. 422; 2 *Bac. Ab.* 210. 212. 231. 356; 5 *Mod.* 250; 1 *Black. Com.* 167. 237. 269. 270.

Mr BAKER, on the ſide of the *Duke et Ux.* aſſerted, That the order to remove the *proceedings*, ſhould have been to the *principal*, not to the clerks. He ſaid in this caſe, that the conſtitution of the colonies ſhould be conſidered; and that the conſtitution of the *Court* of *Error* as eſtabliſhed here, is highly beneficial. An appeal lies to the *King* in Council from the *Iſle of Man*, 1 *Black. Com.* 95. 105. An act paſſed in 1776 here relative to the *Court* of *Error*, has not altered the *King's inſtructions*, therefore may be ſaid *pro tanto* to recogniſe them.

Mr SHARPE,—ſame ſide.

He obſerved, that the *execution*, even after a ſecond judgment *here*, is peculiar, and an indulgence, as in *England* it is ſtayed till the ultimate determination, *Salk.* 97. For another purpoſe not material, he quoted 2 *Bac.* 203. and *Lord Raym.* 427.

Mr *Attorney-General* cited 1 *Salk.* 261. 321; 2 *Cro.* 535. 341; *Carthew*, 169. 319. and 3 *Mod.* 335.

Mr LEWIS alſo cited the following caſes, and argued from them againſt the motion, 1 *Black. Com.* 107; *Ducheſs of Kingſton's caſe*; *Bayly* and *Prioleau*, exactly the ſame with that of *Cuſſans* and *Gregory* mentioned by Mr *Browne*; 2 *Rolle* 492; 4 *Bur.* 340; 4 *Mod.* 127; *Hob.* 327; *Show.* 57; *Salk.* 403.; *Carth.* 237. and *Rocke* and *Hall* here.

Mr REDWOOD replied.

The Court conſidered the doctrine about *mittitur* and *remittitur* out of the queſtion, as the *tranſcript only* is ſent from this Court; and the end is afterwards anſwered by the certificate from the clerk of the *Court of Error*. The rule of taking ſecurity in the *Court of Error* on *affirmance*, ſeems beneficial and reaſonable, and is moreover well eſtabliſhed by paſt practice; therefore the motion was denied, and

The rule diſcharged.

Doe ex dim. HAMILTON *verſus* MORRIS.

IN the deduction of a title, the *probate* of a deed from *John Noy Robinſon* was objected to, becauſe the witneſs's name is not filled up in the *record of the memorandum of the probate* before the Judge. By the majority of the Court the objection was over-ruled; but a bill of exception thereon was prayed and granted; *quæry*, It being an old deed? Afterwards a *Thomas Watſon* proved the hand-writing of one of the witneſſes to this deed.

On this trial the queſtion aroſe, Whether the *defendant* is bound to ſhow his title? which had been the old practice; but the Court determined that he is not; but may ſtand on *poſſeſſion only* if he pleaſes; *per* GRANT, COPE, LEWIS and ELPHINSTON.

Browne's depoſition *de bene eſſe* was tendered and rejected, becauſe it was not ſhown that he was *dead, or unable to attend* to be examined *ore tenus*.

MEMORANDUM.

French

January the 16th 1783. Mr ~~FINCH,~~ the *Chief Juſtice*, died, and, on the 17th, I was appointed to that office.

I took out at firſt a *ſeparate* commiſſion, conceiving that under the law paſſed in 1780, the *aſſiſtant Judges* hold their places of courſe under the old commiſſion, notwithſtanding the demiſe of one *Chief Juſtice*, and the appointment of another. I am yet inclined to this opinion, as the moſt beneficial conſtruction of the act; but having conſulted the gentlemen of the bar, they thought the *aſſociation clauſe* in the Grand Court commiſſion required that a new one ſhould be taken out, which was afterwards done, *ex abundante cautela*, but of the ſame date as my firſt.

The only Judges I added to the old liſt, were WILLIAM PEATE, and JOHN HENCKELL, Eſquires.

To the *Aſſize Court* commiſſions I made no addition.