

against him by his right name, to which he pleaded another action pending. *Et per Holt, Chief Justice*: The plaintiff should first have discontinued the first action; it will be too late to do it now, for the discontinuance will relate only to the time of its being entered on record; so that upon *nul tiel record* it will be against him; for it was pending at the time of the plea pleaded: and this differs from a reversal of an out-lawry or judgment by writ of error: for if *nul tiel record* be pleaded, and after that, but before the day given to bring in the record, the judgment is reversed on a writ of error, that reversal avoids the record *ab initio*, and it is a *defect de recordo*.

[330] FEES.

1. STOCKHOLD *versus* COLLINGTON.

[Mich. 3 W. & M. B. R.]

1 Show. 342, S. C. *Quantum meruit* lies for serving as a commissioner on a commission to examine witnesses. 2 Salk. 557, 597. Comb. 186. Carth. 208. Holt 7. Cases B. R. 9. *Vide* Sho. 78. Str. 747. Espinasse Dig. 7, 8.

The plaintiff brought an action upon a *quantum meruit* against the defendant, for that he at his request had served him as a commissioner in a certain commission out of the Exchequer, directed to him and others, for examination of witnesses: after verdict on *non assumpsit*, Tremaine moved in arrest of judgment, that the plaintiff acted by command of Court, and could not therefore take a promise of reward for the service, no more than a sheriff or bailiff. *Sed non allocatur*; for he is appointed at the nomination of the party, who ought to pay him if he employs him.

2. GOSSIN *versus* ELLISON.

[Hill. 5 W. & M. B. R.]

Prohibition granted to a suit for fees for swearing churchwardens. 1 Mod. 167. Skin. 589. Doug. 629 [607]. Bunb. 170. 2 Str. 1108. Com. Rep. 18. Com. Dig. Prohibition, F. 5, vol. 6, 3d ed. 114.

Prohibition was prayed and granted to stay a suit in the Archdeacon of Litchfield's Court against churchwardens, for a fee for swearing them and taking their presentments; and Sir James Montague came afterwards to discharge the rule, but was over-ruled: Mr. Acherley on the other side insisted, that no fees could be due but by custom or for work done, in which case a *quantum meruit* lay.

3. HESCOTT'S CASE.

[Mich. 6 W. & M. B. R.]

Under-sheriff cannot refuse to execute process till he has his fees. *Vid.* 2 Lill. 510. *Post*, pl. 5. 2 T. R. 155.

An under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fees. And, upon motion against him, the Court said, that the plaintiff may bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion. *Noy* 75, *post*, pl. 5.

[331] 4. BROCKWELL *versus* LOCK.

[Pasch. 7 W. 3, B. R.]

5 Mod. 97, 47, S. C. executions out of Inferior Courts not within the statute 29 El. c. 4. 2 Mod. 241. Poph. 173. Palm. 399. Cont. Hutt. 53.

Debt was brought by the bailiff of the Liberty-Court of the Bishop of Rochester,