REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

GEORGE MAULE and WILLIAM SELWYN, Esqrs.
OF LINCOLN'S INN, BARRISTERS AT LAW.

Sit ergo in jure civili finis hic, legitimæ atque usitatæ in rebus causisque civium æquabilitatis conservatio. CICERO.

VOL. III.

Containing the Cases of TRINITY, MICHAELMAS, and HILARY Terms, in the 54th and 55th Years of GEORGE III. 1814, 1815.

LONDON:

JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS, 43, FLEET-STREET;
AND J. COOKE, ORMOND-QUAY, DUBLIN.

1816.

1814.

The KING *against* The Inhabitants of BILLINGSHURST.

thing was done that was sufficient to give that notification of the marriage, which it was the object of the marriage act to insure.

Per Curiam (*a*), Order of Sessions confirmed.

(*a*) *Dampier*, J., was absent.

NOTE, No. 1.

The following is a Minute of the Sentence delivered by Sir *William Scott*, in the case cited.

Consistory Court of *London*, *Wednesday*, *May* 29, 1805.

FRANKLAND *against* NICHOLSON, falsely calling herself FRANKLAND.

THIS is a proceeding for nullity of marriage, which is admitted to have been had in effect between *Anthony Frankland* and *Ann Nicholson*, on the ground of an improper publication of banns, she having been described in the banns by the assumed name of *Ross*. This suit is founded upon the marriage act, which directs that there must be publication of the true christian and surname of the parties. I think proper to observe, that the rule to be applied to it, if it had rested upon
[260] the old ecclesiastical law of the country, would be the same as if no marriage act had subsisted. By that law the publication of banns is necessary; marriage is a contract by which the relation of parties to the public is materially altered; it is a contract which is to be entered into by the parties with all public notoriety, and which is to be performed in a public place. The high importance of this contract has required by the known law of the country, and every christian country, that there shall be a publication of banns, to give validity to a contract sui generis. The word "banns", in the old *German* language, signified a publication, meaning that there should be a previous notification generally to the world, that all persons may have notice that such and such persons are going to be married. This condition is never relaxed but by dispensation in the way of licence. If this be so, what is the publication the law requires? I think nothing can be more clear than that the publication should notify, what it is fit the world, for public purposes, should know, that such persons are going to enter into that state and condition of life. A publication that *A.* and *B.* were going to be married, when in fact it was *C.* and *D.*, would be a nullity in itself, and consequently a marriage grafted upon it must be a nullity likewise; and though later times have introduced a very relaxed practice, yet by the known law of the country it requires a publication by banns, at least where not dispensed with by the ordinary, which the statute law reaffirms and strengthens. Now it has been argued, that the true and proper christian and surname of the party cannot be altered but by proper authority, by the king's licence, or an act of the legislature: yet there may be cases, where names acquired by general use and habit may be taken by repute as the true christian and surname of the parties. If a person has required a name by repute, in fact the use of the true name in the banns would be an act of concealment, that would not satisfy the public purposes of the statute; therefore I do say the names so acquired by use and habit might supersede the use of the true name; and if this case came up to this requisition, I should think the party entitled to have the marriage affirmed. The statute has prescribed several rules, and this by publication of banns of the true christian and surname of the parties, for the purpose that every person may be informed what is going to pass. The public at large, the relations, the parties themselves, have an

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interest in it; until the marriage is solemnized there is a locus pœnitentiæ. They may receive very important information of the conduct and character of the parties, who are going to enter into this contract for life: there may be persons well acquainted with the particulars, whether of his or her conduct, which may alter the resolution of either of the parties themselves. In this particular case, suppose the party had been described by her own proper name, there might have been persons acquainted with her conduct, which might have influenced, and fairly influenced, the party himself; therefore the publishing not in the true name, deprives him of that information which he has a right to possess. I do not hold it to be necessary that there should be actual fraud on the individual party; it is enough if the thing leads to a probability of fraud; and this mode of conducting the matter would lead to such consequences and mischief, as it is the intention of the legislature to prevent. It seems to me that courts of justice are only following up that intention in preventing such modes as are so obnoxious, and lead to fraud; certainly if this mode was permitted, a man might be married to the wife of another person without the slightest knowledge of the fact; and many instances might be put in which a liberty of this kind would be extremely grievous. And in all those cases, where a false name is assumed for the publication of banns, it may be considered as an imposition on the party himself: it may prevent him from having that information which ought to be open to him, up to the very time when the contract is pronounced irrevocable. If the fact had come out that the woman had grossly misrepresented her condition and state of life, it might have altered the intention of the party, with respect to this marriage; therefore, if the woman has been guilty of practising this fraud, and imposing upon the man with respect to her condition (holding even possible fraud in this case) it is enough. But in this case there is a fraud practised; there was an assumption of the name of *Ross*, in such a way as will justify the Court in holding, that it had not superseded the other name, and that it was this very person that was going to be married. One would rather have expected witnesses would have been called to establish the fact, that in the district in which this woman lived, such was the name by which she generally passed, either by Miss or Mrs. *Ross*, as she thought proper to describe herself; but nothing of that appears; it is left to the testimony of the sister and brother of the party. The sister says, that about two years and a half ago she met her sister in the street by accident, not having seen her for two or three months preceding, and inquired of her where she lived, and she told the deponent she lived at No. 19, *Portugal Street, Clare-market;* saying, if deponent called upon her she must ask for Mrs. *Ross;* that deponent soon after did call at No. 19, *Portugal Street*, and inquired for Mrs. *Ross*, and was accordingly introduced to her said sister, who on that occasion said she had accidentally met with a gentleman who wanted to have her. I cannot collect from this any thing more, than that at the house where she lived she was known by that name; it is too much to conclude from this that she bore it till marriage. But the gentlemen say, down to the marriage she did actually go by that name But there is an interrogatory (which I presume the gentlemen did not read) to this effect, "that the ministrant, for long time before the marriage between her and the producent, passed as his wife, and went by the name of *Frankland;*" therefore she was cohabiting with this man for some time before the marriage. I think there is not proved such a use of the new name, as comes up to the requisition of the statute. The statute requires the true christian and surname, and unless there be a publication to that effect it cannot be qualified, the marriage must be pronounced null and void. I do not know that it is necessary to show a particular fraud in each case; but here is a fraud practised on the party as to the condition and situation of the woman; likewise a fraud upon

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the public, being in violation of the law, and also a fraud upon the officiating minister, whose duty it is to inquire into the requisites, whether the parties are living within the parish. I am, therefore, of opinion that this marriage is not a legal one, and must be pronounced null and void.

NOTE, No. 2.

Consistory Court, *Jan.* 1812.

POUGETT *v.* TOMKYNS, falsely calling herself POUGETT.

THIS was a suit for nullity of marriage, by reason of publication of banns by a false name of one of the parties who was a minor.

It appeared, that *William Peter Pougett*, a minor under 16 years of age, was married to *Letitia Tomkyns*, his father's maid-servant, and that the banns were published, and the marriage celebrated, in the names of *William Pougett* and *Letitia Tomkyns*, whereas the real name of the minor was *William Peter Pougett*. It further appeared, that he was generally known and addressed by the name of *Peter* only, and that very few people were acquainted with the fact that he had likewise the christian name of *William*. The marriage took place in the church of *St. Andrew's, Holborn*, in which parish the parties had never resided.

Judgment. Sir W. SCOTT. This is a suit brought by *Joseph Pougett*, Esq., father of *William Peter Pougett*, a minor, to annul the marriage which has taken place between his son and *Letitia Tomkyns*, on the ground of minority and want of consent, and undue publication of banns. *William Peter Pougett*, the son, was born at *Surat*, in the *East Indies*, in *May* 1794, and the marriage is proved to have taken place in *January* 1810, consequently he was at the time under 16 years of age. It is proved, also, that the son resided in the house of his father in the parish of *St. Mary-le-bone*, and that the marriage was solemnized in the church of *St. Andrew's, Holborn*. The alleged wife, it appears, was a servant in the family; what her age might have been, does not appear from the evidence before the Court, but the letters which have been exhibited shew that she was a very uneducated person. It is proved, that the young man was christened *William Peter*, but that he was addressed by the name of *Peter* only; and that nobody, except his near relations, knew that he had the name of *William* also. His own letters were commonly subscribed *Peter* only, though some of them are signed *Peter W. Pougett*. *Letitia Tomkyns*, the party against whom the suit is brought, always called him Master *Peter*, and he is so addressed in her letters to him; so that nothing can be more clear, than that although *William* formed a part of his baptismal name, yet the other obliterated it in common use. The name of *William* would not have sufficed to designate him to most persons, and this is certainly a most important incidence in the present case. In what manner
[263] the marriage was brought about does not exactly appear. An attempt, it seems, was made to have the banns published at *Highgate*, which miscarried, as one of the witnesses, who was employed by the minor to obtain the publication, states, because the clerk did not believe that the parties were resident in *Highgate*. It has been said, that the business of obtaining publication of the banns having been entrusted to this witness by the minor himself, shews that there was no fraud upon him on the part of the wife: but the fraud suggested in this case is not a fraud upon the boy himself, but upon the parental rights of the father, his natural guardian. The account which the witness who was present at the marriage gives is this, that the clergyman asked the minor his name and residence; that he answered his name was *William Pougett*, and appeared to be much confused; that the brother of the woman answered as to his residence. He is, therefore, I think, to be taken as the principal actor in the business, though