[563] 40. WALDEN *versus* HOLMAN. Hill. 2 Ann.

6 Mod. 115, 116.

Holman was sued by the name of B. H. and pleaded in abatement, that he was baptised, and always known by the name of J. Absque hoc, that he the said J. was ever called or known by the name of B. H. Plaintiff replies, that he was known by the name of B. from the time of his baptism. To which the defendant demurs.

Judgment to answer over.

41. D'AVENANT *versus* RAYTER. Mich. 3 Ann.

Mod. Cases 236.

In this case Holt C.J. took this diversity as to conclusions of pleas; that if a dilatory plea be pleaded, and the plaintiff take issue upon it, he may conclude with a petit judicium & damna, because there final judgment shall be given: but if a dilatory be pleaded, which the plaintiff doth not deny, but confesses and avoids it, he must not conclude petit jud. & damn'. As if the defendant pleads an attainder in disability of the plaintiff, and he replies a pardon; here his conclusion must be in maintenance of his writ.

42. HENLY *versus* WALSH. Hill. 4 Ann.

Where a man ought to plead the sum tendered in certainty, and where it is sufficient to plead, that he tendered sufficient amends.

This case was again argued by Squibb for the defendant, and Eyre for the plaintiff; and

Eyre held the plea not good, because the certainty of the sum tendered is not set forth, nor is there any refusal; for the refusal is of the gelding; but 'tis not said that he refused the money, and all the precedents of tenders are of a sum certain; and the book cited of 44 E. 3, 14, is not against me, for that is no more than the issue may be taken on the sufficiency of the amends.

Squibb: The tender of sufficient amends was well enough, and that proper issue was the sufficiency of the amends; and if not, 'twas but a default in form, which is aided by a general demurrer; as if I plead my self to be cousin and heir, and do not shew how; this is bad on special demurrer; but if you demur generally, 'tis aided, and the Court did hold, that tendring sufficient amends is [564] enough, ascertaining the same, and the proper issue is, sufficient, or not sufficient:

And Holt C.J. said, 'twas never necessary to plead in certain the sum tendered, unless the lord demands too much; for when the lord demands so much, then the owner shall tender so much, and which of them is sufficient to the jury is a question; but the owner must in such case set forth a sum certain; for tho' the lord demands too much, yet he may keep the estray until the owner does tender sufficient amends. 1 Roll. 879, 5, by Tanfield C.J. But in this case the plaintiff's replication does destroy his action; because first he brings trespass for his taking an estray; and then in his replication he does not set forth, that he did proclaim him; and it does also there appear, that it was more than a year and day after the taking him as an estray; that the defendant, as owner, took him away; now after the year and the day, the lord had the absolute property in him, which is much a greater property than a lord has in an estray; and if you do first declare for him as an estray, and in your replication shew the property was absolute in you, that is bad; then if you do not shew that this estray was proclaimed the next market-day after the same was found, at the next market-town, you have no property in the estray; and so your action fails therein also; for you must, to justify your self, shew that you did what the law required of you, to give you this title; to which Powell agreed.