

R E P O R T S
O F
C A S E S

ARGUED and ADJUDGED in the COURTS of
K I N G ' s B E N C H
A N D
C O M M O N P L E A S,
In the R E I G N S of
The late King *William*, Queen *Anne*, King *George* the First,
and King *George* the Second.

Taken and collected
By the Right Honourable *ROBERT* Lord *RAYMOND*,
late Lord Chief Justice of the COURT of KING'S BENCH.

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L O N D O N:

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and J. BUTTERWORTH, W. BROWN, W. CLARKE
and Son, and J. GALBRAITH.

MDCCLXXC.

Emerton *vers.* Selby, serjeant at law.

S. C. Salk. 169. 6 Mod. 114. Holt. 174.

IN replevin the defendant justifies the taking *damage feasant* in his freehold. The plaintiff in bar says, he is seised of a cottage, and prescribes for common in the defendant's land for all his cattle *levant* and *couchant*, as appendant to his cottage: the defendant demurred.

A claim of common for cattle *levant* and *couchant* on a cottage, is good. Vide ante 726. Vaugh. 253. 2 Brownl. 101. Co. Litt. 5. b. 2 Inst. 736.

Mr. Page. A man cannot prescribe for common for his cattle *levant* and *couchant* upon his cottage, for that cannot be; for there is no land belonging to a cottage, as there is to a messuage or house. But *per Holt* chief justice *et curiam*, it is a good prescription.

Powell justice. A cottage containeth a curtilage, and so there may be a levancy and couchancy upon a cottage, and it has been so settled. There is no difference between a messuage and cottage as to this matter. The statute *de extentis manerii* says, a cottage contains a curtilage. If there be four acres laid to it, it is a lawful cottage within the statute of 31 Eliz. c. 7. We will suppose that a cottage has at least a court to it.

4 Edw. 1. 4.

IN trespass, assault and battery, if the plaintiff lay the assault one day, and the defendant pleads a special matter that justifies at another day, whereby the day becomes material, the plaintiff may reply an assault at another day; and it is no departure, although it has been otherwise held, for the day is not material, and the plaintiff may maintain his count. *Holt* chief justice.

Acc. ante 120, 121. and see the books there cited. 1. Lev. 110.

Walden v. Holman.

THE plaintiff declared against the defendant by the name of *John*, who pleaded in abatement, that he was baptized by the name of *Benjamin*, *absque hoc, quod idem Johannes* was ever known by the name of *John*; and the plaintiff demurred generally.

que hoc quod idem Johannes was ever known by the name of *John*, the plea is S. bad. Vide post 1178. 1 Lutw. 10. And shall be over-ruled on a general demurrer.

If a man sued by the name of *John* pleads in abatement, that he was baptized by the name of *Benjamin*, *absque hoc* 6 Mod. 114.

Holt chief justice. Matters of form may be taken advantage of on a general demurrer, when the plea only goes in abatement; for the statute of *Elizabeth* only means, that matters of forms in pleas which go to the action shall be helped on a general demurrer. So here, the plea is ill in form, for it is *absque hoc, quod idem Johannes, &c.* which is a confession of his name to be so, and makes the subknown by a different name than that mentioned in the declaration, a traverse known by the name in the declaration is proper. S. C. 6 Mod. 114. Salk. 6.

An exception may be taken to a matter of form in a plea of abatement on a general demurrer. Upon a plea in abatement that the defendant was that he was ever

WALDEN
v.
HOLMAN.

quent matter repugnant; and by this traverse the defendant has waved the matter that went before, of his being baptized by the name of *Benjamin*, and has made the traverse the substance of his plea.

Powell justice. This plea is good in substance, and then will an immaterial traverse hurt it?

Holt chief justice. It is a good traverse, but informal; for the plaintiff may take issue on it; and in this case, since the defendant has not relied on the plea of baptism, the traverse is become material.

Powell justice. I think the traverse is immaterial, for a man can have but one name of baptism; and the defendant has alleged that matter sufficiently, and it will not be hurt by the traverse.

Holt chief justice. The matter of the baptism would have been a good plea of itself, for it implies a negative, that he might have concluded with it, and relied upon it, without saying that he was never called or known by any other name, for he can have no other *Christian* name. This plea is only dilatory, and not to the merits.

Let the defendant answer over, *per curiam*.

Intr. Trin. 2
Ann. B. R.
Rot. 146.

Crosse *vers.* Bilson.

S. C. Salk. 3. Pleadings Lill. Ent. 351. Gilb. on Distresses. 190.

The plea of *prisel en auter lieu* ought to be pleaded in abatement only. S. C. 6 Mod. 102.

Holt 627. R. cont. *Bullythorpe v. Turner, Barnes*, 4 Ed. 351. If the defendant in *replevin* avows the caption in *alio loco*, pleads that it was his freehold, and that the thing taken was *damage feasant*, traverses the caption in the place mentioned in the declaration, and concludes with praying judgment and a return, this is a plea in bar. Vid. ante 593. The defendant in *replevin* need not pray damages either upon an avowry or a plea. S. C. 6 Mod. 102. *Holt* 627. If the defendant pleads in bar, and demurs to the replication in abatement, the plaintiff may join in demurrer, and if the demurrer is over-ruled he shall have final judgment. Where the defendant pleads in bar, and demurs to the replication, if the conclusion of the demurrer is, wherefore as before he prays judgment, and that the declaration may be quashed, the words "and that the declaration may be quashed" are surplusage, and the demurrer is a demurrer in bar. S. C. 6 Mod. 102.

UPON a writ of error in *replevin* out of the common pleas the plaintiff declares of the taking his mare *apud Hardingstone in comitatu Northampton, in quodam loco ibidem vocato* the king's highway. The defendant pleaded after this manner: *et prædictus J. B. venit, et defendit vim et injuriam, quando, &c. et ut ballivus prebonorabilis Willielmi domini Lempsler bene cognoscit captionem equae, &c. in quodam loco vocato* the queen's highway, *et juste, &c.* and says it was the freehold of the lord *Lempsler*, and avows the taking there *damage feasant*; *absque hoc, quod prædictus J. B. equam prædictam in quodam loco vocato* the king's highway *cepit, prout prædictus S. C. versus cum narravit; et hoc paratus est verificare. Unde petit judicium et retorum equae prædictæ sibi adjudicari.* To which the plaintiff comes and says, *quod prædictus J. B. &c. captionem equae prædictæ juste cognoscere*

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