# MODERN REPORTS,

OR,

# SELECT CASES

ADJUDGED IN

# THE COURTS

OF

# KING's BENCH,

# CHANCERY, COMMON PLEAS,

AND

# EXCHEQUER.

## VOLUME THE SIXTH;

CONTAINING,

CASES argued and adjudged in the Court of QUEEN's BENCH at Weſtminſter, in the Second and Third Years of QUEEN ANNE, in the Time when SIR JOHN HOLT, KNT. ſat as Chief Juſtice in that Court: together with the Pleadings to ſeveral of the Caſes.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

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1794.

Case 157.

## Morgan *against* Tomkins.

On outlawry on an indictment being reverſed, the *indictment* ſtands.
S. C. Holt, 402.

BY THE COURT. If there be an outlawry upon an indictment, and the outlawry is afterwards ſet aſide, the indictment ſtands good and open to proceed upon: but if judgment be upon an indictment by *nil dicit*, or any other judgment by the Court, and that be reverſed, all is ſet at large, and there is an end of the indictment.

Caſe 158.

## Anonymous.

If a *traverſe* be tendered to an inquiſition of forcible entry, *reſtitution* ſhall not be granted.
Salk. 260. 588.
4. Com. Dig. "Forcible Entry," (D. 7.)

IT has been held in KELYNGE's time, that if a forcible entry were traverſed, yet there ſhould not be a reſtitution, in the caſe of *the King v. Carle* (*a*). But the contrary has been held ſince, and before; and that there is no way to prevent reſtitution, but by *certiorari*, or pleading that the party had poſſeſſion for three years before (*b*).

(*a*) (*b*) See 31. *Eliz.* c. 11.

Caſe 159.

## Anonymous.

Execution upon *habere facias poſſeſſionem*.
Ante, 27.
Poſt. 298.

PER HOLT, *Chief Juſtice*. Upon an *habere facias poſſeſſionem*, the execution is not complete until the bailiff deliver the poſſeſſion, and is gone.

Caſe 160.

## Anonymous.

Departure in pleading.
1. Salk. 222.
5. Com. Dig. "Pleader," (F. 11.)
4. Term Rep. 419.

PER HOLT, *Chief Juſtice*. If a man lay a day in his declaration that is not material, and the defendant, by his plea make it material, and then the plaintiff, in his replication, varies from the day in the declaration, it will be *a departure*; otherwiſe if the day had not been made material by the plea.

Caſe 161.

## Walden *againſt* Holman.

If a man ſued by the name of *Benjamin* plead in abatement that he was baptized by the name of *John*, with A TRAVERSE that the ſaid *John* was ever known by the name of *Benjamin*, the plea is bad.
S. C. Ed. Ray. 1015. S. C. 1. Salk. 6. S. C. Holt, 492. 563. Cro. Eliz. 897. Cro. Jac. 558. 2. Brownl. 48. Poſt. 225. Noy, 135. 2. Roll. Abr. 135. 4. Mod. 347. Ld. Ray. 118. 249. 509. 1178. Stra. 556. 816. 1218. 1. Lut. 10. 3. Term Rep. 660.

HOLMAN was ſued by the name of *Benjamin Holman*, and pleaded in *abatement*, that he was baptized and always known by the name of *John*; ABSQUE HOC that he the ſaid *John* was ever called or known by the name of *Benjamin Holman*. The plaintiff replies, that he was known by the name of *Benjamin* from the time of his baptiſm. To which the defendant demurs.

It was urged, that the material part of the plea was, that he was baptized by the name of *John*; and if ſo, the plaintiff ought to anſwer that; for if the defendant were baptized by the name of *John*, he could not be known by any other name of bap-

tiſm,

tiſm, for one can have but one name of baptiſm; and the ABSQUE HOC coming after that, which is a material plea, is frivolous, and therefore not to be regarded. WALDEN *againſt* HOLMAN.

And to this opinion POWELL, *Juſtice*, ſtrongly inclined, for he thought that to ſay that he was baptized by another name, without more, was a good plea in *abatement*, and therefore the reſt was nugatory (*a*).

* HOLT, *Chief Juſtice*, and the reſt of the COURT, *contra*; for admitting that it might be relied upon for a plea that he was baptized by ſuch a name, yet that is not done here, but it is only made an inducement to a traverſe, which matter of traverſe is not immaterial, but would be a good plea in *abatement*; for it is a good plea in *abatement* for a defendant to ſay that he was known and called by ſuch a name, though he never was baptized, as many thouſands in *England* never were: nor is it true to ſay that one baptized by the name of *John* cannot be known by another name. *Sir Francis Gawdy* acquired a new name by his *confirmation* (*b*), without, as HOLT, *Chief Juſtice*, ſaid, loſing his *Chriſtian name*; at leaſt he ſaid he was not ſatisfied that his *name of baptiſm* did ceaſe upon his taking a new *name of confirmation*, as POWELL, *Juſtice*, would have it (*c*). * [ 116 ]

BROTHERICK at the bar remembered a caſe wherein he was of counſel, in which it was held, that it is not a good plea in *abatement* for a defendant to ſay that he was baptized by another name, without ſhewing likewiſe that he was always known by it, and not put the plaintiff to ſhew how his name was altered to enable him to ſue them.

DARNELL, *Serjeant*, affirmed the ſame thing.

And judgment was given to *anſwer over*.

(*a*) See Jones *v.* Macquillin, 5. Term Rep. 195.
(*b*) See Co. Lit. 3. a.
(*c*) See Diſply *v.* Sprat, Cro. Eliz. 57. Fermor *v.* Dorrington, Cro. Eliz. 222. Watkins *v.* Oliver, Cro. Jac. 558. Blunt *v.* Sneadſon, Cro. Jac. 116. See alſo 2. Roll. Abr. 135. 5. Co. 43. Poph. 57. Noy, 135. 1. Brownl. 47. the Year-Books 3. *Hen.* 6. pl. 26. 14. *Hen.* 7. pl. 11. and Bro. Abr. "Miſnomer," 2. 4. 7. 43.

## Roſewell *againſt* Pryor. Caſe 162.

MIDDLESEX, *to wit.* } NATHANIEL ROSEWELL complains of *Samuel Pryor* and *Richard Avery* in the cuſtody of the marſhal, &c. for this, that whereas the ſaid *Nathaniel*, on the firſt day of *June* in the ninth year of the reign of

Caſe for ſtopping up of lights (*a*).

(*a*) It is not ſaid ancient meſſuage, neither ancient windows. And after verdict this was moved in arreſt of judgment. But by the whole Court, it being after a verdict, it ſhall be intended that it was given in evidence at the trial, that the houſe and windows were ancient. But WRIGHT, *Serjeant*, and NORTHEY, were of opinion, that the declaration would have been good upon a demurrer. Salk. 460. 714. Mod. Caſes, 416. Pract. Reg. 16, 29.

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