A

DIGEST

OF

THE LAWS OF ENGLAND.

VOL. I.

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DIGEST

OF

THE LAWS OF ENGLAND.

BY THE RIGHT HONOURABLE

SIR JOHN COMYNS, KNIGHT,

LATE LORD CHIEF BARON OF HIS MAJESTY'S COURT OF EXCHEQUER.

THE FIFTH EDITION, CORRECTED,

(WITH CONSIDERABLE ADDITIONS TO THE TEXT)

AND CONTINUED FROM THE ORIGINAL EDITION TO THE PRESENT TIME;

TO WHICH IS ADDED,

A DIGEST OF THE CASES AT NISI PRIUS.

BY ANTHONY HAMMOND, ESQ.

OF THE INNER TEMPLE.

THE FIRST AMERICAN, FROM THE FIFTH LONDON EDITION.

WITH THE ADDITION OF

THE PRINCIPAL AMERICAN DECISIONS.

BY THOMAS DAY, ESQ.

VOL. I.

ABATEMENT—AWARD.

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2. *When not allowable.*

But it is no plea in an action upon the st. 8 H. 6. for a forcible entry. Per Newton, 22 H. 6. 42. [37.]; Th. D. l. 11. c. 35. s. 16. — Nor in trespass, that the plaintiff was possessed of the goods taken. Id. c. 36. s. 2. Nor in replevin. Id. s. 3.

3 a. *Form of the plea.*

The plea may be either to the writ, or to the action. Th. D. l. 11. c. 35. s. 20.

4 b. *Bankruptcy in defendant.*

[If two are sued as joint contractors, and one pleads his bankruptcy in discharge of himself, the plaintiff may enter a nolle prosequi as to him, and proceed against the other. 2 M. & S. 444.]

(F 17.) Misnomer of the defendant or third person, — and [*]first, as well in general as with respect to defendant in name of baptism. Vide supra (E 18.)

1. *Whether allowable.*

Misnomer of the defendant's christian name, may be pleaded in abatement. Lut. 10. — But one defendant cannot plead misnomer of the other, per Seton, 30 Edw. 3. 22. [17. b.]; 14 H. 6. 3.; R. Lut. 36.; vide Th. D. l. 11. c. 5. s. 8. — Though the husband may that of his wife sued jointly. Reg. pl. 289.; 30 Ass. pl. 16.; but he must likewise answer for himself. Th. D. l. 11. c. 5. s. 17. — [Bail sued in scire facias with their principal cannot plead *his* misnomer, though he may. 8 Mod. 290.; vide Id. 114.]

2. *What is or is not a misnomer. Vide supra*, (E 18.) 2.

[Where the defendant is sued as A. (his proper name), arrested by the name of B., there is no misnomer. 1 B. & P. 645.; vide Id. 105.]

3. *By what name a party shall be sued. Vide supra*, (E 18.) 3.

Though said that a party cannot be sued by the name by which he is known only. Th. D. l. 6. c. 2. s. 9.; yet here contra. Mod. ca. 116; 1 Sal. 6.; [and B. R. H. 286.] He may be sued by his name of confirmation. Co. Lit. — [And though he cannot be sued as by two *different* christian names, since he cannot have them. 1 Ld. Raym. 562.; Willes; yet where he has two christian names, (making one) and has omitted one of them in his dealings with the plaintiff, it seems he may be sued by that. 2 Mars. 230.; 6 Taunt. 530. — A party to a deed must be sued thereon by the christian and surname by which he is described therein. Dyer, 279.;] Mod. ca. 225, transposed from (F 18.); [1 Salk. 7.; 3 Taunt. 504.; unless not bound thereby, as where a feme covert gives a bond. 1 Salk. 7. — though the true surname may be given under an alias dictus. 3 Salk. 238. — A party likewise may be sued for a false return to a mandamus by the name and description given in the return. 4 T. R. 669. — And as well where defendant is no party, as where he is to the recognizance of bail, he is estopped by the name given him therein. 2 N. R. 453.; Lofft. 82.; vide 2 Wils. 393.; 1 Salk. 3.; 1 Ld. Raym. 249.; 3 Lev. 243.; Willes, 461.; Barnes, 94.; 2 Keb. 824.; 1 Vent. 154. — So semble from 1 Salk. 7. that giving a bail bond, unless it be void, as when given by a feme covert, by the wrong name, precludes the plea of misnomer; but from others the rule seems to be, that defendant may still plead misnomer to the original action, but not perhaps in an action on the bail bond. Willes, 461.; Barnes, 94.] — An abbot may be sued in a real action without his name of baptism. Th. D. l.

6. c. 2. s. 2. — So in a replevin. Ibid.; in an annuity. Id. s. 5.; in an ejectment of ward, Ibid.; in a cessant. Id. s. 2. But in a plea personal, where process of outlawry lies, an abbot ought to be named by his proper name; as in trespass. Id. s. 3. 7. Scire facias upon a recognizance lies against executors, without naming them by their proper names. Id. s. 4.

4. *Form of the plea of misnomer. Vide supra,* (E 18.) 4.

The plea must not commence, — and the *said* A., B., &c.; for thereby he affirms his name as it is in the writ Lut. 10.; R. 1. Sho. 394.; [3 Wils. 413.; 2 Ld. Raym. 1178.; Show. 394.; 5 T. R. 487.] — Nor [*]that defendant is eadem persona versus quam, &c. Lut. 10.; [nor "and he against whom," &c. 5 Taunt. 652, 653. n. — It must be in person. Lut. 11. transposed from (F 18.) 1 Ld. Raym. 509.; vide infra (I 17.)] It must aver that he is known by the name. Mod. ca. 116.; 1 Sal. 6.; [B. R. H. 286.; and it need not add that he was baptised by it. Ibid;] though a plea that he was baptised, &c. without this that he is known by the name given is good. R. Powel J. contra, Mod. ca. 116.; 1 Sal. 6. — [The plea must state that defendant is sued, " by the plaintiff." 3. Wils. 413. And must give his true surname, though it be given in the declaration. 8 T. R. 515.; 5 Taunt. 652. Id. 653 n.—Where the plea and affidavit were entitled by the wrong name, the plea was set aside. Barnes, 348.]

5. *Of the replication.*

[Where defendant pleads misnomer by attorney, the plaintiff must not therefore demur, but should either refuse the plea, or rely on the warrant of attorney as an estoppel. 1 Ld. Raym. 509.]

6. *Judgment on the plea.*

By a misnomer of one, the writ does not abate as to all. 8 Co. 159. b. 27 H. 8. 266.; vide post. (N)

7. *Consequences of misnomer.*

[A defendant cannot be declared against by a different name to that in the writ, unless he has appeared in such name, and thereby estopped himself. — An appearance entered for him by the plaintiff, not being his own act, does not estop him. 2 Wils. 393.; 3 T. R. 611.; 10 East, 328. And though a declaration conditionally against A. sued by the name of B. (the name in the process) is regular in C. B. 1 B. & P. 105.; but 2 N. R. 132. seems contra. It is otherwise in K. B. 10 East, 328.; even after interlocutory judgment. 11 East, 225. And on application made before appearance, and before the time for pleading in abatement has expired, proceedings will be set aside. 4 M. & S. 360.; 2 Taunt. 399.; 15 East, 159.; secus where the time has expired. 15 East, 159. see 11 East, 225.; 10 East, 328.; 1 Mars. 474.; 6 Taunt. 115.; 2 Price, 328., as to the consequences of delay. — Where defendant appears, he must object by plea in abatement. 2 Str. 1218; 16 East, 110.; 3 T. R. 572.; 1 Price, 277.; though apparent to the court, 2 Blk. 1120.; vide 3 Anst. 935., unless in the case of variance from a written instrument. Vide supra (E 18.) 5. Hence if he does not so object, he may be taken in execution by the name in which he is sued. 2 Str. 1218.]

(F 18.) Misnomer, — in surname. Vide ante (E 19.)

1. *Whether allowable.*

Misnomer of the defendant's surname may be pleaded in abatement. Ast. Ent. 1.; Reg. pl. 288. But one defendant cannot plead misnomer of another. Lut. 36.; nor can a defendant, who appears gratis after the sheriff

has returned non est inventus to the capias, plead misnomer; for he cannot be intended the person sued, except where he comes in upon a cepi corpus or exigent. 27 H. 8. 1.; [Style 440.]

2. *What is or is not a misnomer.* *Vide supra*, (E 18.) 2.

A defendant may plead that his surname is Symms, absque hoc that [*]he was known by the name of Symonds. 4 Mod. 347.; or that it was Wesley, and not Westby alias Westly. Per three J. in B. R. in an information by the Attorney General against W. F. 4 Geo. fort. contra. [But a defendant may be described by a second surname, if it be laid under an alias, for a man may be known by two surnames. Leach, 469.; 1 H. 7. 28.; Bro. Misnomer, 47. Hence qu. the case just quoted.]

3. *By what name a party shall be sued.* *Vide supra*, (E 19.) 3. (F 17.) 3.

It suffices if the proper name be joined with a sufficient description; as A. the son or daughter of B. vide Th. D. l. 3. c. 2. s. 6, 7, 8.; l. 6. c. 2. s. 2. — or A. the wife of B. vide Id. s. 6. — or with a name of dignity, vide Id. c. 3. s. 5.; l. 6. c. 3. s. 12.; vid. Dav. 60. a.

4. *Form of the plea of misnomer.* *Vide supra*, (F 17.) 4.

If the defendant says that he was baptised, he ought to add the place where he was baptised. R. Skin. 620. — or if that he was baptised by another name, he ought to add that he was known by such name, at the time of the writ. R. Skin. 620.

5. *Of the replication.*

The plaintiff may reply, that defendant is known as well by one name as the other. Ast. Ent. 1.; Th. D. l. 6. c. 2. s. 1.; Semb. 4 Mod. 347.; [1 Hen. 7. 29.; 2 Hale's P. C. 238.; 1 Salk. 6.; 2 Ld. Raym. 1015.] Or estop the defendant by his deed. Mod. ca. 225.

(F 19.) Misnomer, — in name of dignity.

1. *Whether allowable.*

So a defendant may plead in abatement, if his name of dignity be omitted or mistaken. 39 Edw. 3. 35. b.; 22 Ass. pl. 24.; Dav. 60. a.; Th. D. l. 6. c. 3. s. 6.; l. 3. c. 3. s. 8. But if the defendant appear by the name given, he shall not take advantage of the misnomer. R. 2 Rol. 88.; adm. 1 Vent. 154.; R. 1 Rol. 450.

2. *What are names of dignity.*

As if an earl be not named so 39 Edw. 3. 35. b.; 22 Ass. pl. 24.; Dav. 60. a.; Th. D. l. 6. c. 3. s. 6.; l. 3. c. 3. s. 8. — or a duke, marquis, archbishop, bishop, 27 H. 6. 5. b.; duchess, countess, &c.; or if a countess-dowager be not named dotissa. Semb. per Pemb. Skin. 15.; or a knight, R. Mod. ca. 105.; 5 Mod. 302.; vide Th. D. l. 3. c. 3. s. 14.; master of an hospital, 2 Edw. 3. 47.; Th. D. l. 6. c. 3. s. 3.; or if garter king at arms be not so named. R. Cro. Eliz. 224.; Dub. in an action that does not concern his office. Cro. Eliz. 542.; Owen, 61.; [or if clarencieux king at arms be not so named, though in an action that does not concern his office. Str. 850.]; if a baronet be not so named, Hob. 129., Clift. 17.; R. 1 Vent. 154. — So in an action against the executor of B. arm', where he was a knight, the writ abated, though he was only arm' at the time of the bond given. Bro. Bre. 513.; so if he be named baronet only, where he is knight and baronet. R. Carth. 14.

3. *What are not names of dignity; or, being such, need not be given.*

Gentleman, or esquire, are not names of dignity. 14 H. 6. 15.; Th. D.

l. 6. c. 6. s. 9.; 5 Mod. 302. Nor dean, archdeacon, or præcentor, Th. D. l. 6. c. 3. s. 1. 8.; R. 27 H. 6. 5. b.; vide Th. D. l. 3. c. 3. [*]s. 6. 17.; nor provost. 17 Edw. 3. 1.; Th. D. l. 6. c. 3. s. 14.; and a dignitary of another kingdom need not be named by his name of dignity, Mar. pl. 26.; Dav. 60. a.; vide Th. D. l. 3. c. 3. s. 7. Though if a name of foreign dignity be added it does no harm. Semb. 3 Lev. 42. — So if he be deprived of his dignity, it need not be given; as if a deanery be dissolved by act of parliament. 4 H. 7. 6.; vide Th. D. l. 3. c. 3. s. 16.; l. 6. c. 3. s. 10. Though the deprivation was minus juste; for it stood in force till restitution. 13 Ass. pl. 2.; Th. D. l. 6. c. 3. s. 15. — So if a suit be to avoid the dignity, as if the king brings a quare impedit of a priory, the defendant need not be named prior. 14 H. 4. 36.; Th. D. l. 6. c. 3. s. 4.

4. *Which of two names of dignity shall be preferred.*

A knight shall be so named, though he is an earl of another kingdom. Mar. pl. 26.

5. *What is or is not a misnomer of or in respect to the name of dignity.*

So if the defendant has a name of dignity given to him, when he has no such dignity, it may be pleaded in abatement; as if he be named knight and baronet, when he is not a baronet, Reg. pl. 287.; or when he is not a knight, R. 1 Vent. 154.; or be named by a name of dignity, which is lost by marriage, vide Dy. 79. b.; Ow. 81.; or the eldest son of a duke, &c. be named marquis, &c. Sal. 451.; Semb. Ow. 82.; or if one be named knight when he is a baronet, R. Jon. 346. But if the defendant be named by his proper name and name of dignity in the first part of the writ, it is sufficient, if he be named by his proper name only in the other parts of the writ. Semb. Th. D. l. 6. c. 3. s. 12, 13. And if the defendant be named domina, &c. when she ought not, in any other part of the pleading except in the writ, it does no harm. Dy. 79. b. in marg.

6. *Form of the plea of misnomer.*

If the defendant does not plead that he was a knight, &c. at the time of the bill or writ, it is ill. R. Mod. ca. 105.

7. *Whether amendable.*

A mistake in a name of dignity shall not be amended. 1 Vent. 154. R. Hob. 129.

8. *A reference.*

When a writ shall abate for a mistake in the name of dignity of the plaintiff, vide ante (E 20.).—Where by an acceptance afterwards, vide post (H 44).

(F 20.) Misnomer, — in name of office. Vide ante (E 21.)

1. *When a person shall be named by his name of office.*

So if a man has a cause of action against another by reason of his office, he ought to name him by the name of his office; as against a sheriff, collector. 15 Edw. 4. 27.; vide Th. D. l. 6. c. 4. s. 4. — So if land be demanded against a parson, which he holds in right of his church, he ought to name him parson. Th. D. l. 6. c. 6. s. 1. 7. — If dower be demanded against a guardian, he ought to name the defendant guardian. Th. D. l. 6. c. 7. s. 1. 3. — So an assize against the warden of a chapel, ought to name the defendant warden. 13 Ass. [*]pl. 2.; 15 Ass. pl. 8.; Th. D. l. 6. c. 7. s. 6. — So an action against a man as heir, ought to name him heir. Th. D. l. 6. c. 9. — And an action against an executor ought to name

him executor. Id. c. 11. { So, one sued as executor, may plead, that he is administrator. Rattoon v. Overacker, 8 Johns. Rep. 97. Vide Hunt v. Wilkinson, 2 Call, 49. }

2. *When a person need not be named by his name of office.*

Otherwise if the cause of action be not by reason of his office; as in trespass against a parson; there is no need to name the defendant parson. 11 H. 4. 40.; Th. D. l. 6. c. 6. s. 4. — Nor in debt. 13 Hen. 4. 2.; Th. D. l. 6. c. 6. s. 4. — In a quare impedit to present to a church, which the defendant claims as annexed to his prebend, he need not be named prebendary. 7 Edw. 3. 302.; Th. D. l. 6. c. 6. s. 8. — Or, in quare impedit against one who claims the advowson as guardian, he need not be named guardian. 9 Edw. 3. 465.; Th. D. l. 6. c. 7. s. 4. — Nor in a darrein presentment. Th. D. Ibid. — Or if the action be to avoid the office; as in assize against the warden of a chapel. 10 H. 7. 18.; Th. D. l. 6. c. 7. s. 7. — So where the ground of the charge upon the defendant otherwise appears at large in the count, the defendant need not be named by his office; as in debt against the ordinary it is not necessary that he be named ordinary; for the count shows, quod bona defuncti ad manus, &c. devener'. 35 H. 6. 42.; Th. D. l. 6. c. 4. s. 3. — In an action against an inn-keeper, it is not necessary to name him inn-keeper; for the count shows that he is a common inn-keeper, or keeps a common inn. 22 H. 6. 24. [21.]; 11 H. 4. 45.; Th. D. l. 6. c. 5. s. 2. — In debt against an heir, there is no necessity to name him heir, for by the count is shown, that it was the lien of the heir. Th. D. l. 6. c. 9. s. 1.; cont. Ibid. s. 2.; and the register names him heir in the writ. Vide Reg. 140. a.

3. *How the name of office shall be given.*

In an action against an executor, it is sufficient if the declaration show him to be executor, though he is not named executor in the writ. Vide pleader (2 D 2.) — If a feme covert be executrix, the action ought to be against the husband et per executricem, &c. 18 H. 6. 4.; Th. D. l. 6. c. 11. s. 8. — If a feme covert and a stranger are executors, it ought to be against the stranger, executor, and the husband and wife executricem præd', &c. 1 Edw. 4. 2.; Th. D. l. 6. c. 11. s. 8.

4. *What is or is not a misnomer.*

The defendant may plead, that he is administrator, and not executor. 1 Leo. 69.; vide in Pleader (2 D. 4.) [1 Salk. 296.] — So the defendant, being sued as administrator may plead in abatement, that he is executor and not administrator. Vide Th. D. l. 6. c. 11. s. 9.; vide in Pleader (2 D 12.) — So being sued as administrator, he may plead that he is only administrator durante minori ætate. Lut. 20. — But if an action be against an administrator durante minori ætate of A. executor to B. it is well; though he is suable only as administrator de bonis non to B. R. Hob. 246.

5. *Form of the plea.*

How that defendant is not executor and administrator shall be pleaded. Vide Lut. 29.; Pleader, 2 D. 4. 2.; 1 Brownl. 97.; 2 Brownl. 184.; 5 Mod. 136, 7.]

{ 6. *Of the replication.*

Where one was sued as executor, the plea was, that he was administrator, and the plaintiff replied, that he was executor de son tort; to this there was a demurrer; and the demurrer was held sufficient. Rattoon v. Overacker, 8 Johns. Rep. 97. }

[*](F 21.) Misnomer, — diversity of names.

1. *When allowable.*

So in actions where a man may be outlawed, the defendant may plead in abatement that there is B. the elder and B. the younger, and that he is the younger; as in account, &c. Th. D. l. 6. c. 13. s. 3. — So in assize. 22 Ass. pl. 14.; Th. D. l. 6. c. 13. s. 2. — So in a suit against a corporation, that there is a prior in W. de freres preachers, and a prior de nostre dame. 25 Edw. 3. 48.; 29 Ass. pl. 70.; Th. D. l. 6. c. 13. s. 5.

2. *When not allowable.*

In a præcipe quod reddat, dower, &c. diversity of names is no plea; for the tenant may disclaim. Th. D. l. 6. c. 13. s. 2. — Nor when the same person who is sued appears. 39 H. 6. 48.; 27 H. 8. 1.; Th. D. l. 6. c. 13. s. 9. — Nor in an indictment; for the name cannot be changed but by the jury. 9 H. 4. 3.; Th. D. l. 6. c. 13. s. 6. — Nor in an action upon an obligation or specialty; for it is ascertained by his deed. R. 9 H. 7. 21. b. —[Nor where the defendant is sued in custody of the marshal of B. R., unless it be averred that another of the same name (father or son) is in custody likewise. 1 Salk. 7. pl. 16.]—So there is no need of the addition of elder or younger, except where there is a father and son of the same name. Semb. per Moile, 33 H. 6. 53, 4. acc.; 39 H. 6. 46. a.; Th. D. l. 6. c. 13. s. 9. — So where the defendant himself appears, he cannot abate the writ for want of the addition of younger. 44 Edw. 3. 34 b.: per Prisot, 39 H. 6. 46. — And the writ shall not abate for uncertainty of the names of those who are not parties to it. 7 Edw. 3. 302.; Th. D. l. 6. c. 13. s. 11.

3. *What is or is not a sufficient distinction.*

Any addition that shows the diversity of person is sufficient; as, executor of another will, &c. Per two justices, Moile cont. 39 H. 6. 47. — So if one of them be, in custod' mar' in B. R. R. 1 Sal. 7.

4. *Whether amendable.*

The plaintiffs may give the addition of younger, and enter it upon the roll, and the writ shall not abate, Th. D. l. 6. c. 13. s. 7, 8., when the demandant himself appears, who is sued without the addition. R. 44 Edw. 3, 34. b.

5. *Of the replication.*

If the defendant offers himself ready to answer, and the plaintiff says that *he is not* the same person, and does not show the diversity of names, the writ abates. Th. D. l. 6. c. 13. s. 1.; 8 Edw. 3. 20. a.

6. *Of the judgment.*

If a stranger appears (not being the son of the person sued) and says that he is the younger, where the plaintiff says that he is not the person sued, the writ shall not abate. 39 H. 6. 46.—So the writ abates not, if at the day given for waging of law, A. B. the younger comes to wage his law, and the plaintiff says, that he is not the same person; for he sued A. B. the elder. Dub. 5 Edw. 4. 23. 114. [Vide 1 Salk. 7. pl. 16., that by A. B. simply without addition, A. B. the elder shall be intended.]

[*](F 22.) Misnomer,—addition to the name,—by the common law.

Vide ante (E 22.)

1. *When allowable.*

If a man had given any addition to the name of the defendant, and that

was mistaken, it might have been pleaded in abatement at the common law. As if the defendant was named A. B. of P., he might say that he was A. B. of D., and not of P. 11 H. 6. 13. [11.]; 21 H. 6. 54. b.; 9 H. 5. 8.—So if he was named A. B. smith, he might say that he was A. B. carpenter, not smith. 21 H. 6. 54. b.; Th. D. l. 6. c. 17. s. 2.—Or A. B. fishmonger; that he was A. B. gent.; per Paston, 19 H. 6. 51.—So if he was named by his proper name and surname with the addition of his office, &c., it might have been pleaded, that he was not such officer; when the being such an officer is material to the action.—As if he be named parson of A. the writ shall abate, if he was not parson the day of the writ purchased, or ever since. Th. D. l. 6. c. 6. s. 2, 3.—Or if he was parson but of a moiety of the church. 18 Edw. 3. 33.; Th. D. l. 6. c. 6. s. 2.—Or if he was parson of B. in which A. was a chapel and not the parish church. 18 Edw. 3. 44.; Th. D. l. 6. c. 6. s. 2.

2. *When not allowable.*

But if the addition was immaterial, a mistake cannot be pleaded in abatement; as in an action against *A. B. citizen of Y. one of the company of M.*, it is no plea, that he was not of the company. 38 Edw. 3. 40. [34.]—or against J. N. attorney of Peter de Medicis, it is no plea that he was not his attorney. 38 H. 6. 24.; Fitz. Brief, 139.; Th. D. l. 6. c. 17. s. 3.—Or against M. B. dominam de B., when she is not a lady. 8 H. 6. 10. a.—So any difference is sufficient to distinguish two of the same name. If an action be brought against A. B. of C. where there is a father and son there of the same name, in custodia mar', it is sufficient to distinguish without saying senior or junior. R. 1 Sal. 7.

3. *By what addition a party shall be sued.*

If one give a bail-bond by such a name, he shall be estopped to say, that that is not his name. 1 Sal. 7. [Vide supra, (F 17.) 3.]

4. *Form of the plea.*

If the defendant acknowledge himself to be the person who was sued, it is no plea, that the addition was mistaken; [Ld. Raym. 1015. 1178.]; as if he be named A. B. of P., it is no plea that he lives at D., but he ought to say, that his name is A. B. of D., and not of P. Th. D. l. 6. c. 17. s. 2. 5. [And as a plea in abatement must shew how the plaintiff should have sued, the plea of misprision of addition must shew what the defendant's right addition is. 2 Str. 816.; Ld. Raym. 1178. 1541.]

5. *Of the replication.*

Where defendant has estopped himself by giving a bail-bond by the wrong addition, it must be replied; for defendant may (still) plead misnomer; the plaintiff shall say, that he made the bond by such a name, to which, without oyer (which semble should not be prayed) defendant may say non est factum. R. 1 Sal. 7.—So giving common bail is an appearance, which aids misnomer; it must however be replied as an [*]*appearance*; for to plead it as a putting in of bail is no estoppel, since putting in bail is the act of the court. 1 Sal. 8.

6. *How aided.*

By appearance. Per Keel, 1 Sid. 247.; and filing common bail is an appearance. 1 Sal. 8.

(F 23.) Misnomer,—addition to the name,—by st. 1 Hen. 5. c. 5.—when necessary.

The st. 1 Hen. 5. c. 5. enacts, that in all original writs of pleas *personal**, appeals and indictments, in which the exigent shall be awarded; to the names of the defendants, additions shall be made for their estate, or degree, or mystery, and of the towns, hamlets, or places, and counties, of which they were or be, or in which they be or were conversant; and then directs, that if these additions be omitted, any outlawry pronounced on the process shall be bad, and that before the outlawries pronounced, the said writs or indictments shall be *abated* by the exception of the party wherein the said additions be omitted. Provided that they be not abated for the *surplusage* of such additions. Hence there must be an addition of the place as well as of the degree, &c. Lut. 169. — And an addition is necessary in all writs original, in actions personal, appeals, and indictments upon which the defendant may be outlawed. So in a presentment before the coroner for outlawry, lies upon it, and it shall be taken as an indictment. R. 2 Leo. 200.

(F 24.) Misnomer, — addition to the name, — by stat. 1 Hen. 5 c. 5. — when not necessary.

It is not necessary in a real or mixed action, thus an assize; notwithstanding that if force be found, a capias and exigent lie for the king's fine. 9 Ass. pl. 1.; 9 Edw. 3. 449.; 7 H. 4. 39.; Th. D. l. 6. c. 16. s. 2.; [2 Ld. Raym. 987.; 3 Salk. 20.; 1 Salk. 5.] — Nor is it in replevin and recordare, notwithstanding outlawry lies therein. Th. D. l. 6. c. 16. s. 3.; 1 Sal. 5.; Mod. ca. 85.; [R. 2 Ld. Raym. 987.] Nor in rescous returned by the sheriff, though process of outlawry lies upon it. Th. D. l. 6. c. 16. s. 4. — Nor if a man let to bail does not keep his day, whereby a capias and exigent issue against the bail, there is no need of any addition. Th. D. l. 6. c. 16. s. 4. — Nor in a homine replegiando. R. Mod. ca. 34.; 1 Sal. 5.; [3 Sal. 20; 2 Ld. Raym. 987.]—Nor in any writ that is vicontiel, per Powel, Mod. ca. 85.; 1 Sal. 5.; [3 Salk. 20.; 2 Ld. Raym. 987.—Nor in an alias or pluries writ, where no addition was required in the original. Ld. Raym. 987.]—Nor in an action by bill. 1 Sal. 7.—So in an action against husband and wife, there, is no necessity for any addition to the wife; for she shall be intended of the same place as her husband. 3 Edw. 6. 31. b.; 2 Leo. 183.—So in an action against an abbot and his monk, there needs no addition to the monk. 3 H. 6. 31. b.—So in an indictment against a feme covert, as the wife of A., no other addition of place or mystery is necessary. Per 2 J., Gawdy, cont. Cro. Eliz. 196.—So when process of outlawry does not lie, no addition is necessary; as in an indictment for encroaching upon a highway. R. Cro. Eliz. 148.; R. 6 H. 6. 9. b.— [*][Nor for the same reason, in informations in nature of quo warranto; 1 Wills. 244.; secus in quo warranto informations by original. Ibid.]—Nor in actions in inferior courts. R. Mod. 354.—Nor in a decies tantum; for outlawry lies not. 1 H. 6. 2. 54. b.; 8 H. 6. 9. b.—Nor in detinue of charters. 19 H. 6. 51. a.

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* Since oyer of the original writ or plaint will not now be granted, 5 Taunt. 653. n. no objection on the ground of addition can, in civil suits, be taken by plea in abatement. 3 B. & P. 395.

(F 25.) Misnomer,—addition to the name,—what addition is good, —of place. Vide Indictment. (G 1.)

1. *Of what place a man shall be named.*

A man may be named of a vill, hamlet, or other place. So of a parish, that has not divers vills. Th. D. l. 6. c. 14. s. 20.—If a man be of a hamlet within a vill, he may be described of either. 35 H. 6. 30. b.; Th. D. l. 6. c. 14. s. 14.; [14 Hen. 6. 23.; 2 Inst. 669.; vide 2 Hawk. c. 23. s. 103.]—If a man resides in one vill, and has a family in another, he may be named either of the one or of the other. 19 H. 6. 1.; Th. D. l. 6. c. 14. s. 15; [vide 2 Hawk. c. 23. s. 103.]—So if a man has a family at G. and dines at W. he may be named of W. Dub. 1 Sid. 325.—[The place where he is conversant is a sufficient addition though neither commorant nor inhabitant there. Barnes, 162.—And late of X. is good though commorant in Y. 2 Str. 924.]—If he has moved from one vill to another, he may be named either of the latter, or as late of the former. 19 H. 6. 1.; 33 H. 6. 9.; Th. D. l. 6. c. 14. s. 15.—[And in every case a description as *late* of such a place, is sufficient. 2 Inst. 669.]

2. *With what certainty the place shall be described.*

If a man be of a city, which is a county within itself, it is sufficient if he be named of the city; as of London, without saying of what ward, or parish. Th. D. l. 6. c. 14. s. 8.—But the addition of a county only without naming a vill therein, is not. R. 2 Cro. 616.—Nor is that of a parish, where there are divers vills in the same parish. 35 H. 6. 30.; Th. D. l. 6. c. 14. s. 20.—Nor that of a hundred or soken, where there are divers vills. Th. D. Ibid.—Nor of any great place containing divers vills. 5 Edw. 4. 1.; Th. D. l. 6. c. 14. s. 21.

3. *Manner of averring the addition of place.*

If a man be named rector of the church of T. in such a county, it is sufficient, without saying of what place, for he shall be intended resident upon his church. 7 H. 6. 1. b.; 10 H. 6. 8.; Th. D. l. 6. c. 14. s. 7.; [2 Inst. 669. Sed vide infra indictment (G 1.)]—So a chancellor of the university of Oxford, in the county of Oxford, is sufficient, without saying of Oxford. 8 H. 6. 38. [37.]; Th. D. l. 6. c. 14. s. 13.—The place should be annexed to the person of the defendant; and therefore if the addition be after the alius dictus, it is not sufficient. Th. D. l. 6. c. 14. s. 19.; R. Cro. Eliz. 198.; R. Mo. 354.; 2 Leo. 183.; [2 Inst. 669.; Leach, 469.; Cro. Eliz. 249. 583.; Dyer, 88.; Stamf. 68.; 2 Hale, H. P. C. 177.; and after an alias, an addition is unnecessary. 2 Hawk. c. 25. s. 70.]—Yet if a man be named A. B. alius dictus D., the addition after the alias is good. 5 Edw. 4. 141.—So A. B. servant of J. Noke of D. in the county of M. butcher, is not good; for the addition shall be referred to J. Noke. 6 Edw. 4. 3.; 9 Edw. 4. 50. [48]; Dy. 46. b.; Th. D. l. 6. c. 14. s. 10. —Yet A. B. who was the wife of N. of D. is good; for the addition [*]shall be referred to the wife, and not to the husband who was dead. 4 H. 6. 4.; Th. D. l. 6. c. 14. s. 9.—But where the addition is not proper to the wife, as yeoman, &c., it shall be referred to the husband. R. Dy. 46, 47. [Where both the name and addition are the same, there should be some further description added for the sake of distinction. 2 Hawk. c. 25. s. 70. And where several defendants have the same addition, it sould be repeated after each. Ibid.]

4. *Plea objecting to the addition of place — matter of.*

If there be no such vill or place as mentioned in the addition, the defendant may say, nul tiel vill. 8 Edw. 4. 5.; Reg. pl. 284. 286. — Or that he is of D. and not of P. 8 Edw. 4, 5.; Th. D. l. 6. c. 14. s. 22.—Or that there are two D's, and none without an addition. Th. D. l. 6. c. 14. s. 23.; Reg. pl. 285.

5. *Plea objecting to the addition of place—form of.*

If the defendant plead that he was not of the place mentioned in the addition, it is not sufficient without saying of what place he was. Th. D. l. 6. c. 14. s. 11.—And he ought to say, that he was not of that vill the day of the writ purchased, nor ever since. Per Martin; Strange Cont. Th. D. l. 6. c. 14. s. 12.; 8 H. 6. 9. b.; Agr. 2 Edw. 4. 15.; Cont. Fitz. Brief. 944.; Acc. Mo. 70.—But if he plead, that he was of D. parva, and not of D. without an addition, it is sufficient without saying, that D. parva was a vill by itself, and D. another vill by itself. Th. D. l. 6. c. 14. s. 14.

6. *Of the replication.*

[A plea objecting on the ground of addition will not be set aside on motion, but should be demurred to. Barnes, 338.]

(F 26.) Misnomer,—addition to the name,—of estate, degree, or mystery.

1. *What additions of estate, degree, and mystery are good.*

[The words *estate* or *degree*, are of the same signification, comprehending the nobility, clergy, graduates in any profession, and those under the degree of nobility, as yeomen, &c. 2 Inst. 666.]—The addition of the *estate* is good, as widow, single woman. 10 H. 6. 22. [21.]; 14 Edw. 4. 8. [7.]; Th. D. l. 6. c. 15. s. 4.—Labourer, 3 H. 6. 316.; 5 Edw. 4. 33.; Th. D. l. 6. c. 15. s. 1.—Parson, clerk.—Wife, 2 Leo. 183.—Servant to A. B. Mod. ca. 58.; 3 H. 6. 31. b. Th. D. l. 6. c. 51. s. 1.—So the addition of the *degree* is sufficient, as duke, earl, &c. Th. D. l. 6. c. 15. s. 12. [Ld. Raym. 1541. Baronet, 3 Salk. 234.; 1 Vent. 154.; Cro. Car. 372.; vide Lat. 169.]—Serjeant at law, knight. 1 Sal. 6.; Th. D. l. 6. c. 15. s. 12.—Esquire, yeoman, gentleman. Rast. Ent. 108.; Th. D. l. 6. c. 15. s. 6.; [8 Mod. 52.]—Alderman, doctor, archdeacon, dean, &c.—Though it be a degree in another kingdom: as bishop of D. in Ireland. 21 H. 6. 3. b.; Th. D. l. 6. c. 15. s. 8.—[But qu. this last, for a party cannot be described by any dignity which he holds in any nation except England. Leach, 620.; 9 Co. 118.; Salk. 451.]—So the addition of his *mystery*, *art*, or *trade*, is sufficient; as, merchant, 4 H. 6. 26. b.; Th. D. l. 6. c. 15. s. 2.—Mercer, 5 Edw. 4. 33.; Th. D. l. 6. c. 15. s. 2.—Chopchurch, brogger. 9 H. 6. 65.; Th. D. l. 6. c. 15. s. 3.—Husbandman, schoolmaster. 2 Leo. 186.—Grocer, taylor, [*]tanner, currier, shoemaker, chapman, &c.—Spinster, &c. Dy. 46. b.—Scrivener. 2 Leo. 186.

2. *What additions of estate, degree, and mystery are not good.*

But the addition of *office* is not good [unless the party is sued in respect of his office. Infra indictment. (G 1.)], as servant; unless it be said, the servant of such a one. 7 Edw. 4. 10. b.; 9 Edw. 4. 50. [48.]; Dy. 46. b.; 3 H. 6. 31. b.; Th. D. l. 6. c. 15. s. 1.—Nor chamberer, butler, &c. 5 Edw. 4. 32, 33.; Th. D. l. 6. c. 15. s. 10.—But litterman is. 21 Edw. 4. 77. b.; Th. D. l. 6. c. 15. s. 11.—Nor chancellor, treasurer, chamberlain, &c.—Sheriff, coroner, escheator, bailiff, &c.—Nor the addition of an un-

lawful employment; as maintainer, vagabond, &c. 22 Edw. 4. 1.; 2 R. 3. 2.; 9 H. 6. 65.; Th. D. l. 6. c. 15. s. 3.—Bankrupt, extortioner, usurer, &c. 22 Edw. 4. 1.—Dicer, bowler, carder, &c.—Nor the addition of a general occupation; as farmer. 28 H. 6. 4.; Th. D. l. 6. c. 15. s. 9.

3. *Which of two additions of estate, degree, or mystery shall be preferred.*

If there is a choice between several additions, the most worthy shall be preferred; thus a gentleman, though a husbandman, shall be sued as gentleman. 14 H. 6. 15.; Th. D. l. 6. c. 15. s. 5.; [2 Inst. 669.]—[And another and false addition to the true one vitiates, 1 Vent. 154.]—A viscount shall be sued by that name, and not by the name of lord. Dal. 42.—Yet if a man has a more worthy addition, by his office, or by a degree in the university, he may be sued by the one or the other; as a master of arts, or doctor of divinity, may be sued by the name of clerk. 35 H. 6. 55.; Th. D. l. 6. c. 15. s. 13.—So a serjeant of the king's kitchen may be sued by the addition of cook, or gentleman, or esquire. 14 H. 6. 15.; Th. D. l. 6. c. 15. s. 6.—So a man may be sued by the addition of his degree or mystery, as horner, packer, &c. or of yeoman. 2 Mod. ca. 51, 2.—So a gentlewoman may be sued by the name of spinster. Semb. Dy. 88. b.—[But 2 Inst. 668. is contra to this last position, and maintains that she has as good a right to that addition as a baroness, viscountess, &c. has to hers. A trader may be sued either by his degree or trade. Str. 556.; 816.; Ld. Raym. 1541.]—In an indictment, &c., there is no necessity for the addition of a dignity created since the st. 1 H. 5.; as if a man be knight and baronet, it is sufficient if he be named knight only. R. Lat. 169.

4. *Manner of averring the addition of estate, degree, or mystery.*

The addition shall be the same, [and so averred] as it was the day of the writ purchased, and not with a nuper; as nuper episcopus, &c. 21 H. 6. 3. b.; 9 Edw. 4. 2. b.; Lut. 40.; Th. D. l. 6. c. 15. s. 8. [Though as was said before, such an addition of place is sufficient, supra. (F 25.)]

5. *Form of the plea objecting to the addition of estate, degree, or mystery.*

A plea in abatement of misprision of addition, must shew what his true addition of the same nature is; thus if a tradesman is sued as yeoman, he cannot plead that he is a horner, or of any other mystery, unless he be a gentleman, or of other degree superior to a yeoman.—R. 2 Mod. ca. 51. 2.; [Ld. Raym. 1541.; Str. 816.; Com. 371. [*]contra.]—The plea must say that such was his addition tempore brevis, or before. R. 1 Sal. 6.

6. *Of the replication.*

If a defendant named gentleman plead that he was a merchant tempore brevis, and not a gentleman, it is no estoppel to say, that he bound himself by the name of gentleman; for perhaps he was a gentleman by an office, which is now determined; but if he was not so at the time of the writ, the writ by st. 1 H. 5. is not good. R. 28 H. 6. 2. b.—[The addition as it was tempore brevis, must be given. Supra.]

(F 27.) Outlawry, and attainder.

A defendant cannot plead that himself is attainted or outlawed. R. Co. Ent. 246. b., 248. a.; 2 And. 38., 46.; see 1 Leo. 330., 466. And after outlaing a joint defendant, the plaintiff may continue the proceedings against the other alone. Vide Lut. 35. [Transposed from (E 2.) (E 3.)]