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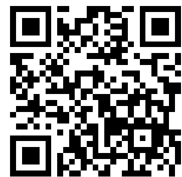

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE SEVERAL

COURTS OF LAW AND EQUITY,

IN ENGLAND,

DURING THE YEAR 1839.

Jurist Edition.

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things are indespensable, viz. a specification of the amount, and an express offer to pay it. (*Ryder* v. *Lord Townsend*, 7 D. & Ry. 119; *Alexander* v. *Brown*, 1 C. & P. 288; and *Evans* v. *Judkins*, 4 Camp. 156.) In all the cases cited on the other side, from *Wade's case* down, the money was produced in such a manner that the precise sum due was instantly separable from the mass. (*Robinson* v. *Cook*, 6 Taunt. 336.)

Lord ABINGER, C. B.—This rule must be discharged. Where a party knows the amount which is really due to him, and his debtor comes with a sum of money acknowledged to exceed that amount, and makes an offer to pay him the amount which he shall say is due, and the creditor makes no objection on the ground of his not having change, it is a good tender in law. If, indeed, the party does not happen to know what is the precise amount due, and tells his debtor so, or says that he will look and see how much it is, and the offer is not subsequently renewed, the tender would be incomplete. In the present case, it is admitted that the party, who acted for the plaintiff, knew the amount at the time the shop-boy went to him to make the tender, who, not knowing how much was due, asked the question, on which the other refused to tell him the sum. He then laid the money on the desk, and said, "Tell me the amount, and I will tender you the exact sum; if you will not do that, take it yourself from the money I produce." This the agent for the plaintiff refuses to do, unless the balance of a shop account, another transaction, was to be fixed at an amount which he mentioned.

ALDERSON, B.—The attorney put his refusal on the ground that he would not name the sum unless the opposite party would allow the set-off to stand at a certain amount; now that was a condition which he had no right to impose. Then, is it not a tender, if a party says, "Tell me the amount due, or, if you will not do that, take what you consider due out of the amount I put down before you?"

GURNEY, B., concurred.

MAULE, B.—This tender is good; for, although a tender must always be made of a specific sum on a specific account, yet that condition is complied with wherever the creditor has it put into his power to take the money, provided the offer is not made coupled with any condition to which he would have a right to object. But when the condition is of such a nature as, "I will pay you the money, provided you put it into your pocket," and such like, there is nothing in this of which he has any right to complain. Now, the present case falls within that principle, for here it was in the power of the plaintiff to take the sum mentioned in the plea as having been tendered, and the offer is not coupled with any objectionable condition.—*Rule discharged.*

WILLIAMS v. WILLIAM FRANCIS BRYANT, the Elder, (sued as WILLIAM BRYANT, the Elder.)

In an action of debt on bond, the plaintiff declared against the defendant as W. F. B. sued as W. B., and on non est factum pleaded, gave in evidence at the trial a bond of W. B. with proof of its having been executed by the defendant in that name, by which he had for some time previously been known:—Held, first, that this proof was no variance from the declaration; and secondly, that, even if it were a defence, it was not one of which the defendant could avail himself under non est factum, since the R. G. H. 4 Will. 4, 11.

Semble, that in the present day the christian name of a party cannot be changed or added to at confirmation.

DEBT on bond. The declaration commenced "T. Williams, the plaintiff in this suit, complains of Wm. Francis Bryant, the elder, sued as Wm.

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Bryant, the elder, the defendant in this suit, for that whereas, &c." It then proceeded to declare on a bond alleged to have been executed by the *defendant*. Plea, non est factum. At the trial before Maule, B., it appeared that the bond had been executed by the defendant as Wm. Bryant; by which name he had been previously known for some time. On this evidence Maule, B., directed a verdict to be entered for the plaintiff for the amount claimed in the declaration, with leave to the defendant to enter a nonsuit, if the court in banc should be of opinion that the plaintiff had not proved his case.

Erle, after referring to *Field* v. *Winlow*, (Cro. Eliz. 897;) *Clark* v. *Istead*, (Lutw. 894,) and *Gould* v. *Barnes*, (3 Taunt. 504.) obtained a rule nisi for that purpose; against which

Crowder and *Jardine*, showed cause.—It is a principle of law that if a man execute a bond by an assumed name, and is afterwards sued upon it by that name, it is not competent for him at the trial to rely on the misnomer. But as this rests altogether on the doctrine of estoppel, if it should appear on the face of the record that a person really bearing one name is sued by another as the obligor of a bond, it will be error, and judgment must be arrested. And this is what effectually distinguishes the present case from those relied on, of *Field* v. *Winlow*, *Clark* v. *Istead*, and *Gould* v. *Barnes*. As also from the others (should they be cited,) of *Hyckman* v. *Shotbolt*, Dyer, 279 b;) *Watkins* v. *Oliver*, (Cro. Jac. 558;) *Maby* v. *Shepherd*, (Cro. Jac. 640;) and *Evans* v. *King*, (Willes, 554,) in all of which it appeared on the record that the defendants had executed instruments in names to which they were not entitled. The reason of the rule is, that in all bonds and deeds the law requires the names of the parties to appear on the face of the instrument in order to operate as designatio personarum, and to prevent uncertainty as to the parties meant to be bound thereby. But it is established by a series of authorities that the essential part of the description of a person is his christian name, not his surname, for a man cannot have *two different* christian names. (3 Hen. 6, 25, pl. 6; 33 H. 6, 19 b; Fitzh. Ab. Graunt, 23, citing M. 9 Ed. 4, 43; 2 Rol. Abr. 21, Faits, B. 3; Co. Litt. 3 a.; Perkins, P. B., Graunts, pl. 17: *Displyn* v. *Sprat*, Cro. Eliz. 57; *Humble* v. *Glover*, Cro. Eliz. 328; *Button* v. *Wrightman*, Poph. 56; *R.* v. *Bishop of Chester*, 12 Mod. 185: 1 Ld. Raym. 292; Bac. Abr. Misnomer, B. and Grants C.; Com. Dig. Fait, E. 3; Gilb. C. P. 174; Vin. Abr. Misnom. C. 12.) Then, as in the present case, it is not disputed that the defendant was rightly named William, the second name of Francis may either be an additional name taken at confirmation, or a surname lawfully assumed since the execution of the bond. A name may be taken at confirmation. (*Sir F. Gawdy's case*, Co. Litt. 3 a.; Bac. Abr. Misnomer, B.; 2 Ro. Abr. 135; *Evans* v. *King*, Willes, 554.) [*Parke*, B.—That could only be done in Roman Catholic times. In the Reformed Church, the bishop, it is true, lays hands on the person to be confirmed, but does not give him any additional name.] Then, as there is nothing here to show whether Francis be a christian or surname, the latter ought to be intended, for the law will rather presume in favor of a deed, than facts tending to vitiate it. But, at all events, even supposing this to be a misnomer, it is no defence under non est factum, which, since the R. G. Hil. 4 Will, 4, II. only puts in issue the execution of the instrument.

Erle and *Ball*, contra.—It may be true that a man cannot, in reality, have two christian names, but then it is a fixed principle in law, that, if a party execute a deed by any name, he will be estopped in an action on the instrument from disputing that it is his true one. (*Hyckman* v. *Shotbolt*, Dyer, 279 b; *Panton* v. *Chowles*, Moore, 897; *Watkins* v. *Oliver*, Cro. Jac. 558; *Maby* v. *Shepherd*, Cro. Jac. 640; *Linch* v. *Hook*, 6 Mod. 255; *Evans* v. *King*,

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Willes, 554; *Gould* v. *Barnes*, 3 Taunt. 504; *Reeves* v. *Slater*, 7 B. & C. 486; 1 M. & Ry. 265.) This also appears from the cases of Quakers and Jews, who, recognising no baptism, can have no christian names, but are liable to be sued by the names in which deeds have been executed by them. This defendant, therefore, ought to have been declared against by the name which he would have been estopped from disputing, viz. that of Wm. Bryant. Then, as to the new rules: by the plea of non est factum, was meant to be put in issue, the *execution* of the instrument *by the person charged in the declaration;* so the execution by W. B. is no proof of an action brought against W. F. B. Cases where a bond is sought to be vitiated by some informality, come within the new rules; but not cases like the present, where the plaintiff's proof is deficient in an essential part, viz. the identity of the party sued. As to the suggestion of Francis being a surname, it ought to have been so stated at the trial, as whether it be so or not is a question for the jury, and evidence might have been given to rebut the supposition. Besides, if it were assumed since the execution of the bond a suggestion to that effect ought to have been entered on record. *Cur. adv. vult.*

In the sittings after term the judgment of the court was delivered by

PARKE, B.—We think that the rule in this case ought to be discharged. Several authorities were cited on the part of the defendant; *Gould* v. *Barnes*, (3 Taunt. 504,) and many others; from which it appears to be a settled point, that if a declaration against a defendant who has but one christian name, Joseph, for instance, state that he executed a bond by another name, suppose that of Thomas, and there be no averment to explain this inconsistency, the declaration will be bad either on demurrer or in arrest of judgment; and the reason is, that, in all bonds, deeds, and other instruments, the effect of which rests on the instrument itself, and does not derive its efficacy from livery or any other matter in pais, there must be on the face of the instrument a sufficient designatio personarum. Besides which, many authorities were cited by Mr. Jardine (several of which are to be found in Sheppard's Touchstone, 233–4,) one of which in particular is the case of *Evans* v. *King*, (Willes, 554,) which show that a man cannot have two different christian names; nor indeed can he, properly speaking; but still at the present day a party may be sued by a name which is not his own; for although there is this case in Vin. Abr. "Misnomer," c. 12, 7 W. 3, "Defendant pleaded that he was baptized by the name of Micha not Michael, plaintiff replies that he is known as well by the name of Michael as of Micha. Demurrer, because he ought to have traversed that he was *baptized*, and not that he was known by one name and the other, for a man cannot have two christian names; and judgment was given for the defendant;" still, if a party be sued by any improper name, the proceedings may go on, and no misnomer is now pleadable in abatement. But we do not rest only on the modern practice, for this doctrine is in accordance with the most ancient authorities. Bracton, 188 b, says "Circa personam vero contingit errare dupliciter, quandoque ex imperitiâ vel negligentiâ impetrantis, quandoque ex dolo adversarii. Ex imperitiâ vero impetrantis, ut si quis nominaverit Petrum ubi nominasse debuit Rogerum, et propter talem errorum cadit breve multis rationibus. Item si quis binominis fuerit, sive in nomine proprio, sive in cognomine, illud nomen tenendum erit quo solet frequentius appelari: quia ideo imposita sunt ut demonstrant voluntatem dicentis, et utimur notis in vocis ministerio. Idem est si in prænomine, agnomine, vel cognomine." In Com. Dig. "Fait," E. 3, it is laid down that "if a man be baptized by one name and known by another, a grant by the name by which he is known shall be good." And the same is stated by Rolle, in the 2d volume of his Abridgment, p. 43, tit. "Graunts," B., who refers to 46 Ed. 3, fol. 22, where the doctrine receives some recognition

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from one of the judges.* And if a party may be sued by a name to which he is not really entitled, why should not that name be good in a bond? It does not therefore follow that if in the case of *Gould* v. *Barnes* it had been averred on the face of the declaration that the party was sued by a different name, that the declaration would have been bad with such an averment. There is no authority for saying so. Still less does it follow that where a man has two names, and is declared against as here, that, under the plea of non est factum, where the difference of name does not appear on the record, and evidence is given of his being known by that name, no case has been cited nor do we know of any to establish, that the instrument will be void. In the case of *Hyckman* v. *Shotbolt*, (Dyer, 279 b,) the name of the obligor was written in the bond John instead of William, through mistake, as it was said: but it was signed with the name of William. In the absence therefore of authority, and relying on the law of misnomer in actions as it is now settled, we think that the bond is not void whether Francis be the first or christian name, or a family name.

The Court wish to add, that, even if the objection were valid, it could not be available under the plea of non est factum since the new rules.—*Rule discharged.*

EASTER TERM, 1839.

LEACH *v.* SIMPSON and ROCK.

The rule that the written deposition, taken under 7 Geo. 4, c. 54, s. 3, is the best evidence of what has been stated by a witness before a magistrate, on a charge of misdemeanor, is not limited to the individual case, with the view to which the evidence was taken down, but holds in all subsequent proceedings, civil as well as criminal; and it is not requisite for this purpose that the deposition be signed by the witness.

TRESPASS for assaulting the plaintiff, and forcing him out of a certain theatre, carrying him to a watchhouse, and thence to a common gaol, and there detaining him during the night. Plea, by both defendants, not guilty, in addition to which, the defendant, Simpson, pleaded a long plea in justification, to the effect that he, Simpson, was acting manager of the theatre in question, at which the plaintiff, on the evening when the alleged assault, &c., took place, was engaged to perform in a certain piece about to be exhibited; that the plaintiff unlawfully went first into the boxes, which were set apart for visitors, and thence across the pit and benches, and got upon the stage, conducting himself improperly, and without the consent of Simpson addressing the audience, exciting them to riot and breach of the peace; and that a portion of the audience, excited by such conduct on the part of the plaintiff, proceeded to make a great uproar, and to act in violation of the peace;

* The following is the case alluded to, 46 Ed. 3, fol. 22, pl. 2;—"Præcipe quod reddat against one Mary. *Persay* said, that the party bringing this writ had released and confirmed to this Mary and her first husband, by the name of Mariot, his wife, and to the heirs of their two bodies begotten, all the right, &c. And that the same female who was christened Mary was always in her youth called Mariot or Marion, according to the custom of the country, and prayed judgment, &c. *Hastings.*—You see that our writ is brought against Mary, and he pleads nothing against us, and the deed he puts forward, which was made to Mariot, cannot be understood as applying to Mary; and prays judgment, &c. * * * *Persay.*—A confirmation made to such a one by the Christian name of W. and his wife, without naming her, is good to the wife during her life. *Wich.*—If you make a release by the name of R. and you are known by that name, although you were baptized by the name of John, it would be a hard thing if the release were to be void, for if a man be indicted and arraigned by the name of Robert, although he allege that his name is William, still inquest shall be made was he the person meant." * * *

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