REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT.

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CONTAINING

The Cases in the Court of Common Pleas, in Easter, Trinity, and Michaelmas Terms and Vacations, 1848.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS.
1850.

COMMON BENCH REPORTS.

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IN

THE COURT OF COMMON PLEAS,

IN

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WITH TABLES OF THE NAMES OF CASES ARGUED AND CITED,
AND OF THE PRINCIPAL MATTERS.

BY

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VOL. VI.

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1850.

JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir THOMAS WILDE, Knt., Ld. Ch. J.

The Hon. Sir THOMAS COLTMAN, Knt.

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.

Sir JOHN JERVIS, Knt., Attorney-General.

Sir JOHN ROMILLY, Knt., Solicitor-General.

*577] *LOMAX *v.* LANDELLS. *Nov.* 17.

To a count by an endorsee against the acceptor of a bill of exchange, the defendant pleaded, that the drawer's endorsement was in blank; that, when the bill became payable, and thence until the making of the agreement after-mentioned, the bill was lawfully held by one I. Shakspeare Williams for value; that, whilst I. Shakspeare Williams was the lawful holder thereof, it was agreed between the defendant and the said I. Shakspeare Williams, that the defendant should pay him 10*l.*, part of the amount of the bill, in cash, and should deliver him his the defendant's promissory note for 15*l.* 15*s.*, at three months' date, for the residue; that, afterwards, and whilst the said I. Shakspeare Williams was the lawful holder, and after the bill became due, and before the plaintiff became possessed of it, or had any title in respect of it, the defendant, in pursuance of the agreement, paid the 10*l.* to I. Shakspeare Williams, and made and delivered to him a note for 15*l.* 15*s.*, and paid the same when due; that the bill was overdue when the plaintiff first took and received it, and before the plaintiff had any title in or to the same; and that the defendant had not, nor had he at any time had knowledge of the first or christian name of the said I. Shakspeare Williams otherwise or to a greater extent *than as set forth by the said initial letter*, nor had the defendant been able to obtain knowledge of the said first name otherwise or to a greater extent than as aforesaid, although he had made due and proper inquiries in that behalf:—

Held, that the plea sufficiently alleged that Williams had a legal interest in the bill, and that the bill was paid, when due, to the lawful holder:

Held also,—on special demurrer,—that the christian name of Williams was sufficiently alleged.

ASSUMPSIT. The first count of the declaration was upon a bill of exchange drawn by one Hind upon, and accepted by, the defendant, and endorsed by Hind to the plaintiff.

Plea, to the first count—that the endorsement by Hind was in blank, and that, when the bill became payable, and thence until the making of the agreement thereinafter mentioned, the said bill was lawfully held by one I. Shakspeare Williams, for value; that, whilst the said I. Shakspeare Williams was the lawful holder thereof, it was agreed by and between the defendant and the said I. Shakspeare Williams, that the de-
*578] fendant should pay to the said I. Shakspeare Williams part of *the amount of the said bill, to wit, 10*l.* in cash, and that the defendant should then make and deliver to the said I. Shakspeare Williams his, the defendant's, promissory note, payable to the order of the said I. Shakspeare Williams, for the sum of 15*l.* 15*s.*, payable at three months after the date thereof, on account of the residue of the said bill, interest, charges, and claims whatsoever in respect of the said bill; that afterwards, and whilst the said I. Shakspeare Williams was the lawful holder, and after the bill became due, and before the plaintiff became possessed thereof, or had any title in respect of the bill, or to any part of the amount thereof, in pursuance of the agreement, the defendant paid the said I. Shakspeare Williams the sum of 10*l.*, and made and delivered to him the said note for 15*l.* 15*s.*, and paid the same when it became due; that the said bill was overdue when the plaintiff first took and received the same, and before the plaintiff had any title in or to the said bill, or any part of the amount thereof; that the defendant had not, nor had he at any time had, knowledge of the first or christian name of the said I. Shakspeare Williams, otherwise or to a greater extent than as set forth

by the said *initial letter*, nor had the defendant been able to obtain knowledge of the said first name, otherwise or to a greater extent than as aforesaid, although he had made due and proper inquiries in that behalf,—verification.

Special demurrer, assigning for causes, amongst others,—that the plea was an argumentative and insufficient plea of payment,—that no sufficient excuse was stated for the omission of the first or christian name of the person designated as I. Shakspeare Williams,—and that the title of I. Shakspeare Williams to the said bill was not shown with sufficient certainty.

Joinder in demurrer.

Hawkins (with whom was *Bernard*), in support of *the demurrer. 1. In Stephen on Pleading,(a) it is laid down broadly, that [*579 the christian names of all persons, whether parties to the suit or not, should be stated in full in pleading, or the omission excused: unless, therefore, the averment of excuse at the end of this plea is sufficient, the plea is bad on special demurrer. In *Appelmans* v. *Blanche*, 14 M. & W. 154, the *omission* of the christian name of a person mentioned in pleading, was, in the absence of an averment of excuse for such omission, held fatal. "If," said PARKE, B., "you had declared upon it as a written engagement, and had described the party as 'a certain person mentioned in the said writing as —— Marchand,' it might have been sufficient: but, as it is, the declaration is defective, unless you can in every case leave out the christian names of the persons mentioned in the pleading. There is a special provision in the 3 & 4 W. 4, c. 42, as to bills of exchange, but that applies only to the names of parties to the suit." A *defective statement* of a christian name is equally fatal. Thus, in *Levy* v. *Webb*, 15 Law Journ., N. S., Q. B., 407, a declaration on a bill of exchange, by endorsee against acceptor, averred that one J. C. Pawle made his bill of exchange, which the defendant accepted, and that J. C. Pawle endorsed it to the plaintiff; and it was held ill, on special demurrer. So, in *Gatty* v. *Field*, Ib. 408, to a count upon an account stated, the defendant pleaded, that, a horse-race being about to be run, an illegal lottery was set up, upon the terms that the adventurers therein should consist of seventy members, who should pay 15*s.* each; that Mr. R. should be treasurer, and Mr. S. the secretary; that *the names of the horses should be put on separate cards, in one box, [*580 and the names of the adventurers, on separate cards, in another box; that two disinterested persons should draw these cards by chance, one from each box, alternately; and that the person whose name was drawn next after the name of the winning horse, should be paid, out of the subscriptions, 24*l.*; that the plaintiff, the defendants, and others became

(a) 4th edit. 331, 5th edit. 338; citing *Buckley* v. *Rice Thomas*, Plowd. 128 a, and *Rowe* v. *Roach*, 1 M. & S. 304; which cases merely show that it is not necessary to state the number (Plowd.) or the names (1 M. & S.) of persons whose number or names are unknown.

adventurers, and paid the same sum each to Mr. S. and the defendants; and that the plaintiff became the winner, &c.: and it was held, on special demurrer, that the plea was defective, for not stating the christian names of the persons therein mentioned,—no reason being assigned for the omission. Lord DENMAN, in delivering the considered judgment of the court in these two cases, said: "The question in *Levy* v. *Webb*, and the remaining question in *Gatty* v. *Field*, turned on the propriety of inserting, in *Levy* v. *Webb*, the initial letters of the name of a third person, and, in *Gatty* v. *Field*, the prefix of 'Mr.,' instead of a christian name. We think, that, where that omission occurs, not in a description of some instrument in writing, but in a general statement of some transaction between the parties, which is the foundation of the action, this is a valid objection upon special demurrer. We must presume that every person has a christian name, and it ought, therefore, to have been inserted, unless some sufficient reason is assigned for the omission." In *Esdaile* v. *Maclean*, 15 M. & W. 277, in an action by an endorsee against the drawer of a bill of exchange, the bill was stated to have been drawn upon "one W. Watson," and the count was held bad on special demurrer; PARKE, B., observing,—"You cannot depart from the rule of the common law, without showing that such is the designation of the party in the bill; otherwise, you may, in every case, describe a party *581] *by his initials. You have no right under the statute to designate a party by his initials, unless he is so designated in the instrument; then you ought to show that he was so designated." In *Turner* v. *Fitt*, 3 Man. Gr. & S. 701, this court intimated a similar opinion, and refused to set aside a demurrer on that ground, as frivolous. And in *Nash* v. *Calder*, 5 Man. Gr. & S. 177, the declaration described the defendant as "William Henry W. Calder;" and, upon a motion to set aside, as frivolous, a demurrer upon that ground, MAULE, J., said, "The letter 'W.' certainly cannot be a name of baptism. This is not a misnomer, but an incorrect description of the party. I should incline to say that the declaration, which alleges no excuse for so describing the defendant, is bad, and would recommend the plaintiff to amend on payment of costs. The demurrer clearly is not frivolous." Here, the letter I. certainly is not the whole of the party's Christian name: at least two letters (*a*) are requisite to the construction of a name. [MAULE, J. A vowel, which is in itself a word, and may be pronounced separately, may be a name; though a consonant, which is incapable of being pronounced without the addition of a vowel, cannot.] That cannot be so here, for, it is distinctly averred that "I." is the initial only of the party's christian name.

2. The plea is further defective, in omitting to show when the alleged

(*a*) The English long I is in reality a diphthong; and its sound is represented in other languages by two letters.

endorsement in blank was made, or that the bill was delivered by the drawer to I. Shakspeare Williams. It merely states, that when the bill became payable, and thence until the making of the agreement in the plea mentioned, the bill was lawfully held by Williams. [MAULE, J. The "holder" means, the person legally entitled to hold the bill. A party is held to more strictness in stating his own title than that *of a third person. The plea sufficiently alleges that Williams [*582 was the lawful holder after endorsement.]

3. The plea is bad in substance. It professes to answer the whole of the cause of action in the first count, whereas, in truth, it is an answer only as to 10*l.* [MAULE, J. It alleges an agreement between the parties, that 10*l.* should be paid on account of the bill, and a promissory note for 15*l.* 15*s.* given for the residue; and that the money was paid and the note given.] It should have been stated that the money was paid and received, and the note given and accepted, in satisfaction of the bill *pro tanto.* [MAULE, J. It is stated that what was done, was done in satisfaction of the bill.] There is no answer as to the damages.

Corrie, contrà, was desired to confine himself to the misnomer,—the court observing, that, as to the rest, the plea was an abundant answer to the demand in the first count. I. is not necessarily an initial letter in this case. A man may be christened I. Mr. Unthank says he knows a person who *was* so christened. [MAULE, J. The only difficulty here arises from the concluding averment in the plea,—the allegation of excuse.] At the most, that is mere surplusage, and cannot vitiate. Where the party pleading has no knowledge, and no means of knowledge, of the complete christian name of a third person, he is not bound to set it out: Stephen on Pleading, 5th edit., 338, suprà 579.

COLTMAN, J.(*a*) The objection in question is one to which we are not very willing to yield: and I think we may also escape from it by assuming, as appears to have been done in other cases, that I. may be this man's christian name.

*MAULE, J. Stephen seems to lay it down that inability to [*583 state the true christian name of a party is a sufficient excuse for its omission. But, however that may be, I think we are at liberty to assume that this person's true christian name is "I. Shakspeare,"(*b*) The averment at the conclusion of the plea, by no means excludes this supposition. There is not necessarily a final letter in this man's christian name, because I. is called an initial. Where one makes a devise to

(*a*) Wilde, C. J., was absent by reason of illness.

(*b*) The plea appears to treat "*Shakspeare*" as part of the *surname.* If it were part of the christian name, it would not be true, as the defendant has alleged in his plea, that he had no knowledge of the christian name of Williams, except so far as it might be gathered from the initials; since he would have possessed full information as to the second portion of the christian name.

his first son, having only one, the person so designated as the *first* son would take, though a second should never come *in esse*.(*a*)

V. WILLIAMS, J., concurred. Judgment for the defendant.(*b*)

Hawkins prayed leave to withdraw his demurrer, and reply; but the court refused to grant it.

(*a*) If A. devised to C. by the description of the *first* son of his marriage with his *late* wife B., few persons would suspect that A. never had any other son. If A. devised to the *first* son of B., and it appeared that two persons answering the name of B. had died before the date of the will, one leaving two sons, the other one, it can hardly be doubted that the elder of the two sons would take.

(*b*) *Quære*, whether, upon the whole, less violence would not have been done to the language of the plea, even by reading "*Ishakspeare*" as one word, than by treating *I.* as an initial-final.

And see *Kinnersley* v. *Knott*, 18 Law Journ. N. S., C. P. 281, post, T. T. 1849, 7 Man. Gr. & S.

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*584] *NASH *v.* BROWN. *Nov.* 17.

Where the precise time of the happening of an event is,—with reference to the purpose for which it is alleged in pleading,—of the essence of that event, the circumstance of its being alleged in pleading under a *videlicet*, does not render it immaterial.

In debt, the defendant pleaded, that, after the accruing of the causes of action, and before the commencement of the suit, *to wit*, on the 22d of November, 1843, a petition for the protection of the defendant from process, was duly, and according to the statute in such case made, presented by the defendant to the court of bankruptcy; that afterwards, and before the commencement of the suit, *to wit*, on the 29th of January, 1844, a final order for protection and distribution was made in the matter of the said petition, by a commissioner duly authorized in that behalf, and that the causes of action accrued before the date of the filing of the petition.

Special demurrer,—for that the plea did not disclose any sufficient answer to the action, as the final order must be presumed to have been made according to the statutes in force immediately before the commencement of the suit, or at the time of pleading, *viz.* the 5 & 6 Vict. c. 116, as amended by 7 & 8 Vict. c. 96, and a final order under those statutes, only protects the *person* of the defendant from arrest for debts and causes of action accruing before the filing of the petition, and is no bar to an action for the recovery of such debts; that, if the defendant intended to set up as a defence, a final order made after the passing of the 5 & 6 Vict. c. 116 (Nov. 1, 1842), and before the passing of the 7 & 8 Vict. c. 96 (Aug. 9, 1844), the plea should have *distinctly* alleged that the said final order was made after the passing of the former act, and before the passing of the latter act; that the plea was uncertain and ambiguous, and the plaintiff could not take a safe issue thereon, for that the defendant might prove the plea by the production of a final order made after the passing of the 7 & 8 Vict. c. 96, which, for the reasons before mentioned, would be no answer to the action; that it was uncertain on what final order the defendant relied, or under what statute the plea was pleaded; and that, as the *dates* in the plea were all laid under a *videlicet*, the plaintiff could not tell with certainty when the final order was made:—

Held, that the plea was good, and that it showed, with sufficient certainty, that the order was made after the passing of the 5 & 6 Vict. c. 116, and before the passing of the 7 & 8 Vict. c. 96; and that the allegation of time, being material, must, if traversed, be proved as laid, though laid under a *videlicet*.

DEBT, for goods sold and delivered, money had and received, and upon an account stated.

Plea,—that, after the accruing of the several debts and causes of action in the declaration mentioned, and before the commencement of this suit, *to wit*, on the 22d of November, 1843, a petition for the protection of

*585] *the defendant from process, was duly, and according to the statute in such case made, presented by the defendant to Her

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