HAWORTH *against* SPRAGGS. Friday, May 9th, 1800. The defendant, in a plea in abatement of misnomer, must give his surname as well as his true Christian name, although his true surname be used in the declaration. [5 Taunt. 652.]

The defendant was sued in an action of assumpsit by the name of John Spraggs; to which he pleaded in abatement as follows:—"And he against whom the plaintiff hath exhibited his bill by the name of John Spraggs, in his proper person, comes and pleads that he was baptized by the name of James, to wit, at, &c.; and by the Christian name of James hath always, since his baptism, hitherto been called and known," &c.; traversing in the usual form, that he was ever known by the Christian name of John. The plaintiff demurred; and assigned for special causes that, by the manner of pleading, the said James had, by his said plea, admitted himself to be the person named the defendant in and by the aforesaid bill of the plaintiff; and also that the said James had not begun his said plea in the words following: viz. "And James Spraggs against whom," &c. in the usual and known mode of pleading a plea of misnomer in abatement, &c.

Manley, in support of the demurrer, referred to the cases of *Hixon* v. *Binns* (*a*), and *Roberts* v. *Moon* (*b*), to shew that the Court held a strict hand over dilatory pleas, and would not admit of a departure from the usual form of pleading in these cases. In the latter case, a plea of abatement of misnomer, beginning "And the said Richard, sued by the name of Robert," &c. was holden bad, being an admission that he was the person named defendant by the plaintiff's bill; so here the word he is equivalent to said in that case, and must have the same construction.

Reader, contrà, denied that it had ever been decided that such a plea must be penned in any particular form of words. It was sufficient here that the defendant shewed by his plea **[516]** that his Christian name had been mistaken by the plaintiff, admitting himself to have been properly called by his surname; but

The Court said, that at any rate the plea was defective, in not setting out the surname as well as the Christian name of the defendant. That such a plea must inform the plaintiff what is the true name of the defendant; whereas here, the defendant corrected the plaintiff's mistake as to his Christian name; but neither admitted that he was rightly designated by his surname, nor called himself by any other surname.

Judgment, respondeat ouster.

ALPASS *against* WATKINS. Friday, May 9th, 1800. Under a limitation in a marriage settlement to the husband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife took an estate tail;—and though it was recited in the deed that the husband's father conveyed, in consideration of the marriage, and "for settling and establishing the lands, &c. to the uses thereafter expressed," and subsequent uses were added in the deed, this Court would only take notice of the legal estate;—and the husband and wife having levied a fine, and having agreed to sell the estate to a purchaser, from whom they had received part of the purchase-money, this Court would not permit the purchaser to recover back the deposit money in an action for money had and received. [1 Mar. 258.]

This was an action for money had and received by the defendant to the use of the plaintiff, brought to receive back 50l. being the deposit money paid by the plaintiff to the defendant, in part of 925l. the purchase money contracted for between them of a messuage called Perry Grove, and certain lands situate in the parish of Newland, in the county of Gloucester. On the trial at the sittings after last Hilary term, in London, the following case was reserved for the opinion of this Court:—

The estate in question was put up to sale by auction on the 9th of June, 1797; the plaintiff was declared the purchaser in fee thereof at 925l., and paid a deposit of 50l. to the defendant on account of such purchase. The defendant's title to the premisses sold is as follows:—John Watkins the Elder, father of the defendant, being seised in fee of the said premisses, by indentures of lease and release, on the 3d and 4th of June 1754 (being a settlement made on the marriage of his son John Watkins,

(*a*) Ante, 3 vol. 185. (*b*) Ante, 5 vol. 487.

the defendant, with Susannah Stevens) in consideration of the marriage, and of 200l. paid to John Watkins, the defendant, as his intended wife's marriage portion, and for a competent settlement and other provision, to be made for the said Susannah, in case the marriage should take effect, and she should survive her intended husband; and also, in consideration of the great and natural love and affection which John Watkins the Elder had unto J. Watkins the Younger, his son, and for his advancement and better preferment in life, **[517]** and for the settling, conveying, establishing, and assuring of all and singular the messuages or tenements, lands and hereditaments thereinafter more particularly mentioned and described, and thereby intended to be settled to the several uses, intents, and purposes thereinafter expressed and declared, conveyed the premisses above mentioned to the following uses: to the use of the said J. Watkins the Elder for life, without impeachment of waste; remainder to the use of Mary the then wife of said J. Watkins the Elder for life; remainder to the use of the said John Watkins the Younger (the defendant) for life, without impeachment of waste; remainder to the use of the said Susannah Stephens the intended wife of J. Watkins, (the defendant) for her life, for her jointure and in satisfaction of dower; and from and after the several deceases of J. Watkins the defendant, and of Susannah his intended wife, and the survivor of them, then to the use and behoof of the heirs of the body of the said Susannah Stephens by him the said John Watkins the Younger lawfully to be begotten, and of their heirs and assigns for ever; and for default of such issue, to the use of the right heirs of J. Watkins the Younger (the defendant) for ever. The marriage took effect; and there are issue of the marriage now living, two sons and several daughters. J. Watkins the Elder, and Mary his wife being both dead, John Watkins the Younger (the defendant) and Susannah his wife in Easter term 1797, levied a fine sur conuzance de droit come ceo, &c. with proclamations of the said settled premisses. By an indenture dated the 11th of April 1797, duly executed by J. Watkins the defendant, and Susannah his wife, the uses of such fine were declared to be to the use of such person or persons for such estate and estates as the said J. Watkins the defendant, and Susannah his wife, should at any time during their joint lives, by any deed or writing by them executed in the presence of two or more witnesses, direct or appoint; and in default thereof to the use of J. Watkins the defendant, and Susannah his wife, during their lives and the life of the survivor of them; remainder to John Watkins the defendant in fee. The question for the opinion of the Court is, whether the defendant J. Watkins and Susannah his wife, or either of them, are seised of such an estate in the said premisses, or have such power of appointment as will enable them to convey the same to the plaintiff in fee? If they or either of them are so seized, or have such power, then a verdict is to be entered for the defendant; if otherwise, a verdict for 50l. is to be entered for the plaintiff.

**[518]** Holroyd for the plaintiff. Although it must be admitted that S. Stephens took a legal estate-tail under the marriage-settlement in 1754, yet as it appears by a recital in that deed, that it was made "for the settling, conveying, and assuring of the said premisses to the several uses thereinafter expressed," a Court of Equity would give relief to the parties claiming under the subsequent limitations. *Doran* v. *Ross*, 3 Bro. Ch. Cas. 27, 8. Therefore though the defendant could convey a legal title in the premisses in question, yet, as that legal title would be moulded in equity to answer all the purposes of the marriage-settlement, and as the plaintiff would take this title with notice of that defect, the defendant is not in a situation to complete what he engaged to do, namely, to make a perfect title to the plaintiff; and as the action for money had and received is founded on equitable principles, this Court should take into their consideration the equitable part of the case.

Lord Kenyon, Ch.J. (stopping Walton, who was to have argued for the defendant). Sitting in a Court of Law, we cannot take notice of an equitable title; and that the defendant could make a good legal title cannot be doubted. The plaintiff's counsel seems to have admitted that; and if any authority were wanting to support that position, I would refer to the case of *Morris* v. *Ward and Others;* and as my note of that case, which I had from Mr. Filmer, is more full than any of the printed accounts (*a*) of it, I will read it: it is as follows:—"Thomas Wardell, seised in fee, had issue a daughter named Lucretia; and by his will, 20th of February 1682, devised thus:—I give and bequeath unto my daughter Lucretia, wife of G. Andrews, all my plantation,

(*a*) Vide Fearn's Cont. Rem. 247, 4th ed.; 2 Atk. 249; and 2 Burr. 1102.

together with the negroes, &c. charged, &c. during the natural life of my said daughter. Item, I bequeath to the heirs of the body of my said daughter Lucretia, begotten or to be begotten, and to his or her heirs for ever, after my said daughter's decease, all my before-named plantation, &c.; but for want of such heirs of the body of my said daughter, I also give and bequeath the aforesaid premisses after the decease of my said daughter, to my own next heirs, and their heirs for ever." The reasons of the counsel in the printed case:—It is a general rule of law, that when an estate is limited to one for life, a limitation afterwards to the heirs of the body of that same person creates an estate-tail; and though this be in the case of a will, there is no reason to depart from that rule; for if Lucretia were **[519]** construed to have an estate for life only, then the remainder "to the heirs of her body" would be words of purchase; and then though she had had several sons, yet the eldest only would have been heir; and the younger sons would never have taken under that limitation, though it was clearly the testator's intention that all her sons should take by his using the word "heirs" in the plural number; and the subsequent clause, "for want of such heirs of the body of my said daughter, to my own next heirs and their heirs for ever," is a further explanation of his meaning, that his daughter should take an estate-tail, with a remainder to his own right heirs.—Signed, N. Fazakerly; D. Ryder.—This was heard before the Privy Council, 18th March 1730, when it was ruled that "Lucretia took an estate-tail. The Chief Justices Raymond and Eyre assisted at the decision. *Richard Morris Appellant* v. *J. Ward and Others Respondents, from Barbadoes.*—Judgment affirmed."—Though the above were only the reasons of the counsel in that case, they contain as much good sense and sound law as if they had had the authority of all the Judges of England; and that was a stronger case than the present: for there the question arose on a will; and in order to effectuate the intention of a devisor, a greater latitude of construction is allowed by the Courts than in the construction of deeds; but this is the case of a deed; a deed to uses, which must be construed like a common law-conveyance: and there is no case, from *Shelley's case* down to the present time, in which it has not been holden that words in a deed, similar to those in this deed, did not create an estate-tail. If we were to determine otherwise, we should entrench on established rules of law, and we should defeat the intention of the parties in this and almost every other case. Cross remainders could not be raised. The consequences of a contrary decision were well explained by Lord Ch. J. Wilmot in the case of *Roe d. Dodson* v. *Grew* (*a*)[1]. I am therefore clearly of opinion that, sitting in a Court of Law, we cannot do otherwise than determine that as S. Stephens took an estate-tail under this settlement, and as she and her husband have levied a fine, the defendant may make a good legal title to the plaintiff, and consequently is not liable to repay the deposit-money for which this action is brought.

Per Curiam. Postea to the defendant.

**[520]** CASS AND ANOTHER *against* LEVY. Monday, May 12th, 1800. In an affidavit to hold to bail made by the plaintiff's clerk (the plaintiff himself residing in England) it is not sufficient to negative a tender of the debt in bank notes "to the knowledge and belief of the clerk." [2 B. & P. 329. 1 East, 238. 2 B. & P. 389. 2 East, 24.]

The defendant having been holden to bail on an affidavit made by a clerk of the plaintiffs', stating that "the defendant was indebted to the plaintiff in 325l. and upwards for goods sold and delivered by the plaintiffs to the defendant, and that no offer had been made to the knowledge or belief of the deponent to pay the plaintiffs, or either of them, the said sum of money, or any part thereof in notes of the Governor and Company of the Bank of England," &c.

Wigley moved on a former day in this term for a rule to shew cause why common bail should not be accepted.

Marryat, who now shewed cause against the rule, relied on the case of *Creswell* v. *Lovell* (*a*)[2]; where it was ruled that the defendant was properly holden to bail on an affidavit made by a co-assignee, who positively negatived any tender of the debt to himself in bank-notes or to the other parties interested, to the best of his knowledge and belief; but

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(*a*)[1] 2 Wils. 322. (*a*)[2] Ante, 418.