REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

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BURWELL, *againſt* COURT.

THIS was an appeal, from a judgment of the Diſtrict Court of Williamſburg, rendered upon a bond for the forthcoming of property taken in execution.

Mr. RONOLD for the appellant objected to the form of the bond, the condition of which is, "that the property ſhall be produced at the day of ſale," but appoints no *place*.

By the court—The act of Aſſembly requires that the defendant ſhould give bond and ſecurity to have the property forthcoming at the day of ſale, but is ſilent as to the *place*.—The omiſſion therefore cannot vitiate the bond.

Judgment affirmed.

SMITH & MORETON, *againſt* WALLACE.

THIS was an appeal from a decree of the High Court of Chancery. The caſe was as follows: The appellants inſtituted a ſuit in the General Court againſt Benjamin and William Piper, the latter of whom being arreſted by the appellee (the ſheriff) was diſcharged upon the parol agreement of Jett to become bail for his appearance.

The clerk being of opinion that this undertaking was not ſufficient, and a bail piece being offered, and rejected by him, becauſe it did not mention the name of the defendant on whom the writ had *not* been ſerved, a common order was entered at rules againſt the defendant and ſheriff. On the 8th day of the ſucceeding term (at which time the office judgments were to be ſet aſide) the bail peice being again objected to by the clerk, for the reaſon before mentioned, it was ſhewn to the plaintiff's counſel, who thinking it ſufficient, ſaid that he ſhould make no objection to it. It was then delivered to the clerk, who was directed by the counſel to file the ſame; but he, not knowing what had paſſed at the bar, entered the plea of payment *for the ſheriff*, againſt whom judgment was afterwards obtained in the Diſtrict Court. From this the ſheriff appealed, pending which, the real defendant offered

fered to deliver himſelf up to the plaintiff's attorney, in exoneration of the ſheriff, but was refuſed. The gentleman who appeared as counſel for the plaintiffs in the General Court, being examined as a witneſs in this cauſe, depoſed, that when he declared he ſhould not object to the bail piece, he only meant that in caſe a motion were made by the defendant's counſel to receive the bail piece, and to be permitted to ſet aſide the office judgment, he ſhould not oppoſe it; but that he ſtill expected the ſanction of the court was to be obtained, as was the practice where an objection was made to the bail piece.

To be relieved againſt this judgment, the ſheriff filed his bill in the High Court of Chancery, and a perpetual injunction was decreed, from which decree an appeal was prayed.

RONOLD for the appellants. I muſt admit that the caſe of the ſheriff is a hard one, and cannot fail to excite compaſſion. It is to be regretted that he can be relieved only by ſhifting the burthen from himſelf, to another, who on no principle whatever ought to bear it.

Let it be ſuppoſed, that the appellants and the appellee are equally innocent; equally clear of any charge of negligence, or improper conduct. Yet their relative ſituations in this court are widely different. The former, has the law in his favor, and cannot loſe the advantage it gives him, unleſs it be oppoſed by ſuperior equity on the part of the latter. It cannot be pretended that this is the caſe. But the truth is, that the appellee has not equal equity with the appellants, becauſe he has been guilty of an unwarrantable negligence, which has operated to the prejudice of the party againſt whom he now ſeeks relief.

By omitting in the firſt inſtance to take *a bail bond*, he deprived the plaintiff at law of the opportunity of excepting to the ſpecial bail. For unleſs appearance bail be given, ſpecial bail cannot be demanded. But admit that the bail piece was ſufficient, and ſo conſidered by the plaintiff's counſel, it was the duty of the ſheriff, againſt whom the judgment was entered at the rules, to ſee that the bail piece was filed, and a proper plea entered. He could relieve himſelf by no other means. He was legally, as well as equitably, bound to ſubſtitute ſome other ſecurity for the debt, before he could be diſcharged.

Tho' he ſhould be permitted to ſhelter himſelf under the plea of ignorance or ſurprize, on the day the miſtake (as it is pretended) happened, yet the orders of the court being extended, and read the ſucceeding day, gave him abundant opportunity to correct it. His failing to do ſo ſubjects him as leaſt to the charge

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of negligence, againſt which equity can never relieve, and for which a third perſon ought not to ſuffer. This negligence was calculated to impreſs the plaintiff's counſel with a belief, that the bail piece was withdrawn, and conſequently prevented him from objecting to the *ſufficiency of the bail*, which he was not precluded from doing by his agreeing not to object to the form of the bail piece.

Between perſons ſtanding in this ſituation, equity ought not to interfere.

MARSHALL & CAMPBELL for the appellee. If accident or ſurpriſe can ever furniſh a ground for the relief of a Court of Equity, the pretenſions of the appellee in this caſe muſt be well founded. But if Mr. Ronold be correct, it is impoſſible that accident, unmingled with fraud, can ever be relieved againſt; for in all ſuch caſes, both parties are, or may be equally innocent. If a bond be loſt, or deſtroyed, both parties are equally innocent, and yet a Court of Equity will relieve. No blame is imputed to the appellant, and none can with propriety be charged upon the appellee. Yet an accident has happened, which ſubjects the latter to unmerited injury at law.

The appellee did every thing which he was bound to do. When the bail piece was objected to by the clerk, his attorney had either to appeal to the court, or to adjuſt the difference with the adverſe attorney—he attempted the latter, and ſucceeded—the former became of courſe unneceſſary. The clerk was then directed to file the bail piece. Ignorant of the agreement of the counſel, he by miſtake enters a plea for the ſheriff. The blunder was in the officer of the court, not in the party, and therefore it ſhould not injure him. But it is contended that a real injury to the plaintiffs might have reſulted from this miſtake: ſuppoſe it might, yet none ſuch is proved; a *real* injury ſuſtained by one party, is not to be ſanctioned, becauſe *it is poſſible* that the other might alſo have been injured. But there is in truth no ground, even for the conjecture of the counſel. The ſheriff is not bound to take appearance bail. He may himſelf become ſpecial bail, or the defendant may give other ſpecial bail. Suppoſe the bail piece had been filed, would the appellant have been in a better ſituation than he now is? He could not have charged the bail, until after a *non eſt inventus* had been returned upon a *ca. ſa.* againſt the principal; and it appears that the principal offered to ſurrender himſelf.

LYONS

LYONS J.—The court are of opinion that the bail piece was sufficient, and must have been so considered if it had been objected to, at the time it was offered. The clerk therefore mistook the law when he rejected it, and entered a plea for the sheriff. That court might, and most certainly would, have corrected this mistake at any time, if it had been moved to do so. But the party was ill advised when instead of doing this, he applied for a supersedeas to the judgment, since the record furnished a Superior Court with no ground for an interference.

However, we are fully satisfied upon the equity of this case. A more complete surprize can hardly be conceived. It would be strange if an accident so mischievous as this in its effects, were beyond the reach of that court, whose peculiar province it is to grant relief in such cases. The negligence with which the appellee is charged, is fully excused by the agreement of the counsel, and the mistake which followed; and therefore cannot be urged as a ground for denying the relief which has been extended to him.

The decree must be affirmed.

WALTER PETER,

against

SAMUEL COCKE Executor of Henry Cocke.

THIS was an action of debt, brought in the District Court of Williamsburg by the appellant, upon a bond given to him *for and on account of Messrs. Glen and Peter*, merchants in Glasgow. The declaration states the debt as due to the plaintiff without mentioning for whose use.

The defendant without craving oyer, put in the following pleas.

1st Payment—2dly, That the debt was originally due to a British subject, and was acknowledged by the testator to the plaintiff, on account of Glen & Peter, merchants in Glasgow, who were British subjects; and was contracted before the 1st of May 1782, and was not transferred to a citizen of this state, nor to any person capable of maintaining an action in this commonwealth, at any time before the first of May 1775, for a valuable consideration. There are many other pleas, all unimportant