REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

CHAS. H. WYNNE, PRINTER, RICHMOND.

BULLOCK *v.* GOODALL & CLOUGH.

Wednesday, October 11th, 1801.

If the Sheriff neglects to return an execution, at the request of the plaintiff, he is not liable to a fine.

Quære. How far a Court ought to go in imposing a fine upon a Sheriff for not returning an execution?*

Excessive fine is unconstitutional.

Quære. Whether a deposition taken after a cause is decided, but during the same term, can be brought in before the end of the term, and made part of the record?†

Goodall and Clough filed a bill of injunction in the High Court of Chancery against John Bullock, jun., which stated that Goodall, being Sheriff of Hanover, in May, 1792, a writ of *fieri facias* for £497 1s. 11¾d. with interest from 21st December, 1791, issued from the County Court at the suit of Bullock, against the estate of John Bullock the elder; which was delivered to Clough, his deputy, who by virtue thereof took all the effects of the said John Bullock the elder, and that the defendant told the plaintiff that his father had no other property. That the defendant bought the same at three-fourths of the appraised value, and desired the plaintiff not to return the execution till he and the plaintiff should come to a further settlement. That in May, 1795, the defendant moved for and obtained a judgment for £264 8s. 9d. with costs, against the plaintiff Goodall, as a fine for not returning the execution, although the plaintiff offered to prove the circumstances aforesaid, the Court being of opinion that no notice ought to be taken of them in a Court of Law. The bill therefore [45] prays for an injunction.

The answer "admits the execution, and that the defendant purchased the property. Denies that the defendant told the

[* See ch. 134, § 47, p. 542, 1 R. C. ed. 1819.] In *Tomkies'* ex'r. v. *Downman*, 6 Munf. it was held that under that 47th section, only one fine could be imposed for failing to return one execution. The Act of 1821, ch. 34, authorized the Court to repeat the fine at its discretion, (not exceeding 5 *per cent.* a month,) till the execution should be returned. Supp. to R. C. of 1819, p. 271, § 1.

It is not imperative on the Court to fine at all. It may fine, or not, at its discretion. *Fletcher* v. *Chapman*, 2 Leigh, 560. So too, when a Sheriff moves against his deputy, for fines incurred through the deputy's default. *Ibid.*

The debtor cannot, in the creditor's name, make this motion, though he be the party injured. 2 Leigh, 560.

By Code of 1849, p. 251, § 27 and 28, see the forfeitures and fines. The fines expressly given on motion of the party injured, are not to exceed, *altogether*, five *per cent.* a month. § 28.

† Depositions may be read *if returned before the hearing* of the cause; or after an interlocutory decree, if as to a matter not thereby adjudged, and before a final decree. Code of 1849, p. 666, § 30.

plaintiff that his father had no other property on which the execution could at any after time be levied, although he might have told him that *there was no other property just then to be come at.* Denies that he requested the plaintiff to retain the execution; on the contrary, he requested it to be returned, and Clough promised, but failed to do it. Does not conceive the plaintiff's defence better in equity than at law, and prays the judgment of the Court whether there be any equity suggested in the bill which can give jurisdiction to this Court. Does not admit that there is no other property on which the execution can be levied." A witness says, that the defendant told him at the sale, that *the whole of his father's property was sold for his benefit.* Another witness says, that Clough withdrew the execution on the trial of the motion after producing it, and was told by the Court, if he did not return it they would fine him five *per cent.* instead of two and a half; and that he has frequently heard the defendant say he should be obliged to move for a fine for not returning the execution, as he could not get Clough to do it. A third witness says, that he heard the defendant ask Clough if he had r turned the execution, and on being told that he had not, he then said, for *God's sake return it immediately.* A fourth witness says, "that he heard the defendant say, he wished Clough would not return the execution until a settlement took place between them. That on Clough's asking the defendant if there was nothing of his father's estate now to be got with that execution, he answered, not that he knew of: and being asked if he wished the execution to be returned, he answered it was immaterial, and that Clough might do it when convenient, for he never expected to get any thing more from his estate.

[46]

The Court of Chancery, on the 12th of May, 1798, perpetuated the injunction with costs, and Bullock appealed to this Court.

On the 24th of May, 1798, the plaintiff took the deposition of Thomas Moore, who says, that the defendant requested him to tell Clough not to return the execution until he had settled, and that the deponent informed Clough thereof.

On the 26th of May, 1798, the Court of Chancery made an order, purporting that Moore's deposition was that day brought in by the plaintiff's counsel, and on his motion was received by the Court, and ordered to be made part of the record.

CALL for appellant.

The whole case made in the Court of Chancery, was certainly proper for a Court of Law; and, therefore, the plaintiffs

should have defended themselves there, and not resorted to the Court of Equity. The jurisdiction is sufficiently excepted to in the answer; for, if an exception can be collected from the pleadings, it is all that is requisite: And therefore in *Pryor* v. *Adams*, 1 Call, 382, a demurrer was held to be a sufficient exception, although the act of 1787 mentions plea. An analogous principle on the law side, was supported by the Court in *Garlington* v. *Clutton*, 1 Call, 520, where the matter relied on was very informally stated; but, the Court said it was sufficient, if the exception appeared at all; and, as it was apparent that it was relied on, that was enough. Therefore, the bill ought to have been dismissed, upon the ground of the want of jurisdiction.

But, upon the merits, the case is in favor of the appellant. For, there is only one witness to prove that the return was suspended by the consent of the appellant, and the answer in effect denies it. Therefore, without circumstances, the [47] answer must prevail. But, there are no circumstances, and, consequently, the usual rule must take place. Besides, it was the duty of the Sheriff to return the writ, and if he failed to do so, it was at his own peril. Of course, he cannot complain of a judgment which was rendered in consequence of his voluntary delinquency.

DUVAL and WARDEN, contra.

The County Court exercised their discretion improperly: and therefore, the Court of Chancery did right in granting relief; especially, as many facts appeared before that Court which did not appear in the County Court: so that it was a different case in equity from what it was at law. Besides, if it had been the same case, and the evidence was not stated on the record so that a Court of Error could decide on it, this neglect of their attorney ought not to prejudice the plaintiffs; but they ought to have relief in equity. The conduct of the appellant, was unconscientious in proceeding to ask a fine after he had consented that the return should be delayed. But the fine was excessive, and much beyond any proportion to the offence. For the fine is only intended as a compensation for the injury, which the plaintiff in the execution has sustained by being kept out of his money, and the proper measure for that is interest. But here the fine is much greater than any rate of that kind. Besides, in this case, the defendant in the execution was insolvent, and therefore the appellant lost nothing by the delay. The Court of Chancery had jurisdiction. For the bill alleges that the execution was held up with the appellant's

consent, and he is required to answer that charge; which gave jurisdiction, as that fact could not be shewn at law. But be that as it may, the jurisdiction is not properly excepted to; for the answer does not deny it in express words, or in any equivalent terms.

[48] CALL, in reply.

If the fine is severe, it is the law which is to blame; because it is according to the directions of the act, which is a remedial statute; and therefore, to be so construed as to advance the remedy, and suppress the mischief. The fine is not intended as a mere compensation, but as a punishment for the delinquency of the Sheriffs, who could not be controlled by the former laws. The conduct of the Deputy was irreverent to the County Court, in withdrawing the execution after he was warned against it: a circumstance which aggravated the case, and destroys all claim to favor. Added to which, he was several times requested by the appellant to return it. It does not absolutely appear, that old Bullock was insolvent, for it seems there was some expectation of other property. But, if he had been, that circumstance will make no difference; as the law does not discriminate between solvent and insolvent defendants.

PENDLETON, President, delivered the resolution of the Court as follows:

In May, 1792, an execution for the appellant against the estate of his father, was issued from the County Court of Hanover, returnable to August Court following, and was put into the hands of Clough, the Deputy of Goodall the Sheriff, to be executed. He levied on all the estate of the father which could be found, and sold it at auction, when the appellant, the creditor, became the purchaser of the whole, for £206 3s. 6d. for which he endorsed a receipt upon the execution, dated the 22d of May. In May, 1795, Bullock, upon notice to Goodall, obtained a judgment against him in Hanover Court, for a fine of £264 8s. 9d., for Clough's not having returned the execution. In June, Goodall obtained judgment against Clough for the amount of the fine and costs. But Goodall and Clough unite in a bill, exhibited to the High Court of Chancery, praying an injunction to, and relief against Bullock's judgment, on [49] this ground, that the execution was retained, at the request of Bullock, until a settlement should take place between him and Clough.

The answer denies the request, not indeed in the terms of the charge, but probably comprehending a denial of them. Several depositions are taken, fully proving the confession of

Bullock, and the general opinion that Bullock the father, had no estate, on which a further execution could be levied. One witness, Thompson, swears, that in January or February, 1795, he applied to Bullock for his taxes, &c., and for Clough's commissions for serving the execution; Bullock refused to settle with him, and desired him to request Clough to come and settle; and not to return the execution till the settlement. He delivered the message, and a settlement took place, when being asked if the execution must then be returned, Bullock said that it was immaterial, and that it might be done when convenient. A second witness, Moore, confirms the fact of the request not to return the execution until a settlement; but as his deposition was taken after the decree, and the consent of the parties does not appear, the Court doubt the propriety of considering it as evidence; and therefore, it is not regarded. The answer then, stands contradicted by one positive witness only; but the Court consider that witness as supported by the strong circumstances, of Bullock's having rested from 1792, to 1795, without complaint of its not being returned; of having no inducement to require its return, nor the Sheriff any to retain it; since the money levied was paid, and no property for a new execution to act on; and, therefore, the answer is [not] to prevail within the rule of this Court.* The latitude in the sum of the fine, left to the discretion of the Court, is meant to meet the degrees of offence in the officer, and of injury to the creditor. That discretion is not to be exercised arbitrarily, but justly; so as to impose a fine commensurate to the offence and injury; and it was to check these discretionary powers, that our Bill of Rights has declared, that "excessive fines shall not be imposed." † No man can doubt, [50] but that a fine of £264 8s. 9d. imposed on an officer who has committed no fault, for the benefit of a creditor who has sustained no injury, is superlatively excessive, unconstitutional, oppressive, and against conscience. As little can it be doubted, that a Court of Equity may, and ought to give relief, even if the appellant had pleaded to the jurisdiction, or demurred, as was done in the case of *Pryor* v. *Adams*, 1 Call, [382.] The decree affording this relief, is therefore unanimously affirmed.

[* *Pryor* v. *Adams*, 1 Call, 390; *Wilkins* v. *Woodfin*, 5 Munf. 183.]
[† And see *Jones* v. *The Com.* 1 Call, 555.]