REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. Volume II. By William W. Hening and Wil- "liam Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie- "tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

MARCH, 1808.

Monday, March 21.

Turpin, administrator of James, *against* Thomas's Representatives.(1)

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced in *June*, 1803, whereby the bill of the appellant was dismissed.

James was high sheriff of *Cumberland* County, for the years 1773 and 1774, and *Wm. C. Hill* and *Jesse Thomas* were his deputies: they had also been co-deputies under one *Smith* the preceding high sheriff. In *May*, 1773, *Hill* gave a receipt to *Thomas* for *sheriffs'* tickets, according to a list containing the specific items, which was headed, "*Sheriff* of *Cumberland*, JESSE THOMAS *Ticket List*," and subscribed as follows: "Received tickets agreeable to the "above list, which I promise to collect or return according "to law. *Wm. C. Hill*, D. Sheriff," *without saying for whom.*

A Court of equity cannot relieve against a judgment at law merely on the ground that it was *erroneous*, even though the plaintiff at law was not entitled to recover, or not entitled *in that form of action*, and the judgment was obtained by *default.*

To entitle the defendant at law to relief in equity in such cases, there must be some suggestion of *fraud* or *surprise*, or some good reason assigned for the failure, to make a defence at law.

A person, not a *party* to a judgment, is not bound by it, in law or equity, merely on the ground that he was *present*, and cross-examined the witnesses.

(a) 1 *Wash.* 339.

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(1) A previous question in this case was, whether the Court would proceed to a hearing against the *representatives* of *Thomas*, in that *general* character, or whether the representatives should be *specially named.* The cause having abated, by the death of *Thomas*, was revived, by consent, at the last term, in the name of his *representatives generally.*

Judge TUCKER was of opinion, that the Court ought not to proceed till the parties were before it *by name.*

Judge ROANE thought, that as the suit had been revived *by consent* against the representatives of the appellee generally, it might be a surprise upon his counsel *now* to object; and cited the case of *Southal* v. *M'Keand*,(a) in which such a practice seems to have been sanctioned by this Court.

Judge FLEMING concurring in opinion with Judge TUCKER, another cause was called. But Mr. *Hay* having afterwards suggested, that there was a Mr. *Thomas*, who was administrator, the cause was opened, and stood revived in the name of —— *Thomas*, administrator, &c.

It seemed, however, to be the opinion of the Court, that in future no cause should be considered as revived, till some person should be *named* as a party representing the deceased.

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In *July*, 1785, *Thomas* obtained judgment on motion, and without opposition, against *James*, as late high sheriff, for the amount of the above tickets; *James* assigning as a reason for his making no opposition to the motion, that he took it for granted the amount was due from *Hill*, his deputy, and that he should have his remedy over against *him*. Afterwards, in *September*, 1785, *James* moved for judgment against *Hill;* but his motion was overruled, " it " appearing to the Court that the receipt of *Wm. C. Hill*, " on which the judgment was obtained by *Jesse Thomas* " against the said *James*, as late high sheriff, was dis- " charged by the said *Wm. C. Hill.*" At *what time*, or *to whom* the receipt was discharged, the record does not shew.

Thomas having, in the year 1797, renewed his judgment against *James* by a writ of *scire facias*, the latter obtained an injunction from the late Judge of the High Court of Chancery, stating, that *Hill* had paid *Thomas* the amount before the rendition of the original judgment: also alleging in his bill that *Thomas* (though not a party to the motion against *Hill*) was present and cross-examined the witnesses. Of this last circumstance, however, there is no further proof than its being alleged in the bill, and not denied in the answer.

The answer of *Thomas* positively denied the fact of *payment*. It was proved, indeed, that in 1783 and 1784, *Thomas* acknowledged that he and *Hill* had settled all their accounts, except a small store account; but it was insisted in the answer, and established by testimony, that this acknowledgment related only to the accounts between *Hill* and *Thomas* as co-deputies of *Smith*, the immediate predecessor of *James*. It is further proved, that *after* the time when *Thomas* made the above acknowledgment, *Hill* admitted that the *tickets* had not been paid by him, but said that *James* had himself collected, and ought to pay for them.

The injunction having been dissolved, and the bill dismissed on a final hearing, an appeal was taken to this Court.

Randolph, for the appellant, argued that the judgment of *Thomas* against *James* was neither warranted by law nor equity. These tickets were for services rendered by *Thomas* as the deputy of *Smith*, the immediate predecessor of *James*. The act of 1745,(*a*) authorises a sheriff to make distress for fees due *to himself*, or the sheriff of *another County*, which shall be put into his hands to collect. But no law imposed upon a *succeeding* sheriff the duty of collecting fees due to a *preceding deputy-sheriff*. The 13th section of the same act, gave a remedy, by motion, against a sheriff for the *secretary's*, *clerks'*, and *surveyors'* fees; but no law authorised a motion for *sheriffs'* fees till the year 1802.(*b*)

(*a*) Ed. 1769. p. 140. sect. 12.

(*b*) See *Rev. Code*, vol. 2. ch. 17. p. 16.

The judgment of *Thomas* against *James* was by *default*; which is not binding, *as to facts*, either in law or equity. In the subsequent motion of *James* against *Hill*, the Court was *satisfied* that the tickets had been previously paid by *Hill* to *Thomas*; and, although *Thomas* was no party to that motion, yet he was present, and in vain attempted to give aid to *James*. This is expressly alleged in the bill, and not denied in the answer.

The great lapse of time before *Thomas* moved for judgment against *James*, and his delays in attempting to enforce it, are strong arguments against the justice of the demand.

Hay, for the appellees. Whatever error might have been committed by the County Court, in rendering judgment for *Thomas* against *James*, it was a question purely of a *legal* nature, which is no ground for the interference of a Court of equity. If this Court *could* properly have considered the question, it would still have been governed by a well known rule, that he who comes into a Court of equity for relief, must submit *to do equity*. Admitting the

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judgment of *Thomas* against *James* to have been erroneous in *point of law*, yet, the money being due *in conscience*, a Court of equity will not prevent the payment of it.

It is true that, on the motion of *James* against *Hill*, the Court gave to the testimony an extent to which it was not entitled. *James* was defeated on the ground that the receipt had been *paid* by *Hill*. But this was unimportant as it respected *Thomas*, since a majority of the witnesses prove, that his accounts with *Hill* had been settled, but that *these tickets* were not taken into the account. The money was consequently *due to Thomas;* and *from whom* it was due was a question between *James* and *Hill*.

No inference is to be drawn from the silence of *Thomas* from 1773 to 1785, when the situation of the country is considered.

As to the position, that the allegations of the bill are to be taken as *admitted*, because they are not *denied* in the answer, it is in direct opposition to a rule of the Superior Court of Chancery, established at the last term.(*a*)

(*a*) See *ante*, p. 17. *Dangerfield and others* v. *Claiborne and others*.

Wednesday, *March* 30. The Judges delivered their opinions.

Judge TUCKER. This cause having abated by the death of one of the parties, was revived by consent last term against the representatives of the party deceased, without naming them. The cause was now called for hearing, *no person* having been made defendant by name, in consequence of that order.

I was of opinion we ought not to proceed to a hearing of the cause, until the parties were before the Court *by name*.

Judge ROANE cited *Southal* v. *M'Keand*, which appeared to me to be in favour of my idea.(*b*) He seemed to think the trial might proceed.

(*b*) Vide 1 *Wash.* 339.

Judge FLEMING concurring in opinion with me, another cause was called. But Mr. *Hay* afterwards suggested,

that there was a Mr. *Thomas*, who was either executor or administrator.

The cause was opened. But the Court *seemed* to agree that in future no cause should be considered as revived until some person should be *named as a party*, representing the party deceased.

The case appears to be this:

One *W. C. Hill*, in *May*, 1772 or 1773, being a deputy-sheriff, in the County of *Cumberland*, for *James*, the appellant's intestate, who seems in his bill to admit that he was then high sheriff of that County, subscribed a paper headed thus, "Sheriff of *Cumberland*, *Jesse Thomas's* ticket list," to which he subjoined a receipt as follows, "Received tickets agreeable to the above list, which I promise to collect, or return according to law. *W. C. Hill*, D. Sheriff," without saying for whom. On the 25th or 26th of *July*, 1785, *Thomas* obtained a judgment without opposition on motion against *James*, the high sheriff, for the amount of these tickets. After which *James* moved for judgment against *Hill*, his deputy, but his motion was overruled, because, as he alleges in his bill, it appeared to the Court that the receipt had been discharged by *Hill* himself, *Thomas* (though not a party) being present, and cross-examining the witnesses. Of this last circumstance there is no proof that I have discovered in the record. *James*, in the year 1797, obtained an injunction to a judgment upon a writ of *scire facias* sued out by *Thomas* upon the first judgment, and upon the hearing the Chancellor dismissed his bill with costs; upon which *James* appealed to this Court.

That the judgment against *James* was erroneous, and might have been reversed *at law*, appears sufficiently clear, to me, from this circumstance. The fee-bill(*a*) was a temporary act. It had been twice continued before *James* was high sheriff. It expired in *May*, 1774, was revived and continued in *Oct.* 1777 and *Oct.* 1778, when it again expired; and was again revived in *Oct.* 1782, and continued for two years, when it expired, and was again revived

(*a*) *L. V.* 1745. c. 1.

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in *Oct.* 1785.(a) The judgment obtained by *Thomas* was in the interval between the last mentioned expiration and the revival thereof; consequently the remedy by *motion* did not exist at that time, even if the judgment were right upon the merits.

(a) *L. V.* 1745. c. 38.

A second reason why the judgment as against *James* was erroneous, and might have been reversed at law, appears to me to be this. The sheriff is not bound by law to collect the fees which may be due to his predecessor in the same County; the law obliges him to collect the fees due to *surveyors*, *clerks*, and to the *sheriffs* of *other* Counties, but makes no such provision in favour of *preceding sheriffs of the same County*, who were authorised by the 12th section of the act to collect and distrain for *their own* fees, as well as for those due to sheriffs of other Counties. Of course *James*, as *high sheriff*, not being bound in duty to collect the fees due to his predecessor, *in virtue of his office as sheriff*, the undertaking of his *deputy* to collect them was not an official act, but a *mere personal* undertaking, for which *James* was in no manner whatsoever liable. The judgment consequently was erroneous upon this ground also. But, instead of appealing from that judgment to a Court of law, or applying for a writ of error, or of *supersedeas* to reverse that judgment, he has obtained an injunction from the Chancellor, I presume, upon the usual terms of releasing errors. This brings the case precisely to that of *Branch* v. *Burnley*,(b) and the question is, whether the appellant, under these circumstances, is entitled to the relief that is sought.

(b) 1 *Call*, 147.

The only grounds upon which one man can be bound to answer for the undertaking and default of another, is where he has expressly bound himself to do so, or where the law, by reason of some official connexion or other relationship between them, so far identifies them together, as to consider the act of the inferior as the act of the superior. This is the case with sheriffs and their deputies in every instance where *the law imposes a duty upon the sheriff virtute of-*

ficii; but, where the law does not impose a duty, in that manner, the sheriff and his deputy are *distinct* persons, and the high sheriff is no more responsible for the acts or undertakings of his deputy, than for those of any other person whatsoever. I have already stated, that this was a mere personal undertaking of *Hill's*, and not an official one, by which his superior was bound.

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The judgment is therefore against equity as well as against law. This, I apprehend, distinguishes it very materially from the case presented by the bill of *John Whiting* v. *Maupin*,(*a*) where *Whiting* wished to avail himself of the circumstance of his not having *signed* the replevy bond, upon which, as I understand the case, judgment had been obtained against him: the Court said, if he was not bound at law, his not having signed the bond was a legal defence, of which he should have availed himself upon a motion for a judgment on the bond, and not have resorted for relief, on that ground, to a Court of Equity, where the case is to be decided upon its real justice, and not on the omission of strict legal ceremonies. In that case the plaintiff had not indeed *signed* the bond; but, on its being shewn to him, with his name thereto, said he supposed he must be his father's security, and *acknowledged* it. This Court said, that, upon that view of the case, *Whiting* had no pretence of *equity*, and dissolved the injunction. It is also, I think, distinguishable from the case of *Terrell* v. *Dick*,(*b*) in this, that no defence was made; whereas in that case the question of law was fully argued at the trial, and no steps were taken to carry the cause before an appellate Court of Law. In this case, the complainant seems to be wholly ignorant, that he was neither bound at law, nor in equity, for the acts of *Hill* in this particular instance. He supposed himself bound thereby, and made no defence at law; nor does he even suggest this in his bill, as a ground for relief in equity. Under these circumstances, I strongly incline to think, that this case differs materially from any of those in which relief has been refused in equity. But, as a majority of

(*a*) See *Maupin* v. *Whiting*, 1 *Call*, 224.

(*b*) 1 *Call*, 546.

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the Court is of a different opinion, and as I concur perfectly in the grounds upon which former decisions upon this question have been made, I shall acquiesce in their opinion without further observations.

Judge ROANE. Whether *James*, the high sheriff, was liable to the judgment of the appellee for the fees in question; or liable in that particular form of action, is a question completely and emphatically *legal*. If determined erroneously, that decision must still bind, until duly reversed by a Court of Law; and a Court of Equity cannot relieve against the judgment on the mere ground of this error. It is a question which is not cognisable by that tribunal. It cannot do this, however palpable it may conceive the error to be; for if its jurisdiction is admitted in plain cases, it will go on to adjudge what cases are plain, and the function of the appellate Court *of Law* will be entirely superseded. It is believed, that no difference exists in this respect between a judgment suffered by default, and one obtained upon a verdict.

The doctrine just mentioned was fully settled by this Court, upon argument, and a full consideration of all the *preceding* cases, in the case of *Terrell* v. *Dick*.(a) In that case the jurisdiction of the Chancery was disclaimed under strong circumstances, rather than (in the language of the President) "to fix a precedent wholly destructive of all dis- "tinction in the common law and Chancery jurisdiction."

(a) 1 *Call*, 546.

Considering the natural and progressive tendency of the jurisdiction of the Chancery to encroach upon that of the common law Courts, and thus not only to lose the advantages of Jury trial and *viva voce* examination, but also to give a man the benefit of his *own* testimony, that jurisdiction, however salutary and valuable, should not be extended to the overthrow of the jurisdiction of the Courts of common law; nor ought the land-marks established by this Court, in relation to this subject, lightly to be departed from.

Upon this ground of error, then, the appellant is not entitled to relief; but, indeed, he has not himself taken this

ground in his bill, but has merely *charged* therein, that the money recovered against him had been previously paid. I may here ask why this defence was not used *at law;* it being a clear principle, that discounts shall not (without assigning some reason) be *first* set up *in equity?* The case of the appellant is therefore incomplete in this respect. But, waiving that objection; the answer of the defendant has expressly denied the *payment*, and that answer is powerfully supported by the testimony of *Theodorick Scruggs*. *Scruggs* states, that *Hill*, after the time mentioned by *Flippen* and *Carrington*, admitted that *he* had not paid the money due for the tickets, but said that JAMES "had taken and col- "lected the tickets, and ought to pay for them." If this be the fact, certainly the judgment cannot be said to be inequitable. This answer and deposition, therefore, entirely outweigh the testimony of *Flippen* and *Carrington*, (upon which the County Court probably went in the case of the motion against *Hill*,) but that testimony taken singly, is *at least*, equivocal and inconclusive, whereas that of the answer and of *Scruggs* is positive and affirmative. This latter testimony must therefore prevail; and, on the merits, the judgment of the appellee ought not to be enjoined. The appellee ought not to be at all affected by the decision in the County Court, in the case of *James* v. *Hill*, as he was no party to that controversy; although (happening to be present,) he may have interfered in cross-examining the witnesses. He is not be estopped by that decision, unless, like other *parties*, he had had a full, fair, and *previous* opportunity to meet the question in controversy.

As to the lapse of time prior to 1785, it is accounted for by the existence of paper money, and the revolutionary war. The delay, afterwards, is ascribed by the appellee to the existence of the appeal, to his infirmities, and the death of the complainant. As to these, we have no certain *data*, (which, if they would help his case, ought to have been furnished by the appellant,) from which to infer, that the delay evinces that the present claim is unconscionable,

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The same remark applies to the insinuation that the appellee had laid by until the death of *Hill*, with the view of taking advantage of that circumstance; the record being wholly *silent* as to the time of his death.

I am therefore of opinion, that the decree be affirmed.

Judge FLEMING. The case of *Terrell* v. *Dick*, in this Court,(a) seems to have settled the principle, that a Court of Equity will not interfere in a case purely of a legal nature, on the ground that the judgment at law was erroneous, where neither fraud nor surprise are suggested, nor any adventitious circumstance had arisen. In the case before us, *James*, the intestate of the appellant, though he had due notice of the intended motion of *Thomas*, failed to appear and avail himself of the law that seemed then to be in his favour, and, without any defence, suffered a judgment to pass against him, contenting himself, as he states in his bill, that he would have recourse against *Hill*, his under-sheriff, not knowing but he was really in arrear *to Thomas*, on account of the receipt he had previously given him for sheriff's fees. But his motion against *Hill* and his securities, made at a subsequent day, was overruled, the Court stating, that the receipt aforesaid was discharged by the said *Hill*. And whatever injury *James*, the appellant's intestate, may have sustained, it seems to have arisen from his own inattention and negligence; and was this Court, as a Court of Equity, to interfere, it might tend to fix a dangerous precedent, destructive of a proper distinction between the common law and Chancery jurisdiction. Upon this ground, without considering the merits of the case, I am of opinion, that the decree ought to be affirmed.

(a) 1 *Call*, 546.

By the whole Court, (absent Judge LYONS,) the decree of the Superior Court of Chancery AFFIRMED.