ENGLAND

ERROR FROM THE COURT OF KING'S BENCH.

HEARN—*Plaintiff in error.*
COLE—*Defendant in error.*

ACTION of covenant on an annuity bond against the surety in the bond. Grantor covenants to pay on a day certain, and his surety covenants to pay in twenty-eight days from that time, in case of default. Declaration states payment to be due from the surety on 5th July, being only the day of payment by original grantor. Judgment by default against the surety, and error in Exchequer Chamber and House of Lords. Held that writ of error was not sustainable, because the bond and covenant (independent of the above inconsistent allegation) were sufficiently set forth so as to prevent any reasonable mistake as to ground of action.

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THIS was an action of covenant upon an annuity bond originally commenced in the King's Bench against the Plaintiff by the Defendant in error. The annuity was 33*l.* 12*s.*, payable quarterly to the Defendant in error by one Whitelock, for the due payment by whom Hearn became security. The days of payment 5th April, 5th July, 10th October, and 5th January. The Plaintiff in error's covenant was that, in case default was made in any of the payments for the space of twenty-eight days after the time for making the same, the surety would pay.

Action of covenant.

The declaration, after setting forth the bond and covenant, stated, "that, on the 5th July, 1811,

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Surety, by mistake, stated to be liable to pay on the day when principal only became liable.

" two quarterly payments *of the said annuity* had " become due *from the Plaintiff in error* (instead " of saying from original grantor Whitelock) to the " Defendant in error, *under and by virtue of the* " *said indenture*; and that, although default *was* " *made by the said William Whitelock* in the pay- " ment, &c. for the space of twenty-eight days next " after the day on which the same ought to have " been paid, &c. the Plaintiff in error had not paid, " or caused to be paid," &c.

Judgment by default against surety, and error brought.

Hearn suffered judgment to go by default, and then brought his writ of error in the Exchequer, where the judgment of the Court of King's Bench was unanimously affirmed. Upon which Hearn brought his writ of error in the House of Lords.

The errors assigned appear in the following reasons, containing an abstract of the arguments of counsel.

Mr. E. Lawes (for Plaintiff in error) argued,

1st, That the day on which the arrears of the annuity claimed by the declaration are alleged to have become due, was material to be alleged according to the fact, inasmuch as the demand is grounded upon a specialty, and does not depend upon evidence; and on the day so stated in the declaration, no arrears of the said annuity could, by any possibility, become due on the deed declared upon from the said Nathaniel Hearn, as alleged in the said declaration, unless by virtue of some new stipulation or agreement, collateral to the deed, and which is not, nor could be made, the subject of the present form of action.

2d, That considering the day as rightly laid, then the name of the party from whom the arrears of the annuity are, by the declaration, alleged to to have become due, is altogether mistaken; nor is the mistake aided or cured by any of the statutes of amendment or jeofail, which are only meant to apply to cases where the Christian or surname of the plaintiff or defendant was mistaken after the right name was once correctly stated, and where the mistake did not affect the right of the suit, as it does in the present case; and in the statement of the non-payment of the annuity, each subsequent allegation refers to, and is dependent on the first; so that, unless the first can be sustained, none of the others can be of any avail to support the judgment.

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3d, That the allegation of the arrears of the annuity having become due, under and by virtue of the indenture, *or* of their remaining unpaid, contrary to the form and effect of the indenture, cannot assist the statement, inasmuch as that is a mere conclusion of law, not supported by the facts stated; nor can the matter be rejected as surplusage, inasmuch as it is not impertinent, but relevant to the action; nor is it repugnant to antecedent matter, nor impossible in itself, but quite consistent with the idea of a new and collateral contract dehors the deed for the Plaintiff in error, to pay the annuity on the day stated, at the same time that it does not shew that the Defendant in error had any claim upon the deed, on which alone he can recover, if at all, in this suit; and also inasmuch as the whole sentence cannot be rejected as surplusage; and no

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part of an entire sentence can be so rejected without rejecting the whole; nor can the *videlicet* under which the day is alleged alter the case, inasmuch as the matter alleged thereby is material, and it is also matter of law and inference from the deed, unless it be referred to some new contract collateral thereto, on which the Defendant in error cannot recover in this action.

Mr. Abbott, (for Defendant in error,) in support of the judgment, contended,

1st, That though the arrears of the annuity were not due in the first instance from the Plaintiff in error, as stated by mistake in the declaration, but from the grantor of the annuity; yet it being alleged therein that the sum of sixteen pounds and sixteen shillings, for two quarterly payments *of the said annuity*, became due and payable under and by virtue of the said indenture, and that default was made by the said William Whitelock of and in the payment of the same; the allegation that they became due and payable from the Plaintiff in error being impossible, and inconsistent with the previous statement, may be rejected as surplusage at common law; and,

2d, That the mistake would be aided, if necessary, by the statute 16th and 17th Charles 2, cap. 8, which declares that judgment after verdict shall not be stayed or reversed for a mistake in the Christian or surname of either party, &c. to which the Defendant might have demurred, and shown the same for cause, or any other matters of like nature, not being against the right of the matter of

the suit, nor whereby the same or trial are altered, which statute is extended by the 4th Ann. cap. 16, sect. 12, to judgments by default. (*Vide Richards v. Symonds*, 3 Wils. 40.)

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Lord Eldon (Chancellor) was clearly of opinion that the bond and covenant were upon the whole so distinctly set forth that there could be no reasonable mistake as to the instrument and ground on which the action was founded; and that the inconsistent allegation might therefore be rejected as surplusage.

Observations and Judgment.

His Lordship stated, that the resolution of the House to take the causes in their order did not preclude the discretionary power of calling at any time causes which appeared to be carried there merely for the purpose of delay. If the Counsel who signed the reasons were out of the way, the Agents might employ others.

Judgment of Court below affirmed, with expenses of Defendant in error's appearance (110*l.*)

Agents for Plaintiff in error, STRATTON and ALLPORT.
Agent for Defendant in error, TILLBURY.