

Case No. 4,503.

ENTWISLE v. BUSSARD.

[2 Cranch, C. C. 331.]¹

Circuit Court, District of Columbia.

May Term, 1822.

EXECUTION—PRACTICE—FORTHCOMING BOND TO DECEASED CREDITOR.

If the plaintiff delivers his fieri facias to the marshal, and dies, and the marshal levies it upon the goods of the defendant, he has a right, under the laws of Virginia, to give a forthcoming bond payable to the deceased creditor; and such bond will support a judgment on motion by the administrator of the creditor.

Mr. Swann, for plaintiff, moved for execution upon a forthcoming bond given by the defendant [Daniel Bussard] to Isaac Entwisle, who had died after delivering the fieri facias to the marshal and before the levying of it upon the goods of the defendant, for the forthcoming of which, on the day of sale, the bond was given.

The act of Virginia, concerning executions, of the 10th of December, 1793, § 13 (Rev. Code 298), after enacting that the property of the defendant's goods shall not be bound by a fieri facias until it shall be delivered to the officer, provides "that if the owner of such goods and chattels shall give sufficient security to such sheriff or officer, to have

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the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or officer to take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount due thereon with condition to have the goods or chattels forthcoming at the day of sale," &c.; and the act further provides that if the bond shall be forfeited, and returned to the clerk's office, it shall have the force of a judgment, and the court may award execution thereon, upon motion and ten days' notice.

Mr. Swann, contended that if the marshal could, after the creditor's death, proceed to levy the execution upon the defendant's goods, the defendant was entitled to the correlative right of giving a forthcoming bond; which bond, by the express provision of the law, must be made payable to the creditor; and the only creditor whom the marshal could know, was the plaintiff named in the execution. Besides, the defendant is estopped from denying the existence of the obligee; and it is unjust that, having had the full benefit of the bond himself, he should now seek to avoid it.

Taylor, contra. The bond, as a contract, must have two parties; a bond given to a dead man is void, for want of parties. If considered as a judgment confessed, it is erroneous because there was no plaintiff. The defendant is not estopped to plead that there was no such person in *rerum natura*.

Swann, in reply. The bond is a part of the process of execution. When an execution is begun, the death of the parties makes no difference; it must be finished; and for that purpose the parties are still, in law, considered as alive. The bond was as lawful as the execution, and the right to give it and relieve the property was appendant to the execution.

THE COURT (MORSELL, Circuit Judge, contra, and CRANCH, Chief Judge, doubting) refused to quash the bond, and awarded the execution upon it.

¹ [Reported by Hon. William Cranch, Chief Judge.]