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out of the fund on which the bill in his favor was drawn, for one of the liabilities mentioned in the acceptance. That this was not the case, is abundantly proved. But if Blake had other funds of Gibson, beside the note of Barrel, which he also considered as under Gibson's exclusive control, out of which his indemnity as bail might have been obtained, what right has Hughes now to complain, that such other funds were not applied in that way, after he had agreed or consented, that this indemnity should come out of those funds of Gibson, in the hands of Blake, out of which he was to be paid. Having come into the arrangement, Blake might well think himself at liberty, as it seems he did, to apply the other funds of Gibson in any other way which he and Gibson might think proper. Whether Gibson be liable to the appellant for the subtraction of any part of his fund for the payment of his debt, is a question not before the court; but we cannot see that an application of them in express conformity with the agreement of *475] the parties to this suit, can give the appellant any claim on the respondent. At any rate, the plea having denied all the allegations which were relied on as grounds for removing the bar which it was anticipated would be interposed to the appellant's bill, and all the matters stated in the plea, on which issue was taken, having been fully proved, the court is of opinion, that the decree of the circuit court must be affirmed, with costs.

Decree affirmed.

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Bail.

Under the act of assembly of Virginia, the defendant may enter special bail, and defend the suit, at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail.

If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear, and consent to a reference, the report and judgment on which is to bind the appearance bail, as well as himself. Such a joint judgment is erroneous, and will be reversed as to both.

ERROR to the Circuit Court for the District of Columbia.

*476] March 8th, 1821. This cause was argued by *Swann*, for the *plaintiff in error, citing *Dunlops v. Laporte*, 1 Hen. & Munf. 22; *Grays v. Hines*, 4 Ibid. 437; *Fisher v. Riddle*, 1 Ibid. 329; and by *Jones and Taylor*, for the defendant in error, citing *Holdip v. Otway*, 2 Wms. Saund. 106, and the cases there cited; *Gould v. Hammersley*, 4 Taunt. 148.

March 10th. MARSHALL, Ch. J., delivered the opinion of the court.— This is a writ of error to a judgment rendered by the circuit court for the district of Columbia and county of Alexandria, against Andrew Bartle and Samuel Bartle, on a writ issued by George Coleman against Andrew Bartle, on the service of which, Samuel Bartle became bail for his appearance. The defendant in the court below, not having entered its appearance, a conditional judgment was entered, at the rules held in the clerk's office, against the defendant and his appearance bail. This being an action on the case, the

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judgment at the rules was for no specific sum, but for the damages which the plaintiff in that suit has sustained, which damages are to be inquired into, and ascertained by a jury. After this writ of inquiry shall be executed, and not till then, a final judgment for the damages assessed by the jury is rendered by the court. In the meantime, the cause stands on the court docket for trial.

The act of assembly respecting this subject is in these words: "And every judgment entered in the office, against a defendant and bail, or against a defendant *and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put in good [*477 bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." "If the defendant shall fail to appear, or shall not give special bail, being ruled thereto by the court, the bail for appearance may defend the suit, and shall be subject to the same judgment and recovery, as the defendant might or would be subject to, if he had appeared and given special bail."

The courts of Virginia have never construed this act strictly as to time. Although the absolute right given to the defendant to appear and set aside the judgment rendered in the office, is limited to "the succeeding court," he has always been allowed to appear, and set it aside, at any time before it came final. In all actions which sound in damages, the judgment cannot become final, until the damages shall be ascertained for which it is to be rendered. In other respects, too, this law which authorizes a judgment against the appearance or common bail, without the service of process on him, has been construed with great liberality. The cases which have been cited, show that the decisions in the court of appeals of Virginia, have settled principles which seem to decide this case. It has not only been determined, that the defendant may enter special bail, and defend the suit, at any time before a final judgment, but also, that if he appears and pleads, without giving special bail, or appears and confesses judgment, the appearance bail is discharged. *It is also well known, to be the settled [*478 practice of Virginia, if special bail be given, to discharge the appearance bail, although the defendant should not appear, but the judgment should become final, either on his default, or on the execution of a writ of inquiry.

It is then settled, that the appearance of the defendant, or the entry of special bail, before final judgement, discharges the appearance bail. Let these principles be applied to the case before the court. While the writ of inquiry was depending, we find this entry on the record. "In the case of George Coleman, plaintiff, and Andrew Bartle, defendant; and Andrew Bartle, plaintiff, and George Coleman, defendant; by consent of parties this case is referred to Joseph Deane," &c. Could this rule be made, without consent? Or could this consent be given, without the appearance of the party, by himself or his attorney? Both these questions must be answered in the negative. What party, then, did appear and give this consent? Was it Andrew Bartle, the defendant in the cause, who is named as the party, or was it Samuel Bartle, his appearance bail, who is not named? In addition to the omission of the name of Samuel Bartle, an omission which could not have been made, had he actually appeared, and been a party to the rule, it is to be observed, that he had no power to consent to it. The law

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allows him to defend the suit, but does not allow him to refer it to arbitrators. We do not hazard much in saying, that no court would or ought to permit such a rule as this to be made, without the consent of the defendant, *479] given in persons, or by his attorney. *But were it even supposed to be in the power of Samuel Bartle to refer the suit of Coleman against Andrew Bartle, he could not refer that of Andrew Bartle against Coleman; and this suit also is embraced in the same rule. It is then apparent, that it is Andrew Bartle who consented to this rule.

It has been contended, that the consent of Samuel Bartle must also be implied. We do not think so. It is reasonable to suppose, that his name would have appeared, had he been a party to the rule. But it was not necessary, that he should be a party to it. Andrew Bartle was himself competent to make this reference, and the appearance bail never comes into court, unless it be to defend the suit, in consequence of the non-appearance of the defendant. But were it even true, that the consent of Samuel Bartle could be inferred, it would, nevertheless, be also true, that Andrew Bartle appeared, by the admission of the plaintiff; and such appearance, according to the decisions in Virginia, discharges his bail.

In the mode pursued by the clerk, in making his entry, the usual form of saying "this day came the parties," &c., is not pursued. But this is immaterial, because the parties perform an act in court, which could not be performed, without appearing; they consent to a rule which implies appearance, and the form of the entry cannot affect its substance. Were it otherwise, the appearance of the defendant is entered in the usual form, before *480] final judgment. On the return of the award, the following entry is made: "And now here, &c., at this day, &c., came, as well the plaintiff aforesaid, by his said attorney, as the said defendant, by Thomas Swan, his attorney, and the following award was returned," &c. The award is then recited, which shows, that the arbitrators proceeded on notice to Andrew Bartle only, and the judgment of the court is immediately rendered for the amount of the award against "Andrew Bartle, the defendant, and Samuel Bartle, the security for his appearance." Yet the appearance of Andrew Bartle is formally entered on the record, previous to this judgment. If, instead of entering the judgment, in pursuance of the award, it had been entered in pursuance of the confession of the defendant, this would have been the very case cited from 1 Hen. & Munf. 329. And what distinction can be taken between this case and that? The counsel for the defendant in error says, that a judgment by confession is a different judgment from that entered in the office, and therefore, must be a substitute for it received by consent of the plaintiff. And is not this also a different judgment from that rendered in the office? And is it not entered at the instance of the plaintiff?

Where it necessary to pursue this argument further, we should all be of opinion, that judgment could not be rendered against the appearance bail, on this award, and without executing the writ of inquiry, unless by his consent. But as we are of opinion, that the appearance of the defendant has *481] discharged his bail, it is unnecessary to pursue the subject *further. The judgment against Samuel Bartle is erroneous, and as it is joint, it must be reversed against both.

Judgment reversed.