REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

NEW-YORK:
Printed and published by Isaac Riley.
1812.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh year of the Independence of the United States of America, LEWIS MOREL, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. I. By WILLIAM MUNFORD."

IN CONFORMITY to the act of Congress of the United States, entitled, "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, entitled, "An act, "supplementary to an act, entitled 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 extending "the benefits thereof to the arts of designing, engraving and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

Tuesday, April 17.

Fitzgerald, Executor of Jones, *against* Jones.

1. An executor having delivered up the estate generally and the management thereof to one of the residuary legatees, for his benefit and that of his co-legatees—nine years and ten months having afterwards elapsed before he was summoned to render an account; the greater part of his executorship having moreover been during the revolutionary war; and the settlement taking place after his death; it was held *unreasonable rigour* to exact vouchers for many items in his account which appeared *probably* just, though not supported by proof.

IN a suit in the late High Court of Chancery, brought *May* 31, 1793, on behalf of *Edward & Richard Jones*, against *Daniel Jones*, executor of *Daniel Jones* their father, for a settlement of the accounts of his executorship, (which suit, having abated by his death, was revived against *Francis Fitzgerald*, his executor,) Master Commissioner *Rose*, to whom the said accounts were referred, reported a balance due to the estate of 479*l.* 4*s.* 10*d.* *June* 30, 1790; and subjoined the following observations: "Upon the foregoing account your Commissioner begs leave to remark that, after great delay, and much personal trouble to the defendant in procuring testimony, the accounts are submitted in their present form, though not so complete as could be wished; but, when it is considered that upwards of 27 years have elapsed since the defendant's testator qualified as executor to his father's estate, as also the situation of the country during the greater part of the time he acted in that capacity; to which may be added his being unacquainted with keeping regular accounts; it may appear rather surprising they should be so correct as they really are. The plaintiffs, by letter to your Commissioner, have excepted as follows: 'We object pointedly to every voucher that is not agreeable

2. Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be *charged* on the balance due from him to the estate, except from the date of the decree: neither in such case ought interest to be *allowed* him on payments to the legatees before the decree; though made in bonds which carried interest.

3. Under *circumstances* a commission of 7 1-2 *per cent.* may be allowed an executor on all his receipts and disbursements; the *real and personal* estate having, in obedience to the directions of the will, been kept together and managed by him.

4. A wealthy testator having bequeathed *pecuniary legacies* to three of his daughters, to be paid them, "*if the money could be raised by his estate* by the time that either of them should marry, or come of age;" (without saying any thing about their maintenance or education;) it was held that they were entitled (notwithstanding their legacies) to maintenance and education out of the estate; at least while the legacies were not sufficiently productive.

5. On a settlement of accounts in a Court of Equity, a decree will be rendered against a *plaintiff* for a balance of account appearing due to a *defendant*.

to law; also to the price of the board; also to the maintenance and schooling of our sisters, as the will does not provide for the same, and also to the charge he (*Daniel Jones*) made for his services; and, in fact, we object pointedly to every thing but what the law allows.' All the charges supported by regular vouchers are marked thus ||. Many of the others are satisfactory from the affidavits herewith filed; and many of the items could not be expected, from the nature of them, to be accompanied with any voucher. There are others, for which it is probable vouchers have been taken, but in the confusion of the times may have been lost or destroyed, and which the testator of the defendant, if living, could supply by other testimony, which the defendant cannot procure, not knowing where to apply for it: a circumstance which he flatters himself will be considered deserving the attention of the Court. The charge for services objected to above is made by the testator as follows: 'To the management of the estate and the plantations lying forty or fifty miles, seventy-five pounds per year, and I acted as executor ten years and four months;' which would amount to 775*l.* As this charge is not supported by any testimony, it is rejected, and a commission of five *per cent.* allowed on the receipts in lieu thereof; but, as this is no more than what is commonly allowed for receiving and paying money, your commissioner is of opinion, that a further allowance of at least 2 1-2 *per cent.* more ought to be made. The defendant's testator gave up the estate and the management thereof to the plaintiff, *Edward Jones*, on the 23*d of August*, 1782, which is stated for the information of the Court, to determine at what period interest ought to commence on the balance due to the estate."

To this report a great number of exceptions were taken by the plaintiffs; among which the most remarkable were, in substance, as follows:

1. That no vouchers were produced for many items in the account, which might and should have been (as they contended) supported by vouchers.

APRIL, 1810.

Fitzgerald v. Jones.

2. That sundry debits of moneys paid for the board, support, and education of three daughters of the testator, who were *pecuniary* legatees, (no provision for such board, &c. having been made in the will,) should have been deducted from their legacies, and not charged to the estate generally, so as to diminish the *residuum* bequeathed to the plaintiffs; though they did not object to what was charged for the use of two other daughters who had *specific* legacies given them in negroes, which continued with the estate until they married; because (the estate having been kept together under the management of the executor) those negroes were profitable by their labour.

3. That the tobacco made on the estate in the years 1779, 1780, and 1781, was short credited, being only 9,747*lbs.*; whereas it should have been at least 60 or 70,000*lbs.* more than that quantity.

The will, (admitted to record in *June*, 1772,) besides directing all the testator's just debts to be paid, and devising several large and valuable tracts of land to the *plaintiffs*, bequeathed to his daughter *Sarah* five negro girls, so soon as they could be purchased by means of the *profits* arising from his estate; (without *specifying* or *limiting* the prices to be paid;) to his daughter *Mary*, *nine*, and his daughter *Martha*, *eight*, negroes *by name*, and sundry articles of personal property; to his three daughters *Rebecca*, *Elizabeth* and *Prudence* 500*l.* each; to be paid them if the money could be raised out of his estate by the time that either of them should marry, or come of age; if not, then all the negroes not already bequeathed, with all their future increase, to be equally divided between his three last-mentioned daughters and his two sons the *plaintiffs:* but, if the money were raised by his executors for his three daughters, then the estate not already bequeathed to be equally divided between the said two sons only. The testator also desired that his son *Daniel Jones* (the executor) should keep all that he had *already* given him; also 20 head of cattle, 10 head of sheep, and two feather beds and furniture.

On the 13th of *March*, 1801, the cause being heard, the late Chancellor, Mr. WYTHE, delivered this opinion: "From the defendant's testator, who is reported to have given up the estate, and the management thereof, in *August* of the year 1782, to one of the plaintiffs, for the use, undoubtedly, not of himself only, but of his other brother also, and who doth not appear *until nine years and ten months thereafter* to have been summoned to render an account of his administration, the plaintiffs are with *unreasonable rigour* exacting vouchers, upon failure to produce which are founded many exceptions; especially when to circumstances, noticed by the Commissioner, may be attributed loss of papers, and when, too, some debits were of such a kind that, probably, they were incurred because, otherwise, the plaintiffs' property might have been sold for satisfaction of public demands, and for services performed on their estates for their benefit.

"The sisters of the plaintiffs were entitled to maintenance out of their father's estate, notwithstanding their legacies; at least until the legacies were sufficiently productive, which doth not appear to have happened during their brother's ministration; towards which maintenance was exempt from contribution every part of what *had been* given to him by his father; except the additional legacies of cattle and sheep; of which the sisters (whilst they, with their brothers, were one family) are presumed to have shared the profits.

"The debits on account of *James Sturdivant*, and for the hire of slaves, (to which the plaintiffs have excepted,) are justified, one by the affidavits of *John Gooch*, *Richard Hayes* and *Richard Jones*, and the other by one of the exhibits, and by the affidavit of *Thomas Jones*.

"Exceptions to prices, alleged to be excessive, paid for slaves bought to satisfy legacies; to payments for corn and wheat alleged to have been provided unnecessarily; to sundry pretended miscellaneous omissions; are not sustained.

"The defendant's testator is not entitled to compensation over the *customary* commission; and *interest* upon

APRIL, 1810.

Fitzgerald v. Jones.

what is due from him ought not to commence before the final sentence shall be pronounced.

"He ought to be debited with more than *five* hogsheads of tobacco in the year 1779, and the two next following years, if the affidavits of *Jeremiah Brown* and *Daniel Wilkes* are to be credited. With how much more he ought to be debited, a Jury (to be impannelled and charged before the District Court of *Petersburg*, upon trial of an issue to be joined between the parties,) this Court doth direct to inquire and say; whose verdict shall be certified by the Clerk of the said District Court."

On the trial of the issue thus directed, the Jury returned a verdict "that the whole crop of tobacco made by *Daniel Jones*, the executor of *Daniel Jones*, deceased, on the plantation of the testator, devised to the complainants, in the year 1779, amounted to 30,450*lbs.* of *Petersburg* tobacco; that the whole crop made by him as aforesaid in the year 1780 amounted to 49,000*lbs.* like tobacco; two hogsheads of which, estimated at 2,300*lbs.* were destroyed by the *British* troops, at Col. *Brookings*, in *Amelia* County, in the year 1781, and before it was inspected; that the whole crop made by the said executor as aforesaid, in the year 1781, amounted to 40,500*lbs.* like tobacco; that, therefore, in these three years, the said executor ought to be debited 119,850*lbs.* *Petersburg* tobacco, which exceeds the *five* hogsheads mentioned in the Chancellor's decree the quantity of 114,100*lbs.* *Petersburg* crop toabcco."

Upon this verdict a report was made by Master Commissioner *Hay*, by direction of the Court; in which he valued the tobacco found by the verdict at 861*l.* 18*s.* 10*d.* charged the executor with that sum, and with the balance of 579*l.* 4*s.* 10*d.* stated by the former report; credited each of the plaintiffs with half the amount of the balance due by the estate of the defendant's testator; and applied the payments which *Francis Fitzgerald* had made to each, according to certain documents produced, shewing a balance due to *Edward Jones* of 424*l.* 19*s.* 10*d.* and that *Richard*

Jones had been overpaid his share of the estate 36*l.* 2*s.* 6 1-2*d.* The Commissioner observed, that, "as the defendant was not to pay *interest* on the balances stated in the decree, *but from the date thereof*, he had not added interest on the payments to the plaintiffs, though most of them were evidenced by bonds bearing interest."

The Chancellor, on the 6th of *October*, 1804, confirmed this report, and decreed, accordingly, "that the defendant, out of the goods, &c. of his testator, pay to the plaintiff *Edward Jones*, 424*l.* 19*s.* 10*d.* with interest thereupon at the rate of five *per cent. per ann.*, to be computed from that day until paid; that the plaintiff *Richard Jones* pay to the defendant 36*l.* 2*s.* 6 1-2*d.* with like interest thereon; and that the parties bear their own costs:" from which decree the defendant appealed.

Hay, for the appellant.

Call, for the appellee.

Wednesday, *April* 25th, 1810. The Judges pronounced their opinions.

Judge TUCKER. Mr. *Hay*, for the appellant, made the following objections to the decree.

1. Because certain payments made by the executor of *Daniel Jones* to the complainants, *pendente lite*, in bonds on which interest was due, ought to have been credited as the amount of principal and interest due at the time of the assignment or payment. This objection ought certainly to have availed the appellant, if the Chancellor had allowed interest on the sum decreed, *pendente lite;* but, as he did not, and the bonds all bear date posterior to the institution of the suit, I think there is no error on this point. And, though it appears that this mode of applying the credit was done by the Commissioner without any previous direction from the Court, yet being approved and sanctioned by the

APRIL, 1810.

Fitzgerald v. Jones.

Court, it must now be regarded as the act of the Court, and not of the Commissioner.

2. Because *Daniel Jones*, the executor and manager of the plantations, ought to have been allowed something as *manager* as well as *executor*. And I very much incline to think that, where the management of an *estate* is thrown upon an executor, and the care and education of a family of children with it, that an executor ought to have a more liberal allowance than a bare commission of 5 *per cent.* upon his receipts or expenditures. In the present instance the testator left five children, apparently minors, who remained so many years. He charged his whole estate with the payment of his daughters' legacies, if it could be effected out of the profits before either of them married or came of age. To do this, the executor must do many things beyond what the duty of an executor in *ordinary* cases imposes. His personal trouble, and responsibility, under such circumstances, may be increased ten fold. He ought to be compensated accordingly, whenever it appears that he hath faithfully discharged this *extraordinary* duty imposed upon him by his testator. For, even under our law, the executor (*as such*) can have nothing to do with his testator's *real* estate after the end of the year in which he dies. After that period, he ought to be considered as something more than an executor, if the testator by his will entrusts him with the management and care of his family, and his real estate, in general. But, in the present instance, the executor, from some cause or other, perhaps incapacity, has not kept such regular accounts of his transactions, as to entitle him to any considerable further allowances for his *extra* services. And, upon that ground *only*, I was inclined to think the decree right in allowing him only five *per cent.* on the amount of his account as settled by Commissioner *Rose*. I am, however, disposed to concur in the opinion of the other Judge, that he ought to be allowed 7 1-2 *per cent.* In a statement since received from Mr. *Williams*, in the case of *M'Call* v. *Peachy*, it is stated, that

this Court, in a decree made in that suit *May* 21, 1798, allowed a commission of ten *per cent.* to the executor, on the money received by him for the use of the estate, including debts, *sales* and *profits*, in full satisfaction for receiving, putting out, and paying away the said money, and for his *services* in the administration and *management* of the testator's estate. But, as there is a *debit* against him in consequence of the verdict of the Jury for a large quantity of tobacco, supposed to be made in the year 1779, 1780, and 1781, upon which Commissioner *Hay* seems not to have allowed any commission, I am of opinion that the decree is so far erroneous, and I also agree, that a commission of 7 1-2 *per cent.* be allowed on the net balance of that tobacco also.

3. Mr. *Hay* objects to the decree, because the Chancellor was mistaken in supposing that 5 hogsheads of tobacco, only, were credited to the estate for the year 1779, 1780, and 1781, and therein he is clearly right; there being 8 hogsheads weighing 9,747*lb.* net, so credited, which ought to be deducted from the 119,850, found by the Jury to have been made in those years, the whole amount of which is charged to the estate in the account by Commissioner *Hay*. There are other very important deductions which I conceive ought to be made from the quantity of tobacco so found by the Jury to have been made in those years. For they find the whole crop made in 1779 amounted to 30,450*lbs*; that the whole crop made in 1780 amounted to 49,000*lbs*, two hogsheads of which estimated at 2,300*lbs*. were *destroyed* by the *British* troops in 1781; and that the *whole* crop made in 1781, amounted to 40,500*lbs*. These three quantities amount to 119,950*lbs*. They then proceed to say "that they find that in those three years *Daniel Jones* ought to be debited 119,850*lbs*. of tobacco, which exceeds the five hogsheads mentioned in the Chancellor's decree 114,100 hogsheads, *Petersburg* crop tobacco." It is apparent from this, that the Jury neither deducted the 2,300*lbs*. contained in the two hogsheads, which they ex-

APRIL, 1810.

Fitzgerald v Jones.

pressly find to have been destroyed by the *British* troops in 1781; nor yet made any deduction for the overseers' shares, which, according to the evidence in the former part of the record, appear to have been usually a seventh or an eighth part. Supposing it an eighth, which is the lowest, the overseers' shares would have amounted to 14,981*lbs.* which with the 2,300*lbs.* destroyed by the *British* troops, and the 9,747 credited in the accounts settled by Master Commissioner *Rose*, form an aggregate of 27 or 28,000*lbs.* of tobacco, which ought to be credited the executor, against the 119,950*lbs.* the *whole* amount of the several crops for those three years, as found by the Jury. For the balance the executor ought to be charged the same rate that Commissioner *Hay* has allowed for the whole of those crops, as found by the Jury, deducting therefrom all reasonable expenses of the transportation to *Petersburg*, and warehouse expenses; and a commission of seven and a half *per cent.* as before mentioned.

4. Mr. *Hay's* fourth objection to the decree is, that the value of the tobacco found to have been made in those three years, by the Jury, has been arbitrarily fixed by the Commissioner, instead of being ascertained by evidence, as it ought to have been. It certainly does not appear by what means, or by what evidence, the Commissioner fixed the price. Mr. *Hay* said it was 20*s.* per cwt.; in this he was mistaken. Of the tobacco credited in Commissioner *Rose's* account made and sold in that period, three hogsheads are charged at 70*l.* per cwt. the scale of depreciation being at that time 74 for one. Five other hogsheads are credited at 75*l.* per cwt. when the scale of depreciation was at 90 for one. These prices reduced to specie are rather higher than the average price which the Commissioner has adopted. I am therefore unwilling to disturb his estimate; though, from my own recollection of that period, I am persuaded his estimate is not *too low*, and possibly may not be *too high*.

Mr. *Call*, for the appellee, complained of the liberality of Commissioner *Rose*, and the Chancellor, in respect to the accounts stated by the former; but I think without sufficient reason. I am therefore of opinion that, after correcting the errors which I have pointed out, the residue of the decree ought to be affirmed; and that the cause be remanded to the Court of Chancery for a final adjustment of the accounts between the parties, (one of whom has been already overpaid,) upon the principles which I have mentioned.

Judge ROANE concurred that the decree be reformed in the points expressed in that about to be pronounced by this Court. He did not deem it necessary, or proper, to go into any *calculations*, which were more properly the business of a Commissioner. As to the compensation to be allowed the executor, he thought that, under the particular circumstances of this case, the estate having been directed to be kept together, which imposed additional labour on the executor, he was reasonably entitled to a commission of seven and a half *per cent.*

Judge FLEMING gave no opinion on the subject of commissions, being personally interested in that question; but in other respects concurred with the rest of the Court, and read the following as their joint opinion.

"The Court is of opinion that the said decree is erroneous in this; in affirming the verdict of the Jury impannelled to ascertain the quantity of tobacco made on the estate of the said *Daniel Jones*, the elder, in the year 1779, 1780 and 1781, and the report of Master Commissioner *Hay* thereon; by which verdict it is found that the quantity of 119,950*lbs.* of tobacco was made on the said estate in those three years; for which the said executor was debited, and against which he had credit for only 5,850*lbs.* of tobacco; when he ought to have had credit for 9,747*lbs.*, with which the said executor charged himself in his administra-

APRIL, 1810.

Fitzgerald v. Jones.

tion account in the years 1779 and 1781; and a further credit for two hogsheads of tobacco, net weight 2,300*lbs.*, which the Jury found to have been destroyed by the *British* troops, at Colonel *Brooking's*, in *Amelia* County; and a further credit for the overseers' share of the said 119,950*lbs.* of tobacco; and also a further credit for the costs of transporting the said tobacco from the plantations to the inspections at *Petersburg*, and for the warehouse expenses of the same: Therefore it is decreed and ordered that the decree be reversed, &c. and that the cause be remanded to the said Superior Court of Chancery for an account to be taken, and a final decree to be entered, according to the foregoing principles; in which account so to be taken the executor is to be allowed *seven and one half*, instead of *five per cent.* on the receipts and disbursements of the whole estate of the said *Daniel Jones* the elder."

Clarke *against* Conn.

Neither *consent*, nor long *acquiescence* of parties can *give* the Court of Appeals jurisdiction. An appeal, therefore, (having been improvidently granted,) was dismissed on motion, five years after it was entered on the docket.

IN this case a decree was rendered in the Superior Court of Chancery for the *Richmond* District, *March* 16, 1804, dismissing the bill with costs; from which decree the plaintiff prayed an appeal, which was allowed him "on his entering into bond with sufficient security in the Clerk's office of the said Court, for the prosecution thereof, on or before the *first day of the next term.*" This he failed to do; and, the 6th of *October* following, on his motion by Counsel, and for reasons appearing to the Court, further time, until the ensuing first day of *February*, was allowed him for giving the said bond and security; which he did accordingly, as certified by the Clerk of the Court of Chancery.

A copy of the record was sent to the Court of Appeals, and the cause entered on the docket, *April* 4, 1805.