

**REPORTS**

OF

**CASES**

ARGUED AND DECIDED

IN THE

**COURT OF APPEALS**

OF

**VIRGINIA.**

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BY DANIEL CALL.

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**VOLUME V.**

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JOHNSON v. PENDLETON, *Auditor, &c.*

If the owner of a military certificate leaves it in the auditor's office for the purpose of having a warrant for the interest made out; and it is lost, *Quære*, Whether the state, or the auditor, or either, is liable to make satisfaction for it.

But if either was liable, the assignment of the certificate to the plaintiff ought to be proved.

*Johnson* filed a bill in the court of chancery against *Pendleton*, the auditor of public accounts, and the attorney general, stating, that he sent a military certificate to the auditor, for the purpose of obtaining a warrant for the interest; but, there being a press of business, the certificate was left with the auditor, until he should have leisure to make out the warrant. That the plaintiff had frequently applied for the certificate and interest; but could obtain neither. The bill therefore prayed that the state, or *Pendleton*, might make satisfaction for them to the plaintiff.

The answer denied that the certificate was left with the auditor; and says that whenever such papers are left in the office, it is to accommodate the party, who prefers leaving them to waiting for the leisure of the auditor.

A witness proved that he left the certificate in the auditor's office, for the purpose of having the warrant for the interest made out; and never could obtain it afterwards, the auditor and his clerks suggesting that it was mislaid.

Two of the clerks, in the auditor's office, proved that when certificates were left for the purpose of having warrants made out for the interest as above mentioned, they were always left for the accommodation of the parties, who brought them, and at the risk of the proprietors of the certificates.

The court of chancery dismissed the bill upon a hearing; and the plaintiff appealed to the court of appeals.

*Randolph*, for the appellant. The appellee was liable as auditor. For the plaintiff was entitled to a renewal of the

certificate, and the original was left in the office with a view to obtain it. *Yancey* is a competent witness, as he was agent only. The auditor undertook the act, but executed it improperly; and therefore the plaintiff is entitled to satisfaction from the public. Were it otherwise, and the party had no redress against the state, thousands might be injured, as the auditor might not, individually, be able to repair the loss.

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*Duval*, on the same side. The auditor is liable both in his private and public capacity. The first; because he is in the situation of a common carrier, or a tobacco inspector, as he receives a reward for his labour. 2 *Ld. Raym.* 913: The second; because the certificate was left at his request as officer, until he should be able to act upon it, in his official character.

*Nicholas*, attorney general, *contra*. The act complained of was done for the benefit of the party complaining; and therefore he comes into court with a very bad grace, as there is no imputation against the integrity of the defendant. It was no part of the official duty of the auditor to take charge of the certificate, and therefore the public cannot be liable. Nor is the defendant personally liable; for it is not like the case of a miller or blacksmith, as the deposit in those cases is for the benefit of the bailee; but here not. The answer denies that the certificate was left; and it ought to be disproved by two witnesses, or by one witness and strong circumstances. Neither of which is done; for *Yancey* is interested, as he comes to exculpate himself. There is no resemblance between this case, and that of a common carrier; for he also receives a reward for his services; and it cannot be said, that the auditor's salary has any influence, as that relates to official acts only, and this was not of that character. A mere bailee is only liable for gross neglect; and there is nothing of that kind proved. The plaintiff had a remedy at law; and therefore the court of chancery had not jurisdiction.

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*Call*, on the same side. *Pendleton* did not receive the certificate in his public capacity; and therefore is not liable as auditor; for the law did not compel him to receive it; and, unless he was compellable, he could not receive it in his character of officer. *Stuart v. Madison*, 1 Call, 481. Nor is he liable in his private capacity, 1. Because he was to get nothing by keeping it: For his salary had no connexion with it, as it was not his duty to receive it; and the salary extends to nothing, but what the officer is compellable, as officer, to perform. 2. Because a bailee is only liable for gross negligence, and not for common accidents, 2 *Ld. Raym.* 913. *Bull. N. Pr.* 73; for as he does not hire out his care, he cannot be presumed to warrant against involuntary losses. 1 *Roll. Ab.* 3, 4. 8 *Co.* 32, *Calye's case*. Besides the witnesses say, that, in such cases, the certificates were left at the risk of the owner, and that no receipts were ever given; which proves that neither party considered the officer liable, in any capacity. Nor ought he to be. For then the cares of the officer would be increased, and the public business impeded, to the detriment of the community. It is, therefore, better to strip the officer of the care, and oblige the owner to attend to his own affairs. But, in equity, the case is clearer still: For the plaintiff, if he was the real owner of the paper, might have made an affidavit, and obtained another certificate; or he might have sued *Singleton*, as he had not lost his right to the certificate. *Wilson v. Rucker*, 1 Call, 500. His loss therefore was voluntary; and he ought not to be allowed to throw it upon an innocent man. The plaintiff, however, shews no title to the certificate; for it was not assigned; and *Yancey*, the only witness to the deposit, is incompetent; for he was the servant to *Johnson* in the transaction; and liable to his employer for neglect. *Bull. N. Pr.* 77. Consequently, as the plaintiff's right to the certificate is not established, nor the delivery of it to the auditor proved by competent evidence, the bill was properly dismissed.

*Randolph*, in reply. Whenever the evidence of a debt is lost, a court of equity will set it up : which maintains the jurisdiction : and, as the commonwealth owes the money, she ought to be decreed to pay it. The plaintiff's right to the certificate is sufficiently established ; for the bill states it, and the answer does not deny it. Consequently it was not necessary to prove it, as it was not in issue. Besides *Johnson* had a special property, *Esp.* 575 ; and it differs from the case of *Wilson v. Rucker* ; because it is the commonwealth that sets up the title of *Coates*, instead of *Coates* himself. *Yancey* is a competent witness, 1 *Salk.* 289. 1 *Stra.* 507, 575 ; and *Poindexter* proves that a warrant, upon the certificate, had been prepared. The public is liable for the acts of the auditor ; because it was within his general authority ; for it was part of his duty to examine the certificate, and grant the warrant. 3 *Term Rep.* 77. Therefore when he told the plaintiff to lay the paper on the table, it bound the commonwealth ; for *respondeat superior*, 2 *Inst.* 466 ; especially as the negligence was gross. It is not proved, that *Singleton* had the certificate ; and therefore the principle contended for, relative to the obligation to pursue him, does not apply. But, if *Pendleton* is not liable in his public, he is in his private, character : for having undertaken to act, he was bound to a faithful performance.

*Cur. adv. vult.*

TUCKER, Judge. The bill alleges, that *Johnson* was the owner of a military certificate bearing interest, which he delivered to *Robert Yancey*, to bring down to Richmond and obtain a warrant for the interest. That *Yancey* carried it to the auditor's office ; who, being at that time engaged in some other business, told him if he would leave the certificate, and call again, the warrant should be made out by that time. That *Yancey* did leave it in the office, but when he called again, it could not be found. That it had been entirely lost. And that the auditor afterwards told one *Poindexter*, he had heard that captain *Singleton*, had a certifi-

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cate of that description ; it having been issued as payable to one *Coates*, and for the sum of £ 47 or £ 48.

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The bill is one with a double aspect, praying, first, that the auditor may be decreed to issue a new certificate, and to grant a warrant for all arrears of interest ; or, if the court shall be of opinion that the commonwealth is not liable for the renewal of the certificate and payment of interest, in consequence of a loss happening through the negligence or default of the auditor as a public officer, that he be decreed to make compensation for the loss in his individual capacity. The chancellor dismissed the bill.

The auditor, in his answer, positively denies that the certificate was delivered to him ; or that he ever saw it.

*Robert Yancey* swears, "That he applied to the auditor for a warrant for the interest, but was told it could not be had then ; that if he would leave it in the office, it should be made out, and given him at a time then mentioned ; that he, during his stay in Richmond, made frequent application for the certificate and warrant, but could not obtain it."

*James Poindexter* says, he was informed by the auditor that Mr. *Yancey* handed him, or handed in, a certificate ; and that the interest was made out, and laid on the table according to the best of his recollection. This is all the testimony upon that point, and I feel myself incapable of deciding that this indirect testimony should countervail the positive denial by the auditor that the certificate was ever delivered to him, or that he ever saw it. For *Yancey* does not swear that he left the certificate, as the auditor told him he might ; nor does *Poindexter* swear positively to the information he received from the auditor, but mentions it only according to the best of his recollection ; which may possibly have deceived him ; more especially, as the answer of the auditor is positive, and not reconcilable to the information which *Poindexter* supposes he gave him.

Were I satisfied upon this point, and there were no other room for doubt in this case, I should have very little hesitation in deciding that the commonwealth was bound to grant

a new certificate for the principal, and a warrant for the interest. The auditor cannot perform his duty, unless the certificate is given up to him, to examine and compare with his books, or other means by which he may know it to be genuine. He is then to make out a warrant corresponding with it, for the interest thereon due; he is to make an entry in his books of his proceedings therein. Can this be done without the paper being delivered to him? From that moment, it is in the custody of the law, until he has performed all that may be necessary, and redelivered it to the party or his agent. If it be lost, the commonwealth, who is not only the debtor, but may be regarded as having the certificate delivered up to it, (being delivered to a public officer, for a public purpose,) is bound to recompense the loss. 3 *T. Rep.* 760. Nor have I much hesitation in considering *Yancey*, whose credit is not attempted to be impeached, as a competent and credible witness in this case. It would be of mischievous consequences to society, if it were ever held that an agent, who does not appear to have any interest whatever in a transaction, shall be deemed an incompetent, or not a credible witness, because by some act of neglect or inattention during the transaction in which he has no interest, he may possibly become liable for damages to the person for whom he acts. Here, *Yancey* had no interest in obtaining a warrant for the money for *Johnson*, unless we suppose what neither the law, nor any testimony or circumstance in the case, will permit us to suppose, that he intended, if obtained, to convert it to his own use. The certificate itself being not transferrable by delivery only, without an assignment, strengthens this conclusion in my mind. The case in 1 *Salk.* 289, cited by Mr. *Randolph*, is stronger than this. There, a son who had embezzled his father's money, was permitted to prove the delivery of it to the defendant, against whom the father had brought an action of trover for it, the testimony of the son being corroborated by other circumstances. And, in 2 *Str.* 507, cited also, by him, an original debtor was allowed to prove a payment

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of the debt, by the plaintiff in that suit, at the request of the defendant in behalf of the debtor. And the case in *Buller*, 77, cited by Mr. *Call*, does not, I apprehend, apply to the present; for if the master suffer in damages by the fault of the servant, the servant will be liable over to the master, against whom the damages for this fault may have been recovered for the amount. The case of *Lucas v. Haynes*, 2 *Ld. Raym.* 871, is a parallel case: where the person who carried a bill of exchange endorsed in blank to the drawee for acceptance, was admitted as a witness to prove the delivery; and held in the king's bench that he might.

But although *Yancey's* testimony, had it gone further, would have weighed with me in opposition to the auditor's answer, if supported by other circumstances, yet taking it as it stands, I cannot think it sufficient to overbalance the auditor's answer, even with the aid of *Poindexter's* evidence, on which I have already said enough. Nor can I think, even were the evidence more satisfactory, the auditor liable, unless in case of actual misfeasance, which is not charged.

But were I satisfied upon the point of the actual delivery of the warrant into the auditor's office, in any manner usually observed in the office in similar cases, I should still doubt upon another, namely, whether the complainant is entitled to a renewal of this certificate, (which, by his own shewing, was issued to one *Coates*, and made out in his name,) without making the original proprietor a party in the cause? For, in *Wilson v. Rucker*, 1 *Call*, 500, it is expressly laid down as the unanimous opinion of the court, "That the property in these papers, will not pass by delivery, without assignment." The complainant hath not shewn, nor even stated in his bill, that he was assignee of *Coates*, though he claims the property in the certificate. Under the decision in *Wilson v. Rucker*, he could, at most, have only an equitable title, united with the possession, but the legal title, even in that case, would have been in *Coates*. Can this court decree a renewal of the legal evidence of a debt due from the

commonwealth, which is not, in its nature, transferrable by delivery only, to be made to one who does not shew a legal title without calling upon the legal proprietor to assert his claim? I apprehend not. And therefore think that the decree of dismissal must be affirmed; but I am willing that it should be done without prejudice.

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ROANE, Judge. There is a defect in the appellant's case, which cannot be got over. The certificate in question is admitted to have been granted to one *Coates*; and although the appellant may have acquired it for a *bonâ fide* consideration, yet, under the authority of *Wilson v. Rucker*, that does not give him a title against the true owner. Nothing but a regular transfer can give a *title* to a document of this sort. This transfer is not shewn in the present case. We are now in a court of equity, and equity delights to do complete justice, and make an end of the case before it. The court will not decree in favour of *A.* when by another suit *B.* may evict him, and when *A.* has it in his power, if he has title, to shew it in this action; and thus enable the court to do complete, and final, justice.

Besides, the proofs in the case seem to be defective. The defendant, *Pendleton*, swears in his answer, that the certificate was not delivered to him. This looks something like a negative pregnant, since it might have been delivered to his clerks, under the alledged custom, and thus, perhaps, been a delivery to him. I don't know, however, whether his answer ought to be taken thus strictly. If it is not, there is a defect of proof to outweigh it.

*Poindexter*, indeed, shews an acknowledgment by *Pendleton*, that the warrant had been made out, which could not have been without a delivery; but what other proof is there, except that of *Yancey*?

If *Yancey* was not strictly within the line of his undertaking to *Johnson* as agent, his testimony here would go to excuse his own deviation, and therefore is inadmissible. Whether he was, or not, depends upon the solution of the

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main question, *i. e.* whether the leaving the certificate in the office was within the necessary course of proceeding? But there was better testimony than that of *Yancey* touching the delivery of the certificate; such as the registration of it in the auditor's books, or the testimony of the clerks, who performed that service. Why were the latter not examined, or a certificate from the former produced?

On these grounds I am for dismissing the bill without prejudice. The appellant may, if he pleases, come forward again on *further* proof; but my present impressions are that he cannot recover on the ground of the alledged delivery. The alledged custom is founded as much in favour of the convenience of the holder as of the officer; perhaps more so. No inconvenience could arise to the latter from observing a different rule, but the pressure of claimants; which might be avoided by a denial of admittance at such times, or a retreat by the officer to a more private place, or apartment: Whereas, on the part of the applicant, the inconvenience of frequent applications, or a continued attendance, is avoided. Is it not evident, that this practice consults the convenience of the latter as much as the former? But the holder is not bound to deposit the certificate, nor the officer to receive it *for safe keeping*, but merely for *registration and issuing the proper warrants, &c.* If the officer does receive it for safe keeping, he gets no compensation therefor; he is not within the necessary line of his official duty, but consults principally the convenience of the holder. The holder, not bound to deposit, does it voluntarily, and at his own risk. He does it on the ground of personal confidence only. I admit, with the judge who preceded me, that the auditor's duty to grant warrants induces the necessity of a delivery to him; but this delivery is to be understood as for that purpose only, and not for safe keeping for any length of time.

These are my general ideas at present. I will not, however, finally conclude the appellant; but, perhaps, it will be his best way to apply to the legislature, who will no doubt

do him justice. That body, too, might not deem itself bound to turn him round to shew a regular transfer, as we do, but consider the holder as the owner under the general practice of the country respecting papers of this sort. As to the second aspect of the bill, the defects in the case before stated, equally forbids a decree against the appellee in that view.

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FLEMING, Judge. The answer denies that the certificate was delivered to the defendant; and the testimony does not shew, that he took charge of it. One of the witnesses says, indeed, that it was left in the office; but none of them prove that it was put under his care: and *Yancey*, the one who says he left it there, seems himself to have been negligent. I think, therefore, that the auditor had not such a custody of the paper, as renders either himself, or the public, liable for it. But, if he had, *Johnson* shews no right to the certificate; for it was not assigned to him, and bare possession is not enough, according to the decision in *Wilson v. Rucker*, 1 Call, 500. Besides, if he had shewn a title, his proper remedy would have been an action of trover against *Singleton*; who, as one of the witnesses proves, was in possession of the certificate, at a subsequent period. I am therefore, for affirming the decree, but without prejudice to a future suit, if the appellant should, hereafter, be able to prove his title to the certificate, and supply the necessary evidence in other respects.

CARRINGTON, Judge. The testimony does not disprove the answer; which denies that the certificate was delivered to the defendant; and therefore, upon that ground, even if there was no other, the court did right in refusing relief. But, independent of this, the appellant shews no title to the certificate; for it is not assigned to him; and mere possession is not sufficient to prove that it belonged to him. *Wilson v. Rucker*, 1 Call, 500. It is not the duty of the auditor to take charge of the certificate; but the owner should

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wait, until the prior business of the office allows attention to his : and, if his impatience, or convenience, makes him prefer leaving the certificate in the office, he does it at his own risk ; for it would be unreasonable to suppose that so many various claims should be attended to at once ; or that the public officer, who has no interest in them, should be bound to take charge of the evidences respecting them, not only to his own peril, but to the hindrance of the office, and danger to the public, from mistakes and losses, which it might not be easy to foresee or prevent. There is no pretence then, for responsibility either on the part of *Pendleton*, or of the commonwealth. Besides that, *Johnson* does not shew any title to the certificate : the description of it is too imperfect : for the number, date, and service for which it was granted, are not proved ; and the only account we have of it, is that given by himself ; which barely states that it was a certificate for £ 47. 9., and bore 6 per cent. interest : a description much too imperfect to be the foundation of a decree against any body. But as some person may have a just title to the certificate, and may be able properly to identify it, I am for dismissing the bill, without prejudice as to the commonwealth, but generally as to *Pendleton*.

LYONS, President. If the appelland had shewn title to the certificate, *Coates* ought nevertheless to have been a party to the suit, as he had not assigned it, and might be interested in the event. The appelland shews no title however ; and therefore, if there were nothing else in the cause, the decree would have been right upon that ground. But I am strongly inclined against the plaintiff upon the general question. For the certificate was left in the office for the convenience of the plaintiff, and not of the defendant ; who was not bound to take charge of it ; and, in fact, did not. It would therefore be rigorous, in the extreme, to hold either him, or the public, responsible for safe keeping, although he never undertook it, and neither he, nor the state, was to derive any advantage from it. I am consequently of opinion

that the decree should be affirmed absolutely as to *Pendleton*, but without prejudice as to the commonwealth, if the appellant should hereafter be able to prove his right to the certificate, and supply the necessary evidence in other respects.

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### CASE OF THE COUNTY LEVY.

The county levy is not contrary to the bill of rights and the constitution ; and the county courts have power to lay it.

The construction would be unfair, which should extend words of exclusion in the constitution, used for one purpose, to other objects not contemplated by the framers, at the time.

**PENDLETON, President.** The decision of Fairfax county court, in January 1789, "That laying the county levy was contrary to the bill of rights and constitution of government, and unjust and oppressive," concerning the whole state, in every important article of government, deserves the most serious and attentive consideration.

The article in the bill of rights, supposed to be alluded to, is the sixth : "Elections of members to serve as representatives of the people, in assembly, ought to be free ; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good."

The evident purpose of this was to secure the freedom of elections ; to give the principle of the right of suffrage ; and to declare that those having that right cannot be taxed by laws to which they do not assent by themselves or representatives. To maintain that great principle of freedom,