

REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA :
WITH SELECT CASES,
RELATING CHIEFLY TO POINTS OF PRACTICE,
DECIDED BY
THE SUPERIOR COURT OF CHANCERY
FOR THE RICHMOND DISTRICT.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (N. Y.)
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1809.

DISTRICT OF VIRGINIA, TO WIT :

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit :

“ Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia :
“ with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of
“ Chancery for the Richmond District. The second edition, revised and corrected by the
“ authors. Volume I. By William W. Hening and William Munford.”

IN CONFORMITY to the act of the 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 proprie-
“ tors 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.”

(L. S.)

WILLIAM MARSHALL,
Clerk of the District of Virginia.

stronger than the cases just put. The rule on the subject of abatements, that, wherever the death of any party pending the writ makes *no change* in the proceedings, the writ does not abate, (a) is decisive that no abatement exists in the case before us.

When these circumstances are considered ; and, especially, when it is considered that regularly judgment is rendered in favour of and possession is delivered to the lessee, who ought (as is before said from *Blackstone*) to be a *real* person, the difficulties on this subject vanish. As to the difficulty arising from the death of the lessor ; if the *modern practice* be to deliver possession to *the lessor*, he who now stands in his shoes acts at his peril, and under the controul of the Court.

Judge FLEMING said it was the unanimous opinion of the Court, that the suit did not abate.



The Auditor, &c. against Johnson's Executrix.

ON an appeal from a decree of the High Court of Chancery rendered by the late Judge of that Court.

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 ; and that it hath been entirely lost. That the auditor afterwards told one *Poindexter*, he had heard that Capt. *Singleton* had a certificate of that description, it having been issued as payable to one *Coats*, and for the sum of 47 or 48*l*.

*The bill is one of 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 the payment of interest, in consequence of a loss happening through the negligence or default of the auditor as a public officer, that renewal from the Commonwealth, without making the original holder *suit*.

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(a) 1 *Bac. Abr.*
Gwil. ed. 1*l*.

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The answer of the defendant *positively* denying a fact charged in the bill ought not to be outweighed by testimony *not equally positive* on the other side.

A person losing a public certificate bearing interest which never was transferred to him by actual assignments from the original holder, ought not, by a suit in Chancery, to obtain its a party to the

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he be decreed to make compensation for the loss in his individual capacity.

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.

On a hearing, the Chancellor dismissed the bill, from which decree an appeal was taken to this Court ; and the appeal coming on to be heard at the *April* term, 1804, in the name of *Johnson v. Pendleton*, auditor, &c. the decree of dismissal was affirmed, *without prejudice*.

The appellant then supposing that the Commonwealth was liable, in consequence of the act of *Pendleton*, who was one of her public officers, (though he might not be liable in his individual character,) proceeded to another hearing in the High Court of Chancery ; previously to which, he executed a release to *Robert Yancey*, who had been the bearer of the certificate, and whose testimony was objected to on that account ; and he, moreover, proved by a further examination of *John Carter*, one of the clerks in the auditor's office, that the certificate said to have been lost in the said office had been purchased by *George Pickett*, in whose possession he had seen it, but who could not recollect from whom he bought it.

The cause coming on again to be heard in the High Court of Chancery, the Chancellor decreed against the Commonwealth, the amount of the certificate with interest ; from which decree the *auditor*, in behalf of the Commonwealth, took an appeal to this Court.

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*The *Attorney General*, for the *auditor*, representing the Commonwealth, said that this was the same case which had before been decided, on the appeal of *Johnson v. Pendleton*, the late auditor. Neither *Pendleton* in his individual character, nor the Commonwealth, whose agent he was, could be liable unless for gross neglect. (a) It is not, however, admitted that the Commonwealth would be liable for the act of her agent under any circumstances. The Court has

(a) *Jones on Bailments*, 117. 120.

already decided, upon the same evidence, that *Pendleton* was not personally responsible. If gross negligence had been proven, in him, he would have been *individually* liable: and this opinion of the Court may be considered as decisive of the question.

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Randolph, for the appellee. The reservation in the decree in the case of *Johnson v. Pendleton*, the late auditor, shews that the Court did not decide the case as to the Commonwealth. It is not the same case; but, if it were, the Court might consider it as an original suit. *Pendleton* was exempted on the ground that there was no personal claim against him, he having acted as a public officer in the ordinary routine of his duty. The evidence, too, is different from that on which *Johnson v. Pendleton* was decided. *Yancey's* deposition was objected to before, because he being the bearer of the certificate to the auditor's office was interested in shewing how he had disposed of it. This objection has been removed by a release before his last examination. There is also further evidence derived from *John Carter*. In his former deposition, he spoke merely of the *practice* in the auditor's office; in the present, he states that the certificate had been found and sold to *George Pickett*. It is admitted that *Johnson* was possessed of that certificate, in the same manner as others, who drew further certificates from the treasury; such as were entitled to draw interest. The custom at the treasury was, for the person who brought the certificate, to be considered as the actual owner. It was so considered till the case of *Wilson v. Rucker*,^(a) was decided; and, even after that decision, the bearer was considered as the agent for the owner. This certificate was carried to the auditor's office, in order to obtain a warrant for the interest, and was lost in a public office. It was an acknowledged debt of the Commonwealth, on which the interest was to be paid: and the auditor was the agent of the Commonwealth in issuing a warrant for the interest. Compare this to the *case of a common person: a man says, "bring my bond to my agent, "and he will pay you the interest:" if it be lost is not the principal liable? The auditor, being a public officer, and warned that the certificate which was lost belonged to *Johnson*, ought to have made a minute in his books; and when it was brought for final redemption, he ought to have stopped it, and told the holder that it was the property of *Johnson*. In the event of a suit against him, he might have defended himself on the principles of the case of *Wilson v. Rucker*. If the auditor had used common diligence, *John-*

(a) 1 Call, 590.

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son might have regained his certificate. But, suppose it had never been laid before the auditor, he ought to have given information to the treasurer that it was a certificate issued in the name of *Coats*.

The Attorney General, in reply. All that the Court meant to do, by the reservation, in the decree in *Johnson v. Pendleton* was to leave the case open. Although it is an original question as to the Commonwealth, yet it is a fair argument to say, that the Court having, on a similar evidence, decided that *Pendleton* the depositary was not liable; on a parity of reason the Commonwealth could not be liable. The certificate might never have come into the auditor's office: it might have been paid into the treasury for taxes, or funded in the *United States* loan-office. This might have been done by the *holder*, notwithstanding the decision of the Court in the case of *Wilson* and *Rucker*. The President, in delivering his opinion, seems to admit the existence of the custom, to transfer these papers by delivery only; and this record supports the position; for *Pickett* was in possession of the certificate without assignment, or even knowing from whom he received it. If *Johnson* were entitled, at all, he ought to have gone against *Singleton*, or *Pickett*, in whose possession he knew the certificate was, and not against *Pendleton*, or the Commonwealth.

Curia advisare vult.

Wednesday, November 11. The Judges delivered their opinions.

Judge TUCKER, after stating the case, and observing that it did not materially vary from the case of *Johnson v. Pendleton*, late auditor, &c. decided at the *April* term, 1804, said that it might be satisfactory to refer to the opinion which he then gave. He recited the testimony of *James *Poindexter*, stating, that he was informed by the auditor that Mr. *Tancey* had handed him, or handed in, a certificate, and the interest was made out and laid upon the table according to the best of his recollection. "This, said Judge TUCKER, 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 *Tancey* does not swear that he "left the certificate, as the auditor told him he might. "Nor does *Poindexter* swear positively to the information

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“ 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 be given up to him, to examine and compare it 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 herein. 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 re-delivered 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 *Term Rep.* 760 to 763.(a) cited by Mr. *Randolph*; the general reasoning in which seems to be sound law. 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 transferable by delivery only, without an assignment, strengthens the conclusion in my mind. The case in 1 *Salk.* 289.(b) 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

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(a) *Fenn at al. v. Harrison.*

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(b) Anonymous.

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(a) *Brown-*
son v. Avery.

(b) 2 Lord
Raym. 371.

(c) 1 *Call,*
514.

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“ corroborated by other circumstances. And in 1 *Strange*,
“ 507.(a) cited also by him, an original debtor was allowed
“ to prove a payment of the debt, by the plaintiff in that
“ suit, at the request of the defendant, in behalf of the
“ debtor.(1) 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 his 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*,(b) is a pa-
“ rallel case; where the person who carried a bill of ex-
“ change endorsed in blank to the drawee for acceptance,
“ was admitted as a witness to prove the delivery: and
“ held in K. B. that he might.

“ But although *Yancey's* testimony, had it gone further,
“ would have weighed with me in opposition to the audi-
“ tor's answer, if supported by other circumstances, yet
“ taking it as it stands, I cannot think it sufficient to over-
“ balance the auditor's answer, even with the aid of *Poin-*
“ *dexter's* evidence, on which I have already said enough.
“ Nor can I think, even were the evidence more satisfac-
“ tory, the auditor liable, unless in case of actual malfea-
“ sance, which is not charged.

“ But, were I satisfied upon this point, of the actual de-
“ livery of the warrant into the auditor's office, in any man-
“ ner usually observed in the office in similar cases, I
“ should still doubt upon another. Whether the complain-
“ ant is entitled to a renewal of this certificate, (which, by
“ his own shewing, was issued to one *Coats*, and made out
“ in his name,) without making the original proprietor a
“ party in the cause. For, in *Wilson v. Rucker*,(c) 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 as-
“ signee of *Coats*, though he claims the property in the
“ certificate. Under the decision in *Wilson v. Rucker*, he
“ could, at most, only have an equitable title, united with
“ the possession; but the legal title, even in that case,
“ would have been in *Coats*.

“ Can this Court decree a renewal of the legal evidence
“ of a debt due from the Commonwealth, which is not in

(1) See as to the admission of witnesses from necessity, 1 *Str.* 647.
Martin et al. v. Horrel. 2 *Johnson's (N. Y.) Rep.* 189. *Burlingham v.*
Deyer.

“ its nature transferable by *delivery* only, to be made to
 “ one who does not show a *legal* title, without calling upon
 “ the *legal* proprietor to assert *his* claim.(a) 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.” As to the present case of *The Auditor v. Johnson’s Executrix*, Judge TUCKER was of opinion that the decree be reversed.

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(a) See *L. V.*
edit. 1785,
Oct. 1782, c.
1. s. 1. 5.
May, 1783,
c. 8 s. 12 14.
& c. 38. s. 8.
as to these
certificates.

Judge ROANE said that he had perused the case, as formerly decided by this court, and could not perceive any variations in it. He was, therefore, of opinion that the decree be reversed.

Judge FLEMING. This appears to be in substance precisely the case of *Johnson v. Pendleton*, decided in this Court, the 4th of *May*, 1804, with this small variance in the evidence which does not affect the merits of the cause. In that case *James Poindexter* deposed that *John Pendleton*, then auditor of the public accounts, informed him that he had discovered in the hands of Capt. *Singleton*, a certificate which Mr. *Johnson* said he had lost, or words to that effect ;—and in the present case, *John Carter*, in his affidavit saith, that, after the time when the certificate was said to be lost or mislaid in the auditor’s office, the said certificate was purchased by and in the possession of *George Pickett*, who said he could not recollect of whom he bought it, as he had made no memorandum in his book to shew that particular circumstance.

The decree is therefore erroneous, and is to be reversed.