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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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JONES, EX'R, *v.* WILLIAMS.

Thursday, October 17, 1799.

Executors who appear to have made no advantage by it, will not be denied justice for having failed to make up an account of their administration, though, strictly speaking, it is, perhaps, their duty.*

Commissions disallowed an executor where a legacy is given him.

Quit-rents allowed against the representatives of a surviving joint-tenant, under the circumstances.

This was an appeal from a decree of the High Court of Chancery, in a cause removed thither from the County Court of Nottoway, by writ of *certiorari.* The bill states, that William Watson made his will, and appointed several executors, but that Edward Jones was the acting executor; who dying, Richard Jones became the acting executor. That Watson left four daughters, to whom he devised a tract of 2,650 acres of land. That Thomas Williams, the defendant, intermarried [103] with Elizabeth, one of the said daughters, and received the whole of his wife's proportion of the said Watson's estate, except of the cash supposed to be in the hands of the said Richard Jones, which was unsettled. That in the year 1764, the said Richard Jones paid the defendant £77 15s. through the hands of Neil Buchanan. That, afterwards, the defendant requested £100, but was told he had no title to it; whereupon, he proposed that it should be lent him, and that he would refund it, if, on settlement, it should appear that he had no title. That the loan took place accordingly, and a bond for the money was given in conformity thereto, which with other papers has been lost. That the said Richard Jones is since dead, and the plaintiffs are his executors. That since his death, an order of Amelia County Court was made, by consent of the legatees of the said William Watson and the plaintiffs, for settling the accounts of the administration. That the commissioners made a report, whereby it appears that Watson's estate is indebted to the estate of the said

[* By act of 1825 (Supp. to R. C. of 1819, p. 217, § 8,) executors and administrators forfeited all commission or other compensation for their services, unless they settled their accounts before commissioners in two years after qualification, and in every two years afterwards.

By Code of 1849, p. 548-'9, § 7, 8, they and all other fiduciaries are required to have their accounts settled before a commissioner of the court which appointed them within *one year* from the time of appointment, and within six months after the expiration of each other year.

Richard Jones. That, according to that report, the defendant will be found to owe £30 4s. 4d., exclusive of the £100, which he refuses to pay. Therefore, the bill prays a decree for payment and general relief.

The answer admits, that the defendant has received all his proportion of Watson's estate except the unsettled account; denies the charges of the bill relative to the £77 15s., and says that the defendant has a fair copy of all his dealings with Neil Buchanan, and there is no credit therein for the same; admits that the defendant received the £100, for which he gave a receipt, as for part of his wife's portion, but denies that he gave any bond to refund; although he told the said Richard Jones, if he had received more than his proportion, that he would refund; states that he had often requested the said Richard Jones to come to a settlement, as he believed there was a balance due him: That the said Richard Jones lent Erskine, who married one of the daughters of Watson, about £200, which he afterwards told the de- [104] fendant he was afraid would be lost, and asked him what he had best do with respect thereto: That the defendant told Jones there would be some small estate of Erskine's after paying a mortgage to Speirs & Co., but Jones said he was unwilling to distress Mrs. Erskine; admits the order of Amelia Court, but says that the defendant was not present at the settlement, and calls on the plaintiff to support his allegations by legal evidence.

The evidence as to the £77 15s. was chiefly circumstantial, and there was a variety of evidence as to the other parts of the case. The commissioner debited the defendant with a proportion of the quit-rents, and disallowed the £77 15s.

The defendant objected to the quit-rents, but the Court of Chancery allowed them, and approved of the commissioner's allowance of the £77 15s.

The plaintiff appealed from the decree of the Court of Chancery to this Court.

PENDLETON, President, delivered the resolution of the Court.

This is truly stated to be a stale transaction, commencing in 1752. It was the administration of a small estate which was devised in 1765, and yet no account is settled by the executors till after their deaths in 1786, when a partial one is made up by the executors of the survivor.

This had a bad aspect respecting the executors; but since no fraud or misconduct is imputed to them in the management

of the estate, nor any apparent advantage, which they could or did derive to themselves from the omission, but on the contrary a probable disadvantage, in having articles disallowed for defect in the proof, which they might have justified at an earlier period, we inclined to attribute it to inattention in them, and confidence on the part of the legatees in their integrity, rather than to any impure motives, and, therefore, think it would be too severe to deny them justice on account
[105] of that omission of a duty; for such perhaps it is, although the law only directs them to render accounts when desired.

When the children came of age, they might make private adjustments of the accounts with the executors, to their satisfaction, without reducing them to form. This appears to have been the case as to Edward Jones, the principal acting executor, from 1752 to 1758, who never made up any account with the Court; yet, till before the Auditor's in 1796, we hear of no complaint on that head: on the contrary, the defendant acknowledges that he received all his wife's part of the estate, except any money which might appear to be in the hands of Richard Jones.

With these impressions, the Court proceeded to examine the justice of the case, and think the decree right as to the two articles discussed in Court, disallowing the £77. 15s. as not sufficiently proved, though probably just, and allowing the items for the quit-rents.

Mr. Wickham was right in his position, that joint obligations survive as well as joint rights, but it does not apply; since here was no existing obligation, when the survivorship took place.

The testator provided a fund in the hands of his executors to pay these quit-rents, which they yearly applied accordingly, and are allowed those payments as a set-off against that fund, to the surplus of which, the defendant was entitled one-fourth.

We then considered the claim of the executors for commissions and interest on his balance.

The commissions are disallowed, because a reward is devised to the executors by the will.

[106] But interest is allowed, because it is natural justice that he who has the use of another's money should pay interest for it.

It was objected, that the executor had the use of the money previous to 1774, without accounting for interest; a just objection, if true. We examined the account from 1759, when Richard's administration commenced, to 1762, when Williams

married; the balance then in Richard's hands was £125. 14s. 10d.; he paid £83. 15s. 3d., and from that time the estate was in his debt to 1774. It is true, the disallowance of articles now turns that balance against him, so as to reduce the £100 advanced in 1774, to £53. 13s. 4d.; on that balance as an agreed loan, the plaintiff ought to have interest. There is, therefore, error in not allowing that interest: And the decree must be reversed with costs: And a decree entered for £53, and interest from July 29, 1774, and the other reservations in the decree.*

[* *Jones* v. *Watson*, 3 Call, 253. After two references to County Court commissioners, and one to a commissioner of the High Court of Chancery, to settle an administration account, no exception for want of credits will be allowed here, which was not made at one of those examinations.]

COUPLAND *v.* ANDERSON.

Friday, October 25, 1799.

If there be a reference by rule of Court, in a suit depending, to four arbitrators, or any three, and afterwards two others are added; if two of the first named arbitrators, and one of the last, make an award, it is sufficient, and a majority of the whole is not required.*

In such a case, if the rule mentions, that the money awarded is to be paid to the Sheriff, for the benefit of the plaintiff's creditors, the subsequent proceedings must be in that style also.

If the plaintiff be bail for the defendant at the time of reference in a depending suit, the failure of the arbitrators to award concerning that undertaking, will not vitiate the award.

The Court may give costs, though the award does not mention them.

If cross-suits be referred by the parties, a single award that one of them is indebted to the other in a balance of account, suffices to settle the whole controversy.†

This was a writ of *supersedeas* to a judgment of the District Court of Prince Edward. The petition stated, that Anderson instituted one suit against the petitioner, and the petitioner

* See *Manlove* v. *Thrift*, 5 Mun. 493; *Rison* v. *Berry*, 4 Rand. 275.

† An award of a certain sum to be paid by one party to the other, being written on the back of the arbitration bond, must be taken as settling all matters therein submitted; and therefore, is certain, sufficient and final. *Doolittle* v. *Malcom*, 8 Leigh, 608.

What award is complete and final, though not actually delivered; *Pollard* v. *Lumpkin*, 6 Gratt. 398.