

REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME IV.

RICHMOND:

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NOTE BY THE EDITOR.

There is no printed report of the decisions of the first court of appeals, and of those which have been omitted by reporters from that period to the death of Mr. *Pendleton*, although such a work is obviously wanted ; and it is to supply that defect, that the present volume is published : which consists of two parts : the first includes all the important cases determined from the commencement of the first court, to its final dissolution in the year 1789 ; the second contains the unreported cases in the new court of appeals, from that period to the death of judge *Pendleton* in 1803, besides two cases in the general court, and court of admiralty.

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During the paper money age, all sums of debit and credit in the executor's administration account, ought to be stated in due order of time, and to stand as nominally entered, without scaling when the executor is debtor, but when there is an excess, it should be scaled.

And where the executor kept a general administration account; and a separate account for monies borrowed by him from the estate: and, in the latter, entered a sum of sterling money received in February 1777, which he converted into current money at the exchange, and annually carried the interest into the administration account: This separate account should, on his death in 1780, be incorporated, at the proper dates, into the administration account; which should then be closed; the interest and commissions set against each other; and the balance, upon them, carried into the body of the administration account; and, if the balance then due, upon the administration account, should be only equal to, or less, than the specie money borrowed, such balance should be regarded as specie; but if it exceed the money borrowed, the excess should be scaled.

If the executor deposited money in the loan office in February 1778; drew it out in April 1779; and deposited it again on the same day, he should be allowed the nominal amount of the deposit, notwithstanding the great depreciation between the first and second deposit.

If the executor sold tobaccos, made on the testator's lands, to merchants in England, and collected part of the money only, the residue belongs to the devisees, who are to pursue the debtors, without recourse to the executor.

Where the executor enters the profits of the testator's lands in his administration account, it is right that discrimination accounts should be extracted from them by the commissioner, in order to shew each devisee's proportion of debits and credits.

Where the testator directed that the new goods in his house, and those he had ordered from Europe, should be disposed of for the use of the family, in the same manner as if he were living, no account should be taken of them in the settlement of his estate.

If the testator owned a lease for years, it is to be charged at the price it would have produced if it had been sold at his death; and not according to an estimated rent, valued upon the principle of annuities.

And, if the leased premises were exposed to the enemy, interest should not accrue, upon the price, until after the war.

Where the testator had bought some tickets in *Byrd's* lottery, but had not paid for them, the tickets passed by the residuary clause of his will; but the personal estate was chargeable with the price of them.

The heir was not liable, under the act of 1748, for stocks of cattle, &c. destroyed by the British army.

If the testator devises his bonds to two of his infant children; one of whom dies during his minority; and the other comes of age, and receives the specialties from the executor; part of which he collects: he shall be al-

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lowed a commission on the money collected, and the rest of the bonds shall be divided between him and the representatives of the other.

Where the husband of a legatee declined, during the revolutionary war, to take her legacy when offered by the executor, partly in certificates and partly in money, saying that he had rather it should remain in the hands of the executor until the surviving son of the testator came of age, interest was thereby suspended; and the surviving son will be allowed a year after he comes of age, to look into his affairs, before the legacy will begin to carry interest again.

And the same rule will apply, as to *interest* upon the other claims of the husband in right of his wife, against the surviving son, in consequence of his having received the estate from the executor.

If the testator devises £1000 a piece to his two infant daughters, to be paid at age or marriage; but, if either die, her legacy to go to her sister; and one of them dies during infancy, the legacy left *her* is due immediately, and will carry interest from one year after her death.

Where the husband gave a receipt for £200, in part of the *bequest* to his wife, the payment shall be applied to the principal, and not to the interest.

If the testator's widow, who was one of the executors, devises her estate to her daughter on condition that she abide by such settlement of her husband's estate, as the surviving executors shall make; and the surviving executors make a settlement, the daughter will be bound by it.

If the testator devises his furniture to his wife for life, and after her death to one of his sons, who dies: and subsequently, the wife, at her death, leaves the furniture in one of the houses belonging to the surviving son, who, upon coming of age, takes possession of the house, he is not to be charged, in money, for the furniture; but has a right to deliver it, long after he took possession of it, to the representative of his deceased brother.

Whether a mother, during her lifetime, charges her children with board or not, it will be allowed her estate, after her death.

The commissioner is bound to state the accounts, according to the decree of the court of appeals; and cannot charge the appellant with any loss sustained, or supposed to be sustained, by the appellee, in consequence of the principles on which the account was directed, in relation either to depreciation or interest.

Where the accounts have been discussed, for a long time, in the court of chancery before and after the appeal; and have become intricate from the manner of stating them; if a bill of review be applied for to the last decree of the court of chancery, purporting to be made, in conformity to the decree of the court of appeals; and leave to file the bill be refused; the court of appeals will correct what is erroneous in the report of the commissioner, acting under its own decree, and affirm the residue, in order to prevent further delay, although the affirmance may possibly be injurious in some instances.

In a suit brought, in the high court of chancery, by *William H. Macon*, as administrator of *Sarah Macon* his wife, and of *Mary Ambler* the widow of *Edward Ambler*, against

the surviving executors of the said *Edward Ambler*, the executors of *Robert Carter Nicholas*, and *John Ambler*, the case appeared to be as follows :

Edward Ambler died, in 1768, seized in fee of an estate in Jamestown ; a plantation, not far from thence, on Powhatan swamp ; an estate in Hanover called the Cottage ; a plantation in Louisa ; and a moiety of an estate at Westham, (the other moiety of which belonged to *Robert Carter Nicholas*) ; and possessed of a lease for years, from the governour, of a farm on the main land near Jamestown.

By his will he devised, To his wife, the said *Mary Ambler*, during widowhood and in lieu of dower, his Jamestown estate, together with the slaves, stocks and furniture thereon, and one fifth of the nett profits of the rest of his estate : To his two daughters, *Sarah* and *Mary*, £ 1000 each, to be paid when they should respectively marry, or attain the age of twenty-one years ; and, in case of the death of either of them, unmarried and under age, the legacy of the one so dying to go to the survivor ; both, in the mean time, to be maintained out of his estate : To his son *John Ambler*, his lots in York, and his lands in Louisa and Hanover, with the slaves, stocks, &c. thereon, and half his debts after satisfying legacies : To his son *Edward Cary Ambler*, his moiety of the Westham estate, and of the slaves and stocks thereon ; the lease on the main ; the Powhatan plantation ; and the remainder, after the death of his wife, in the Jamestown estate, together with the slaves, stocks and furniture on the premises so devised to him ; the other half of his debts ; and the residue of his estate not specifically devised, except the new goods he might leave in his house, and those he had written for ; which were to be disposed of for the use of the family and plantations in the same manner, as if he were living. Of this will, he appointed his wife, *Jaquelin Ambler*, *Robert Carter Nicholas*, *John Blair, jr.* and *Wilson M. Cary*, executors, and made them guardians of his children ; but *Jaquelin Ambler* was not to be executor of any debt he might owe at the testator's death.

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The five executors all qualified ; but Robert Carter Nicholas was the acting executor ; and kept an account of his transactions.

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Mary Ambler, the widow, took possession of the Jamestown estate, with the slaves, stocks and furniture thereon. She removed to the Cottage in Hanover about the year 1777, and continued there until her death. During all her lifetime, she intermeddled with the estates, taking wood, tobacco, provisions, &c. as she pleased ; and keeping possession of a slave by the name of *George*, which was not devised to her.

The testator's daughter *Mary* died an infant, and unmarried, on the 31st of October, 1768, about a month after his death.

Edward Cary Ambler, the son, made his will on the 5th of March, 1775, being then sixteen years of age, and died an infant, before the 11th of September in that year ; having by his will, of which he left *Robert Carter Nicholas* executor, devised all his monies, debts and liquors to his mother.

The British army, under lord *Cornwallis*, committed great ravages at Jamestown, the main, and Powhatan, destroying, among other things, all the stocks of cattle, &c. belonging to those places.

Robert Carter Nicholas died in the year 1780.

Mary Ambler died in May 1781, and devised all her estate to trustees for the use of her daughter *Sarah* for life, with remainder to the daughters of the said *Sarah* ; but, upon condition, that the legatees should abide by such settlement, as her husband's executors should make with regard to her proportion of the annual profits of his estate, as his affairs had unavoidably been thrown into great confusion by the war, and her removal to Hanover, so that a regular settlement could not be made by the executors.

Mary Ambler had settlements with *Robert Carter Nicholas*, the acting executor, to the 31st of March, 1773 ; but the public commotions prevented any further adjustments between them.

In pursuance of the will of *Mary Ambler*, two of the surviving executors of *Edward Ambler*, that is to say, *Jaquelin Ambler* and *John Blair*, settled the accounts of *Edward Ambler's* estate, with Mr. *Nicholas* and herself, (except as to her fifth of the profits of the *Louisa* and *Westham* plantations, which was postponed for future investigation,) and found a balance against her of £ 1492. 6. 5.

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Robert Carter Nicholas, as acting executor of *Edward Ambler*, in the years 1771, 1772, 1773, drew several sums of sterling money, from *Samuel Athaws*, in England; which he entered, with the exchange, in a separate account, upon his books, as borrowed by him, of the estate, on his own private account; and, in February 1777, he drew, from *Norton & Sons*, of that country, another sum of £ 1000 sterling; which he entered in the same account, and in the same manner. The amount of these transactions, to June 1780, (exclusive of the administration account,) was £ 2590 Virginia money.

On the 30th of January, 1778, *Robert Carter Nicholas* put the proceeds of some debts collected by him into the state's loan office, and took certificates for them; but, on the 22d of April, 1779, he credited the estate with the principal and interest, as then received from the loan office. On that day, however, he put £ 2000, (which probably comprehended the other,) into the same office, took a certificate for it; and charged the nominal amount to the estate.

On the 25th of March, 1779, *William H. Macon* intermarried with *Sarah Ambler*, the surviving daughter of *Edward Ambler*; and, within a day or two afterwards, *Robert Carter Nicholas*, wrote him that he wished to pay her fortune; but left it to himself to receive it, or not: adding, "what I thought incumbent on me, as one of the ladies' guardians, was to be provided for the payment in time: which I have done in loan office certificates and money; which I have reserved for some time for the special purpose. I suppose you will not stand upon my making a formal tender; and should therefore be glad, if you would signify to

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me your inclination by a line or two," To which, *Macon*, on the 30th of March, 1779, answered as follows, "I received your very obliging letter of the 27th inst., wherein you inform me it would be convenient for you to pay Mrs. *Macon's* fortune. As our currency has depreciated in so great a degree since Mr. *Ambler's* death, it has in my opinion become inadequate to the intentions of his will. Unless our paper currency should become of much greater value than it is at present, I think it best not to receive it, but to let it remain in your hands, until Mr. *John Ambler* arrives to a lawful age; then I am persuaded we shall settle it to our mutual satisfaction."

There were some new goods in the house at Jamestown, when *Edward Ambler* died; and those which had been ordered, by him, arrived, after his death.

It does not appear that *Mary Ambler* had, in her lifetime, made any charge against her children for board, although the daughters constantly, and the sons sometimes, lived with her; but, after her death, the surviving executors of *Edward Ambler* introduced it into the account settled by them, although the will of *Edward Ambler* had not subjected his estate to the maintenance of his sons.

John Ambler became of age in 1783, and took possession of his estates. After which he received, from the executors of *Robert Carter Nicholas*, £ 1750, and all the bonds still due: some of which he collected, but the rest remained unpaid at the hearing of this cause. He made several payments on account of the legacies left his sisters: Two of which were expressed to be in part of the principal; but the other was in these words, "Received of *John Ambler*, esq. two hundred pounds current, in part of her father's bequest to my late wife *Sarah*. Witness my hand this twenty-sixth day of August, one thousand seven hundred and eighty-nine. *W. H. Macon*."

Sarah Macon, the plaintiff's wife, left one daughter.

When *Mary Ambler* died, the furniture devised to her for life, was at the Cottage; and remained there after *John Ambler* took possession of the estate.

At the death of *Robert Carter Nicholas*, there was a balance still due from *Athaws*, and another from *Norton & Sons*: Neither of which was collected afterwards.

The principal object of this suit was to recover the two legacies of £ 1000 each, devised to the testator's daughters; *Edward Cary Ambler's* moiety of the debts, his liquors and monies, including the profits of his estate during his lifetime; two-thirds of the stocks and plantation utensils upon the lands devised to him; two-thirds of the furniture devised to *Mary Ambler*, for life; two-thirds of the lease of the farm on the main; and *Mary Ambler's* fifth of the nett profits of her husband's estate, with the supplies directed by his will.

The court of chancery referred the accounts to a commissioner; who reported, 1. A separate account of the profits of the Westham estate. 2. An account of the legacies devised to the daughters, with interest upon that to *Mary*, from the day of her death, and on that to *Sarah*, from the day of her marriage; the £ 200, paid on the 26th of August, 1789, being applied to the interest. 3. The administration account of *Robert Carter Nicholas*, according to his own books, except that he did not extend to his credit, the certificates for the monies deposited in the loan office: This account included the profits of the sons' estates; but two others, called discrimination accounts, were extracted, from it, by the commissioner, against *Edward Cary Ambler* and *John Ambler*, in order to ascertain the respective rights and responsibilities of each of them. 4. The private account of *Robert Carter Nicholas*, for the money borrowed by him, as entered on his books, to November 1779; and charging him with interest upon the balance from that year. 5. An account of the tobacco annually made upon the estates; by which it appeared that no credit was given by the executor for a crop which the commissioner supposed had been made in 1777.

The court of chancery recommitted the report to the commissioner; who made several successive reports, and

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statements, under the directions of the judge ; to which exceptions were filed, but the result was a decree, 1. That the settlement made by the surviving executors of *Edward Ambler* pursuant to the will of *Mary Ambler* should not bind the plaintiff. 2. That *Robert Carter Nicholas* should be charged with the money, borrowed by him of the estate on his private account, as specie ; and should be disallowed credit for the nominal amount of the certificates, of the 22d of April, 1779, for the money put into the loan office. 3. That *John Ambler* should be charged, with a moiety of the new goods and of those which had been ordered by the testator ; with a moiety, in money, of the bonds received by him from the executors of *Robert Carter Nicholas* ; with two thirds of the stocks destroyed by the British army ; with two thirds of the value of the furniture according to an estimate made by the commissioner ; with two thirds of the value of the lease on the main, upon a supposition that it would have rented for £ 30 per annum, and the value of *that rent* calculated upon the principle of annuities : and with board to his mother when he lived with her during his minority. 4. That the plaintiff should have full interest upon the legacies to the daughters, except that of *Mary*, upon which it was to be suspended for the period of the war, and the £ 200 paid, on the 26th of August, 1789, applied to the interest. 5. That an issue should be made up to try whether a crop of tobacco was made in 1777.

The executors of *Robert Carter Nicholas*, and *John Ambler* appealed to the court of appeals.

Randolph, for *Nicholas's* executors. The money borrowed and standing in the private account ought to be scaled ; for a very high exchange was added, and the amount credited by Mr. *Nicholas* in current money ; for which he would have been accountable, if depreciation had not been, afterwards, provided for by the legislature ; and, as he took the risque, he ought to have the advantage. But be that as it may, whenever he was creditor upon the administration

account, the balance ought to be applied at its nominal amount against the private account. The nominal amount, too, of the certificates, of the 22d of April, 1779, should be allowed the executor; for the money belonged to the estate, and the security was a proper one. There is not the slightest evidence of any tobacco crop in 1777; and the situation of the country, at that time, affords a strong presumption to the contrary. This is confirmed by the regularity of the account in other respects; which refutes the idea of an omission so important, and leads to the inference, that, if there was such a crop, it was blended with those of other years. Besides the settlement made by the surviving executors, at a comparatively recent period, contains none; and that ought to be adhered to, as Mrs. *Ambler* intended it for the benefit of all concerned, from an avowed conviction of the injustice that would be done, by any other mode of adjustment.

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Call, for Ambler. The new goods ought not to have been charged at all; for the testator intended them for the indiscriminate use of the family; but, if they were to be charged, Mrs. *Ambler* should have been debited with a full proportion: for it is probable, that she used most of them, as the greater part was of a description suited to her wants. The appellant ought not to have been charged in money for the whole of the bonds; but for those only which were collected by him, and the rest should be divided. The same commission, too, ought to be allowed him upon his collections, as would have been allowed the executors, if they had performed the service. The appellant was not liable for the stocks destroyed by the British army; for the act of assembly did not change the property in them; but gave him the increase for his care and pains, and rendered him liable for ordinary casualties only; not for those arising from supernatural causes, or the events of war. The furniture should be divided; and the commissioner ought not to have turned it into money. The appellant was liable for the ac-

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 October. not for a conjectural estimate, calculated upon the princi-
 Ambler's ples of annuities. Interest was not due upon the legacies
 ex'ors, &c. to the daughters, until *John Ambler* came of age ; for
 v. *Mary's* was intended, in case of her death, to be paid at
 Macon the same time with the other ; because it was not wanted
 & al. for maintenance, as that was provided for by the will, and
 there is nothing to shew that the testator intended that the
 surviving sister should receive the former, before her own.
 Consequently neither was payable, or subject to interest,
 until the marriage of *Sarah* ; and then the tender made, by
 Mr. *Nicholas*, suspended interest to the time when the mo-
 ney was demanded. The £200, paid in August 1789,
 should be applied to the principal ; for it was received, *in*
part of the bequest ; which meant the *corpus*, and not the
 interest.

Wickham, contra. The money borrowed was specie,
 and was so regarded by the executor himself ; who kept it
 in a separate account, to denote that it was, in its nature,
 distinct from the other monies belonging to the estate. This
 indeed was proper ; for he received it in sterling, and could
 not convert it into paper money for his own convenience,
 but ought to account for the specie value, under the fifth
 clause of the act of assembly establishing the scale of de-
 preciation. *Chanc. Rev.* 148. The amount of the certifi-
 cate, of the 22d of April, 1779, ought not to be charged
 to the estate ; for the money was probably drawn, upon the
 former certificates, for some object of the executor, which
 failed, and then it was returned to the loan office at a great
 loss, from the intervening depreciation between the first and
 second deposit. The executor ought to account for a crop
 of tobacco in 1777 ; for it is incredible that none was made.
 The settlement, by the surviving executors, did not bind the
 appellee, as it was imperfect, and kept open for further con-
 sideration. The new goods were properly charged to the
 sons ; for many of them suited their purposes ; and there

is no proof, that they were used by Mrs. *Ambler*. As *John Ambler* took possession of the bonds, and kept them for so many years, he must be considered as having collected them, or been negligent; and, in either view, he was liable in money, without commissions, as he was an intromitter, as to our moiety. It was right to charge him also with the stocks destroyed by the British army; for the act of assembly is positive, that they shall be kept upon the plantation, and that the heir shall be liable for losses. *Old Virg. laws*, 166. The furniture was properly put down at a valuation, as it had been withheld so long, and must have received injury from time. The mode of valuing the lease on the main was unexceptionable; for, as it had not been sold, some reasonable estimate was to be made; and there was probably none better, than that which was adopted. Full interest was due upon the legacies to the daughters; for the devise of *Mary's* to her sister operated as an original bequest; which was demandable immediately, as no time of payment was attached to it, 1 *P. Wms.* 478; and the interest was not suspended either by the war, or the alledged tender. Not by the first, for the law is otherwise: nor by the second, because no actual tender was made, and the offer was to pay certificates, and not money. The £200 was properly applied to the interest, as that was part of the bequest.

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The court, consisting of **PENDLETON**, President, **LYONS**, Judge, and **ROANE**, Judge, made the following decree, without any preliminary remarks.

This day came the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, delivered the following opinion:

The various statements of accounts by the commissioner, and the conflicting opinions delivered at different times by the court of chancery, apparent in this voluminous record,

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render it extremely difficult, if not impracticable, to pursue and decide on each particular opinion : this court will therefore proceed to establish some general principles, according to which the accounts are to be adjusted.

The account of *Robert Carter Nicholas*, commencing in the 22d page of the commissioner's first report, ought to stand, as far as it goes, with the small corrections made therein, and omitting the several articles of credit for interest which is hereinafter provided for. There appears no satisfactory proof or reasonable presumption, that any further sum of money or quantity of tobacco came to the hands of the said *Nicholas*, than is accounted for. The claim for an omitted crop of tobacco made in the year 1777, is merely conjectural. The annual crops are estimated, probably near the truth ; but of those, part were carried to the warehouses, and part kept at the plantations, without even a guess at the quantity of each, and yet all the latter is admitted to have come to the hands of *John Ambler*, after being carried to the warehouses. *Robert Carter Nicholas*, gives credit for tobacco sold *Norton* in 1778, and in December 1779, without mentioning the quantity or when made ; and there seems no reason to doubt but the crop claimed, made prior to both, was included. However, if the appellee, or *John Ambler*, shall desire it, let an issue be made up and tried whether any and what quantity of tobacco, and of what value, came to the hands of the said *Nicholas*, more than is accounted for, and if any found, to be added to his debit. The articles of loan office certificates and of cash received at the treasury to be extended and the estate charged with one thousand five hundred and thirty-one pounds, the amount of the certificates received of *Ambler* and *Norton*, in January 1778. That what is called the private account, stated in the 38th page, and the annual balances of the *Westham* account, commencing in the 8th page of the same report, ought to be incorporated with the said general account, in due order of time, and the articles of all to stand as nominally entered, without scaling, as to the said *Nicholas*, who

was a debtor during the paper era ; but to be scaled when carried to the accounts of the estate, and others who were creditors during the same period. That *Robert Carter Nicholas*, ought to be allowed a commission of five per centum on all his receipts, including those in the Westham and private account ; his account to be closed at the end of each year, and interest charged on the balance : the commissions and interest to be kept in a separate state from the account till its close in June 1780, and then the balance to be carried to that account ; and if the balance then due from the said *Nicholas*, shall exceed two thousand five hundred and ninety pounds, (the specie borrowed,) the surplus to be scaled according to the time when such excess occurred : but if the balance shall be that only or a lesser sum, it is to stand as specie, being so much unpaid of a specie debt, and the principal is to bear interest until June 1789, a middle month of that year in which a payment was made, but no particular time ascertained. His estate is also to be charged with a moiety of one hundred and fifty-five pounds thirteen shillings and five pence, the estimated nett profits of the Westham estate for each of the years 1779, 1780 and 1781, with interest from the end of each year, to June 1789, when the seventeen hundred and fifty pounds paid to *John Ambler*, being deducted, the executors of the said *Nicholas's* will, are to be decreed to pay the balance, with interest, from that time till payment to the appellee in part of his claim.

It was proper for the commissioner to make the discriminations in the account of *Robert C. Nicholas*, which was kept generally with the estate of the testator, but the following errors in making it ought to be corrected, besides the sixty pounds for *Byrd's* tickets here charged to *John Ambler*, but afterwards properly charged to the estate, to wit :

October 1770, seventy pair of shoes charged to *John*, and none to *Edward Cary*, when it is presumable that they were for the whole slaves. The commissioner states that *Edward* had forty-two, and *John* ninety. One third part, therefore, should be charged to the former, and two thirds to the latter.

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The same occurs in May 1771, in November 1772, in November 1773, in November 1774, and in January 1776, and to be corrected in like manner.

January 1778, five pounds eighteen shillings and three pence, paid *Harwood* for work at Jamestown, and fifty-four pounds nineteen shillings and nine pence, for sundries furnished from Westham, charged here to *John Ambler*, but should have been to *Mrs. Ambler*.

Mrs. Ambler is charged by *Mr. Blair* and *Mr. Jaquelin Ambler*, with rent for the land and hire for the slaves at the Cottage. She was therefore to pay the expense of feeding and clothing the slaves, their levies and taxes, and the doctor for attending them, and the taxes on the stock and her chariot, and the plate, if any: *John* only chargeable for the land tax and his riding horse, with his servant and horse, if he kept such. All other of the foregoing articles, which are here charged to *John*, are to be charged to *Mrs. Ambler*, as are also the several articles for corn purchased, for sundries furnished from Westham, and sixty-two pounds ten shillings cash, paid in part of *John's* board. She was entitled to the crops, and if any part of them has been credited to *John Ambler*, it is to be corrected and transferred to her credit. In the credits of the account, besides the tobacco sold to *Norton*, here credited to the estate, but afterwards rightly to *John*, so much only of the money drawn for to *Robert C. Nicholas* and *Jaquelin Ambler* on *Athaws* and *Norton & Sons*, ought to be credited to the estate, as was due from those merchants to the testator, including the crop of tobacco of 1768, shipped in 1769, the goods imported in 1769, in consequence of orders from the testator, the rings and the premiums of insurance connected with them, and also the money received by *Norton & Sons* of *Hindman and Company*, with the annual interest arising therefrom. The residue of those drafts and the interest thereon, ought to be credited to *Edward Cary* and *John Ambler*, in proportion to the quantity of tobacco by them respectively shipped, between whom seve-

rally, and the merchants, and not with the estate or executor, the accounts should be stated from thenceforth, giving them credit for the proceeds of their respective tobaccos, and charging each with his proportion of the said surplus drafts.

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It is just to proportion by the ratio adopted by the commissioner, such goods as were imported for the slaves and plantation use, and his charge is so far approved. But though he reports that those cannot be discriminated from what were imported for the use of the children, if the invoices are produced, the nature of the articles will point it out, and the amount ought to be deducted and charged to the estate. If no invoices are shewn, an estimated allowance should be made by a comparison of the total amount with the probable demands of the estate, for it does make a difference.

The accounts of *Edward Cary Ambler* are to be stated without other interest than his proportion of that which is charged to *Robert C. Nicholas*, which includes interest on the Westham balances, and without credit for liquors or furniture, and be charged with his mother's fifth part of the profits to the year 1776, when his account is to be closed, and the balance carried to the credit of *Mrs. Ambler*, who is to continue to have credit for *Edward's* share of the interest to September, in the year 1784, when her account ought to be closed, and any balance carried to the account of the appellee.

John Ambler ought to be charged for the thirteen years unexpired in 1775, of the term in the governour's land, but not by the rule adopted from calculations of the value of an annuity to a person holding it, allowing compound interest yearly. The true rule is, what would this term probably have yielded if it had been sold for ready money in 1775, in which view, the article of interest would operate to lessen and not augment the amount of the annual receipts. But another capital mistake is made in this adjustment, by rating the annuity at thirty pounds. That sum was not a fixed

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annuity, but an estimated value of the yearly rent for the estate, which was charged with an annual rent to the government, of seventeen barrels of corn, which may be moderately rated at ten pounds, and will reduce the annual charge to twenty pounds, with what might be given for the amount for thirteen years. *John Ambler* ought, in the ordinary course, to be charged an interest from 1775, but considering the difficulty of the estimate, and that eight years of the thirteen occurred during a war, in which the enemy was, for the greater part, in the neighbourhood of this estate, and the deranged state of the plantation at the close of the war, the court direct that he be charged two hundred and sixty pounds for this article, without interest, till September 1784, at which time he is also to be charged two hundred and thirty-five pounds fourteen shillings and one penny for a moiety of the stocks at Westham; these sums, amounting to four hundred and ninety-five pounds fourteen shillings and one penny, as personal estate of *Edward* undisposed of, are to be distributed equally to his mother, brother and sister. For the stocks in James City, *Mr. Ambler* is not to be charged. The act of assembly relied on, contemplates increase or loss of an ordinary nature, and not a total destruction by an invading enemy: nor can *Mrs. Ambler* be presumed, from the general complexion of her will, to have meant to charge her son with a payment to his sister for what he had not, and to the loss of which he had not contributed.

The estate of *Edward Ambler*, ought to have credit for all the outstanding debts which appear to have been received by the executors, and with its proportion of the interest charged to *Robert Carter Nicholas*, and by *John Ambler*, for what of them he has actually received, an account of which he is to render upon oath, deducting a commission of five per centum, and on which he is to be charged interest from the end of each year, upon the amount of the receipts of that year, the court being of opinion that he is not further accountable, since it was not his duty to make the col-

lection, and he probably used proper diligence for the sake of his own interest; at the same time, it is possible that many debts may have been saved by his intronission. Any debts remaining outstanding are to be divided equally between *John Ambler* and the appellee, having regard to such as are sperate and desperate; not, however, including therein the balances due from *Athaws* and *Norton & Sons*, since they arise from distinct accounts with the sons, and each of them is to receive and risk his own balance, the appellee to succeed to that of *Edward Cary*, discarding also, from those accounts, the balance due from Mrs. *Ambler* to *Norton & Sons*, which is to be charged to her. On failure by *John Ambler* to render an account of debts he has received, he is to be charged as by the commissioner in the 6th page of his third report, only deducting two hundred and sixty pounds due from *Jaquelin Ambler* for the bills of exchange which belongs to the accounts of the sons, and not to the estate. On this sum, *John* is to be charged interest from the end of two years from the time he received the accounts, as a medium period in which he had probably received considerable sums, but far from having completed the collections.

The estate is to be charged with its several articles of debit in the accounts of the executors, and with the whole amount of Mrs. *Macon's* fortune, and the interest. Any balance due to the estate, is to be equally divided between *John Ambler* and the appellee, as representing *Edward Cary Ambler*. And to them also belongs in equal moieties, the loan office certificate of April 22d, 1779, and all interest which hath accrued thereon, except the one hundred and sixty-one pounds five shillings and seven pence, already charged to *John Ambler*, and for a moiety of that sum the appellee is to have credit.

The court discover no reason to relieve against the condition annexed in the will of Mrs. *Ambler*, to the devise to her daughter; she had surely a power to bestow her bounty on her own terms, and her motives appear to have been pure and upright to preserve peace between her children

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and with their connexions, and at the same time, to prevent others from being charged for her free use of the estate ; the account, therefore, which was stated by Mr. *Blair* and Mr. *Jaquelin Ambler*, ought to be taken as the ground work, rectifying such mistakes and omissions as shall be apparent ; of which sort, however, the court doth not consider the charge of forty pounds a year for rent, and forty pounds a year for damages at the Cottage, when the commissioner allows but one forty pounds for both on the testimony of *David* and *Thomas Harris*, referring no doubt to their *ex parte* affidavit, since in their regular depositions taken in this suit in 1798, they are explicit for both sums. Mrs. *Ambler* is to be debited with the stated balance of that account, and with any omissions before noted, and others if apparent ; and is to have credit for her fifth part of the profits, her third part of *Edward Cary Ambler's* personal estate undisposed of, for what she is entitled to under his will, and for any articles apparently charged her improperly, or plain credits omitted ; any articles in the paper period to be scaled, and no interest allowed, except the proportions of that charged to *Robert C. Nicholas* as before stated ; the balance to be carried to the credit of the appellee.

At the close of Mrs. *Ambler's* stated account, the gentlemen state one headed, "The estate of *Mary Ambler*, to the estate of *Edward Ambler*, Dr. & Cr.," the articles of which ought to be thus discriminated. In the debits, *John Ambler* to have credit for the hire of negroes, for cotton, wool, flax, provisions furnished by *Clarkson's* and *Richardson's* accounts, the rent for and damages done to the Cottage. The other articles respecting him are before directed to be set right in the discrimination of *Robert C. Nicholas's* account. The estate to have credit for the cartage of goods, and *John Barrett's* account, if it is before charged with those articles, the credits in that account for Mrs. *Ambler's* annual allowance of provisions, and for the board of her daughter, are to be charged to the estate, and for *John Ambler's* board, to him ; from which a deduction ought to be

made for the time he was absent, but that the gentlemen seem to have considered that circumstance, and probably on that account, lessened the annual sum, five pounds below that of his brother and sister.

No account is to be taken of any new goods which were in the house when the testator died, nor of such as were afterwards imported, in consequence of his orders, such to be considered as used in the family according to his will. There is no reason to charge *John Ambler* with the furniture which remains in the house where *Mrs. Ambler* lived and died, merely because that house was his, especially as it was not the seat of his residence; unless he refused to deliver it to the appellee when required. If the parties agreed to refer it finally to the commissioner, they ought to abide by his statement, which does not appear to be unreasonable. But if no such agreement was made, *John Ambler* cannot be compelled to purchase the furniture, and in that case, he is to account upon oath for what he has removed, and be charged to the appellee for its value, who is to take the residue of the furniture as it is, *John's* specific articles of plate excepted.

The slave *George* is to be considered as the property of *John Ambler*, and he entitled to the hire, as stated in the decree.

William H. Macon is to have credit for the one thousand pounds, to which his lady succeeded by the death of her sister, with interest thereon from October 1769, to the time of his intermarriage, and at that time for his lady's one thousand pounds, but that interest on the whole ought to be suspended from thenceforth, until September 1784. The certificates offered by *Mr. Nicholas* were not a legal tender, nor would the offer have been such, if it had been to pay gold and silver. The certificates were of much more value than tenderable paper, since they bore interest, and arrested future depreciation; but the governing principle is, that but for the offer of suspension made by the appellee, *Mr. Nicholas* might have procured and tendered legal money, and

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subjected the appellee to a loss of nine-tenths at least of his claim; of this, the latter seems to have been aware, and judiciously chose to sacrifice the interest to the preservation of his principal; in which he could not fail, since, if he and Mr. *Ambler* should not compromise, the offer of Mr. *Nicholas* could not operate as a legal tender to evade a specie payment of the principal. Interest during the war, ought not, in justice and equity, to have been allowed on debts due to domestic creditors, no more than to foreign; but since it has not been attended to, either in practice or judicial decisions, until so much business has been otherwise adjusted, it would be unjust at this late era, to introduce it in a particular case, unless in one attended with peculiar circumstances. The court think it reasonable to allow *John Ambler*, who appears to have been but six years of age when his father died, a year after he came of age to become acquainted with the state of his affairs, and be enabled to judge of any proposed compromise. From that period, to wit, September 1784, the appellee is to be allowed interest for his whole two thousand pounds, deducting from the principal the thirteen hundred pounds paid at the respective times of payment; an application, which, though it might be illiberal in Mr. *Ambler* to make, it was a legal right of which he cannot be deprived in a court of equity. From the same period the appellee is to be allowed interest on the principal of all his other claims, all which interest, beyond what Mr. *Nicholas* is charged with, *John Ambler* ought to pay, since though the accounts were unliquidated he had the use of the money and might have deposited in court a sum to answer the eventual demand. The account of the appellee to be closed October 18th, 1789, and a decree entered for his balance of principal and interest, with interest on the principal from that day till payment; towards which the executors of *Robert C. Nicholas* are to pay the balance found to be due from him: *Wilson Miles Cary* to pay his balance and interest according to the decree, and the residue to be paid by *John Ambler*, as possessing the estate chargeable there-

with. The costs in chancery to be paid in third parts according to the decree. From the foregoing statement, it appears that the decree of the said high court of chancery is erroneous, as contravening in several instances the principles herein established; therefore, it is decreed and ordered, that the said decree be reversed and annulled, and that the appellee pay to the appellants their costs, by them expended in the prosecution of their appeal aforesaid here.

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Which is ordered to be certified to the superior court of chancery, directed by law to be holden in Richmond, to have the accounts reformed and a final decree entered, according to the principles of this decree.*

The court of chancery, in conformity with the foregoing decree of the court of appeals, referred the accounts back to the commissioner; who mistook the meaning of the decree, and made a different statement from that required by it. The consequence was, that *Macon* would sustain no loss by depreciation, but the whole of it would be thrown upon *John Ambler*.

Exceptions were filed to the report; but the court of chancery overruled them, and decreed that £ 1836. 3. 6. should be paid by the estate of *Robert Carter Nicholas*; £ 44. 7. 6. by *Wilson Miles Cary*; and £ 3859. 19. 9. by *John Ambler*.

John Ambler applied to the court of chancery for leave to file a bill to review the last mentioned decree of that court; which being refused, he appealed, to the court of appeals, from the order of refusal.

The court of appeals made the following decree:

“This day came the parties by their counsel, and the court having maturely considered the transcript of the record of the order aforesaid, and the arguments of counsel, is of opinion, that, on no sound construction of the decree of this court, pronounced on the twenty-fifth day of Octo-

*The foregoing decree was prepared by Mr. *Pendleton*, and was the last public act of that distinguished judge; who died the following night.
“*Acutum sane hominem, et probatum.*”

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ber, 1803, was the commissioner justified in charging the appellant, with any loss sustained, or supposed to be sustained, by the appellee *Macon* in consequence of the principles on which the account was directed, by that decree, to be taken of the transactions of *Robert C. Nicholas*, or his representatives, in relation either to depreciation, or interest. The decree of the court of chancery, therefore, approving the report of the commissioner, and which in consequence of a departure from the manner of stating the accounts as directed by the decree of this court, improperly resulted in a charge against the appellant of the sum of twenty-five hundred and forty pounds eleven shillings and four pence half penny, on account of this supposed loss, is erroneous; and ought to have been corrected on the bill of review filed in this cause. In consequence of the intricacy and perplexity of these accounts, arising as well from the manner in which they have been stated, as from the great lapse of time and other circumstances, it may happen, that some injustice may be done to some of the parties by confirming the report, except so far as it is above declared to be incorrect; yet it is believed it will be better, at this day, to do so, than to open the accounts for new statements to be made, except so far as may be necessary to correct the error above stated. And that the order aforesaid, for the reasons before stated, is erroneous. Therefore it is decreed and ordered that the same be reversed and annulled," with costs, &c. "And it is ordered that the cause be remanded to the said chancery court to have the accounts reformed, and a final decree entered agreeably to the foregoing principles. And if the amount of the decree has been paid, as is suggested, to order restitution of the sum which shall be found to have been improperly decreed with interest."

The result was, that *Macon* had to return a very large sum, which had been paid to him, by *John Ambler*, under the second decree of the court of chancery.