REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

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GRANBERRY's Executor, *against* JOSIAH & JAMES GRANBERRY.

THE appellees filed their bill in the High Court of Chancery against the appellant, the executor of their father; and their guardian, for an account.

To the report of Auditors made in the cause, the appellant took the four following exceptions: 1st, That his receipts of money in depreciated paper, are reduced by the scale of depreciation, on the day they were received, without any proof that he received it unnecessarily, or delayed paying it away to those who were entitled to it.

2dly, Interest is allowed on monies in his hands, as if he were a debtor, or had retained the same improperly, and that too at a time, when borrowers of good credit were not to be met with, and when the executor neither did nor could make a profit thereby.

3dly, No commissions are allowed him.

4thly, That £ 500 due from him to the testator and to be paid in June 1779, and which was paid on the day, is charged to him as specie.

The report being confirmed by the High Court of Chancery, the defendant appealed.

RONOLD for the appellant. As to the first exception.—An executor, is in the nature of a trustee; he receives no benefit from the execution of his office, and should therefore be subject to no injury, unless he hath produced it by his own misconduct. An executor is not only compelled to receive the debts of his testator, but is bound to solicit and to enforce the payment of them. For if they should be lost by his neglect, in not using the proper means of obtaining payment, he must sustain that loss. In this situation therefore, it would be unjust, to burthen him with the loss, by depreciation of money, thus forced into his hands, and at a time, when perhaps no opportunity offered of applying it. Some reasonable time then, should be allowed him, to dispose of the money, before the scale can with justice be applied.

Second exception.—Where the risk must be run by the executor, he is not bound to pay interest: This is laid down in the case of Ratcliff *vs* Graves, 1 *Vern.* 179; and tho' in that case, interest was decreed, yet it was upon a principle, which does not apply in this country: it was, that the money might be

be insured. So, an executor who changes the nature of a debt, due to the testator, becomes liable himself to pay it, out of his own pocket—1 *Vern* 473. An executor is not liable to pay interest, even in England, unless he make a profit by the principal. *Brow. Ch. Rep.* 359, Newton *vs* Bennet. The Chancellor was therefore mistaken, (as I humbly conceive,) when he presumed the appellant had made a profit, because the contrary was not shewn. The executor could not in this case, distribute the money amongst the legatees, who were under age, and who of course, could not give him a discharge; he was therefore compelled to retain it, and unless it appeared, that he made use of it, nothing can be more unrighteous, than to force him to pay interest.

It is true, that the appellant stands in the double character of guardian and executor, but as the debts due from his testator, were not all discharged, he will be considered as holding the money, in his capacity of executor. The interest, I consider as a reasonable compensation for his trouble, upon the same principle, that he is entitled to the undisposed surplus, unless barred, by an express compensation allowed by the testator. There is no case to be found, which subjects a guardian to the payment of interest, from whence I conclude that he is not liable to pay it; and a guardian and executor appear to stand, much in the same situation; for if the former, take a bond for rent due to his ward, he is liable to pay it out of his own pocket, and the bond is his own. 2 *Ch. Rep.* 97.

The law of this state, requires, that a guardian should annually return an account of the profits and of the income of the ward's, *estate*, to court; but this can only mean the real estate, to which, the words *profit and income*, are more properly applicable; unless indeed the guardian should lend out the money, in which case, the interest would be income, and to be accounted for.

Third exception—The legacy given to the executor, is to be considered as a gratuity, independent of his trouble in executing the trust, and not in lieu of his commissions. If he had refused, he would still have been entitled to the legacy, and having undertaken the trouble, he ought to receive a compensation for it.

Fourth exception—The appellant, being an executor, was not thereby rendered incapable, of discharging a debt he owed to the estate of his testator, at the time it became due, more especially, as it appears in this case, that the payment was applied to the discharge of a debt, due from the testator. If so, he

is

is entitled equally with others, to the benefit of the law, respecting payments in paper money.

CAMPBELL for the appellees. 1ſt Point—Nothing can be more juſt, or reaſonable, than that an executor, claiming to be charged on a day poſterior to that, on which he received money, or in other words, with leſs than he received, ſhould ſhew ſome good reaſon for ſuch a pretenſion. It is a ſubject, ſuſceptible of proof and of explanation.

If the rule laid down by the Chancellor be rejected, to what other can we reſort. The liability of an executor, if he do not recover his teſtator's debts in proper time, can only exiſt, where there was probable ground to apprehend inſolvency, or the like; and in ſuch caſes only, can he be charged with ſuch negligence as to render him perſonally liable. But at a time, when a depreciated paper money was in circulation, I ſhould not heſitate, to conſider an executor guilty of malfeaſance in his office, who ſhould preſs for the payment of his teſtator's debts, unleſs under an evident neceſſity.

2d point—The Chancellor, in the caſe of Newton and Bennet, which has been cited, ſays, that where it does not appear, that the executor applied the money to the purpoſes of the will, or unleſs he brings it into court, he ſhall be preſumed to uſe it in the way of his trade, and be liable to pay intereſt for it. This caſe, is ſtrongly in my favor. If there be debts due from the eſtate, and carrying intereſt, and the executor permits that intereſt to accumulate, when it might be avoided, it is right, that he ſhould anſwer it out of his own pocket.

3d point—By the laws of this ſtate, a guardian receiving the *eſtate* of a ward, muſt annually render an account; and he is confined to the *profits or other income*, for the ſupport of the ward, without being permitted to go farther. The word *eſtate* includes *money*, as well as *land*.

THE PRESIDENT delivered the opinion of the court.

The firſt objection made to the report is, that the paper money is reduced by the ſcale of depreciation, on the day it was received by the executor. Upon general principles, ſuch a rule, would certainly be improper and unjuſt; and eſpecially too, when the money was received in a ſtate of rapid depreciation. The executor may not be able to find a creditor, or legatee, to whom he could pay the money, on the day it was received, or the payment might be ſuſpended in ſome caſes, by diſputes amongſt creditors for the preference.

But

But in this caſe, the appellant has neither objected to the mode *originally*, nor pointed out any other, the propriety of which might be conſidered by the court: on the contrary, his accounts were ſtated by himſelf in the ſame manner, the debits and credits being reduced by the ſcale, on the day they were received and paid. He ought therefore to be bound by this mode, and the Chancellor did right, in over-ruling this exception.

The ſecond objection, is to the charge of intereſt, as if the executor were a *debtor*, or had received, or retained the money improperly. It is contended, that ſuch a charge, at the time it is made, is peculiarly unjuſt, as there were then no borrowers of good credit to be met with; and that the executor neither did nor could derive a profit from it.

There are no facts diſcloſed in the record, which can throw light upon this ſubject. The bill is ſilent as to intereſt, and ſo is the anſwer, except that part of it where (ſpeaking of the paper money which he had ſcaled,) he ſtates the injury ariſing from conſiderable ſums having been on hand, from time to time, leſſening every day in their value, without benefit to him, and without an opportunity of paying it away. Thus the queſtion ſtands upon the face of the accounts. It is true, that there is no general rule, which obliges an executor to pay intereſt. We find from the caſes upon this ſubject, that it has been determined both ways; and upon principle, it will appear, that no general rule can be formed.

Each caſe muſt depend upon its own particular circumſtances; in ſome caſes the executor ought, and in others, he ought not to anſwer intereſt. In this we think he ought to be accountable for intereſt, on the money reſting in his hands, from time to time. But for the reaſons before ſtated, in conſidering the firſt point, it would be too rigid, and injurious, to charge him with intereſt from the day of each receipt of money. The accounts ought to be cloſed at the end of *each year*, and intereſt allowed upon the different balances, up to the year 1782, when the whole tranſaction cloſed. But ſuch intereſt, ought not to be carried to the account of the ſucceeding years, in order to deduct the ſame, from the payments made in ſuch ſucceeding years. This though done in the common caſes of debtors is too ſtrict as to truſtees.

As to the riſk ſtated at the bar, or the difficulty of procuring borrowers, it is an objection which does not come from th executor, nor is it ſtated by him in his anſwer, but is

mentioned in argument as a poſſible caſe. But if it were true, he might have applied to the Chancellor for his direction, as to lending it to individuals, or to the public, which would have made him ſafe; or he might have carried the money into that court. In this caſe there were children, whoſe fortunes were almoſt entirely pecuniary. It would therefore be unjuſt that the money ſhould lie in the executors hands unproductive, ſo as to deprive the legatees of maintainance, or oblige them to reſort to the principal of their legacies.

If the executor does not ſettle his accounts every year, he ought at leaſt to ſtrike the balance at the end of every year, that he may ſee the ſtate of his accounts and of the funds in his hands. It is upon this principle, that we eſtabliſh the rule before mentioned.

In ſtating this intereſt, the appellant ought to have credit for the £ 500, in 1773, which by the will was directed to be lent him without intereſt, and to be re-charged with it in 1778, when the loan was to ceaſe.

The third objection is made on the ſcore of commiſſions.

An executor, is certainly entitled to ſome compenſation for his trouble, and that, by cuſtom, is generally fixed at five per cent upon actual receipts. But it is objected, that the legacy left to him, is a bar of all further compenſation. The rule, that a legacy given to an executor, defeats his claim to the undiſpoſed reſiduum, is aſſimilated to the point under conſideration. But that principle, ſeems to be much miſtaken, in the application made of it. It is unneceſſary for us to give an opinion upon that point, as in this caſe, there is no ſurplus; yet it may be obſerved, that if there were ſuch a reſiduum, the legacy would be no bar, as there were ſeveral executors, to all of whom unequal legacies are given, and ſo this court decided, in the caſe of Shelton and Shelton. The preſent queſtion therefore, like all others of this nature, depends, (as to the amount to be allowed,) upon the cuſtom, and the intention of the teſtator. He clearly meant, to allow an adequate compenſation. To one executor, he gives £250, and leſt that ſhould be an inſufficient recompence for his trouble, he authoriſes the other executors to encreaſe it, if neceſſary. In the codicil, he gives the appellant (who is not named an executor in the will itſelf,) a legacy, *as being his nephew*, and to this, he would have been entitled, tho' he had refuſed the office. It would ſeem, as if the teſtator did not at firſt mean to make him an executor, by his directing *his executors*, to lend him £500 with intereſt. So that it is evident,

evident, he never intended the legacy as a compenſation for his ſervices, but merely as a bounty. The appellant therefore, ought to have credit, for five per cent commiſſion on his receipts of each year, before the accounts are cloſed, in order to adjuſt the intereſt as before mentioned.

As to the 4th point, the court entertain ſome doubt, whether the £500, ought to be charged to the defendant at all, or not?

In the exceptions, it is ſtated as a debt due from the appellant, to the teſtator, and paid in 1778,—in his account, he gives credit in October 1777, for this ſum, as due in 1778; and reduces it by the ſcale of October 1777. He is charged with it by the commiſſioners, in 1778, as caſh, had five years, without intereſt, and then due; in which caſe, he ought not to be charged with it, unleſs he received it in other money, that what came to his hands by collection, with the whole of which, he ſeems to be charged in the account. This fact therefore, muſt be aſcertained in the Court of Chancery.

If it appear, that he is ſo charged, the credit in his account (as executor,) in October 1777, ought to be conſidered as a payment on that day, in paper, and reduced by the ſcale accordingly; for a debtor, by undertaking the office of an executor, cannot be prevented from exerciſing, in common with others, the right of paying in paper-money a debt due to the teſtator. And as no better proof can be expected, the entry in his account, will be evidence of the *time* of payment, and from that time, he bound his ſecurities, to be anſwerable for the proper application of the money.

The decree therefore muſt be reverſed with coſts, and the cauſe remanded to the High Court of Chancery for the enquiry to be made, and for an account to be taken, according to the principles of this decree.

CASES