REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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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.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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goods and chattels and debts due:" Making it an executory devise of the fee to the wife, upon the contingency of the son's dying without issue, under age, or a daughter dying under age unmarried, which I conscientiously believe was his intention.

However, as the other Judges are of a contrary opinion, the judgment must be affirmed.

Judgment affirmed.*

[* *Smith* et ux. v. *Chapman* et al. 1 H. & M. 240.]

LAWRASON, ADM'R. *v.* DAVENPORT AND OTHERS.

Thursday, October 31, 1799.

[If an administrator distributes the fund, and it afterwards appear that there are others entitled to a share thereof, he will be liable to them, though he made distribution without a knowledge of their existence.*]

Administrator selling a large certificate to pay a small debt, [was held under the circumstances,] not liable for what the certificate would have sold for if kept, but for the market price at his own residence, at the time of the sale.

Davenport and others, brought a suit in the High Court of Chancery against Lawrason, administrator of Brown. The bill, among other things, stated, that Brown, who was but little indebted, died possessed of some personal property, and entitled to compensation for his services as an officer during the war; which was, after his death, paid to the defendant Lawrason in certificates and warrants for the interest thereof, to the amount of £1260 for certificates and £581 1s. 4d. in warrants; besides some military certificates issued to Brown himself. That Brown died intestate without children, leaving the [96] wife of Davenport and the other plaintiffs, Daniel, Charity and Robert Daugherty, his next of kin and legal representatives. That Brown was a native of Ireland as well as the plaintiffs, who are ignorant of matters in Virginia; which was known to Brown, who has disposed of the effects, certificates and warrants aforesaid without sufficient cause, and, except the pittance paid to the plaintiff Robert Daugherty,

* Executor having voluntarily paid legacies, under the belief that a large debt to the testator was good, which proved worthless; so that he had in fact greatly overpaid the legatees; was held not entitled to recover back any part of the payments to them. *Davis and others* v. *Newman*, 2 Rob. 664.

the whole remains in his hands. That when he sold the £1260 in certificates, and the £581 1s. 4d. in warrants, during the month of August, 1791, there was no debt due from the estate, which rendered it proper, as public credit was then rising. Therefore, the bill prays for satisfaction, with an account of the administration, and for general relief.

The answer admits Brown's death, and that administration *de bonis non* has been granted to the plaintiffs: States that the certificates for £1260 commutation, and the £581. 1s. 4d. interest thereon, never came to the hands of the defendant, nor did he know that as administrator he was entitled to the same, until after the said Robert Daugherty, and a certain John Wise (who the defendant is informed is attorney in fact for the plaintiffs,) had entered into an agreement concerning the commutation aforesaid; and until Wise, under pretence that he knew of a debt due the estate in Richmond, which he thought he could receive, procured a power of attorney from the defendant. That the defendant continued still ignorant of it, until after Wise had contracted for a sale of the certificates with Finlay. When the power of attorney proving insufficient, and Wise and Finlay disagreeing, Finlay informed the defendant of his title to the commutation certificate; but the defendant knows not the amount. That Finlay proposed to give Robert Daugherty as much for the certificates, as he was to give Wise for them; and the defendant believing Wise knew the value of the certificates, as he had understood he had dealt considerably in certificates, agreed to the proposal, and gave a power of attorney; that the price received [97] for them, was £650, and the defendant believes that to have been as much as could have been gotten for them at the time. That the defendant had not sufficient effects in his hands to discharge a note given by Brown amounting without interest to £29. 14s. 5d. That the defendant thought himself more justifiable in giving the power, as Robert Daugherty who was the only relation of Brown in America, and who claimed the whole, was desirous that the certificates should be disposed of. That the defendant knows of no debts due to the estate, except some partnership accounts, which are not likely to produce any thing.

Three witnesses speak as to the relationship of the plaintiffs to the intestate. A fourth proves, that he was concerned a moiety in the purchase of the certificates which he believes were worth about eleven shillings in the pound: Does not know when or for what price he sold them; that only four certificates issued for the £1260, they being all that were asked

for; although it was probable that, if requested, more might have been obtained, as the Auditor was usually accommodating in dividing certificates into convenient sums.

A fifth witness proves, what would have been the value of the certificates in September, 1796, had they been funded by the defendant.

The Court of Chancery at the September term of 1796, being of opinion, that the disposition by the defendant of the military certificates and interest warrants, to which his intestate had been entitled, was not justifiable, the articles sold not being comprised, as that Court supposed, in the terms of the act of the General Assembly, directing executors and administrators to sell such goods as are liable to perish, to be consumed, or to be the worse for keeping, and the sale not being necessary for payment of debts, nor having been made by public auction, decreed the defendant to pay to the plaintiffs, 1887 dollars 55 cents; which would have been the then present value of the certificates and warrants aforesaid, if
[98] they had been funded, with interest on 4320 dollars 46 cents, from the 1st day of the preceding July; after deducting thereform the £29. 14s. 5d. with interest from the first of December, 1791.

From which decree the defendant appealed to this Court.

CALL, for the appellant,

Made three points. 1. Whether the plaintiffs had proved themselves entitled to the estate of the decedent? 2. Whether the payment to Wise the attorney of Daugherty, who was the only known relation of the decedent, was not a discharge for so much? 3. Whether the administrator could be rendered liable for more than the certificate actually sold for? Upon the first, he denied that the evidence was sufficient. Upon the second, he insisted that the payment was good: Because the law would presume that there were no other relations, than those in this country, if the contrary was not shewn; and therefore payment by the administrator to the only known relation here, and who was proved in a Court of Justice to be the decedent's heir at law, would be a sufficient exoneration; unless it could be proved that he knew there were other relations. For, he was not bound to seek throughout all nations and countries for the kinsfolk of the deceased. Therefore, as no knowledge of any other relation was proved at the time of the payment to Wise, that was a sufficient defence. Upon the third, he contended that he could not be made liable according

to the case of *Groves* v. *Graves*, 1 Wash. 1, and *Woodson* v. *Payne*, 1 Call, [570] in this Court.

MARSHALL, contra.

The point relative to the title of the plaintiffs, rests upon the proofs in the cause, which are conceived to be sufficient.

As to the second point made by Mr. Call, the law does not presume that there are no other relations, except what are in this country. There might be some pretext for such a presumption, perhaps in the case of a native, but there can be none in the case of a foreigner. The administrator in this case had a reasonable ground to believe that there were other relations; and, therefore, he ought to have inquired and informed himself. He ought either to have demanded security, or waited for a decree of a Court of Justice, before he proceeded to make any distribution. The payment, therefore, was premature and unjustifiable. [99]

But, if he be liable at all, it must be to the full value of the certificate; that is to say, the plaintiffs are entitled to the certificate itself, or the value at the time of pronouncing the decree. The case of *Groves* v. *Graves*, proves nothing to the contrary; for, that was the case of a contract, and decided on circumstances: at most, it only proves that the debtor could only be charged with the value of the certificates, which he had promised to deliver, upon the day on which they ought to have been delivered. But here, the administrator was a trustee of the article, which he ought to deliver in specie, or pay its value at the time of the decree. As to the case of *Woodson* v. *Payne*, I am not acquainted with it, and therefore am unable to make any remarks upon it. Upon the whole, the administrator should not have sold more of the certificate than was necessary for payment of the £29, especially as it is proved he might have divided it; and therefore, having done otherwise, he is clearly liable for the full value at the time of the decree.

CALL, in reply.

If *Groves* v. *Graves*, be laid aside altogether, yet that of *Woodson* v. *Payne*, will completely decide this case: For, the holder of the certificate there, was a trustee as much as the administrator here. There, the trustee having a right to apply a part, disposed of the whole; which was the case here, because the administrator had a right to sell for payment of the £29. If, therefore, the trustee in that case [100]

was not liable for more than the value at the time of sale, no more is the administrator here. Besides, if the administrator had actually known that the Auditor would have divided the certificate, there was no obligation on him to ask it. But, there is no proof of any such knowledge; and it is far from being certain that the Auditor would have done so: For, it does not follow, that because he would have accommodated Mr. Pollard, an acquaintance, in that way, that he would have extended the same kindness to every body, who asked it: For, that might be attended with infinite trouble.

Cur. adv. vult.

PENDLETON, President, after stating the case, delivered the resolution of the Court.

There is no question upon the liability of the administrator to pay the plaintiffs their due shares, though he paid the whole to Robert without notice; since that payment was at his peril, and he might have secured himself, and perhaps did, by taking security for Robert to indemnify him.

The only question is, for what sum he shall be liable: whether for what the certificates were really sold for, or for the current market price of such at the time; or what they would be now worth, if they had been preserved, had been subscribed into the Continental Loan Office, and had remained in that state?

The opinion of the Court, with the reasons on which it is founded, will appear in the decree formed, and, therefore, are not anticipated.

The Court is of opinion, that the appellant was liable to pay the appellees their distributive shares of the intestate's estate, notwithstanding his having paid the whole to Robert Daugherty, without notice of their being other relations, since [101] such payment was at his peril, and he either did take or might have required a bond from Robert, with security, for his indemnity. That the appellant is not liable for what the certificates, if preserved, would in event have produced now, by operations which he was not obliged, if he had power, to pursue, and which, if he had pursued, might, in a contrary event of things, have reduced them to nothing. He had not only power to sell the certificates, as an article which might grow worse, of which he, acting fairly, was the judge;* but was compelled to do so, to raise as well the debt of twenty-nine pounds fourteen shillings and five pence, as the distribu-

[* *McCall* v. *Peachy's adm'r*, 3 Munf. 288.]

tive share of Robert Daugherty, a more considerable sum; but the administrator ought to be accountable for the value of the certificates at the time, according to the then market price at Alexandria, where the intestate died, and where the administrator lived; as to which the answer is, that the administrator was induced to assent to the sale made by Robert Daugherty to Finlay, from his opinion of the judgment of Wise, a considerable dealer in certificates, and who, when those in question were supposed to be his property, had agreed to sell them to Finlay for the same price which the latter was to give Daugherty; and adds, that he still believes that they were sold for as much as could have been got for them at that time and place, tendering a fair issue for enquiry, whether the market price at that time and place exceeded the sales; to this the appellees have made no proof, the price at Richmond being foreign and unimportant, and the answer, being responsive to the bill, is uncontradicted; for which reason, and since the whole transaction appears to have been fair, without any view to benefit the administrator or purchaser, and had the approbation or rather was the contract of, Roberty Daugherty, the only relation then known to the administrator; without deciding whether the administrator should have [102] sold the certificates at auction, upon due notice, or have enquired further of the current price than of Wise.

The Court is of opinion, under all the circumstances of this case, that the real sale ought to stand as the market value, and the appellant to account accordingly; and that the decree aforesaid is erroneous: Therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellees pay to the appellant his costs by him expended in the prosecution of the appeal aforesaid here; and the cause is remanded to the said High Court of Chancery for an account to be taken, and a decree according to the principles of this decree."