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IN THE

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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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M'Connico et al. Ex'rs. of Holloway *v.* Curzen.*

Wednesday, October 30th, 1799.

A consignee, who receives no orders to the contrary, may sell on the customary credit of the place.

The executors of a consignee will not be liable for outstanding debts, unless there be gross negligence.†

And the appointment of agents [of known ability,] to collect, is *prima facie* evidence of due diligence. So that the consignor must afterwards prove the negligence.

Where the evidence was defective as to a particular item, no decree as to that item was made.

Interest not allowed on an unliquidated account.‡

Specie, during the war, was not an article of currency, but a commodity at market; and items of *specie* advanced during that period, should be extended at the value, at the time of the advance made.

This was an appeal from a decree of the High Court of Chancery, were Curzen brought a bill against Holloway's ex'rs. stating, That in 1780, he consigned the sloop Hero's Revenge, with her cargo to Holloway, at Petersburg in Virginia, to be disposed of by him; which he did, some time in the ensuing year, for £205,072 of which £7726 2s. 4d. by Holloway's own statement, appears to be due; and that the plaintiff is entitled to receive the same in tobacco, at £70 per cwt. as will appear by Holloway's letter of the 19th of August, 1781. That besides the above balance, the plaintiff claims an account for 800 weight of coffee, part of the said cargo, kept by himself, and to be paid for in tobacco at the same rate. That the coffee was then worth £3,720 paper currency. That on the 18th of April, 1781, Holloway transmitted to the plain-

* The above case was accidentally omitted, in publishing the cases of the October Term 1799. It is therefore inserted now.

† See *post.* 415, *Deanes* v. *Scriba* &c., point 2d.

‡ By the Code of 1849, p. 673, § 14. In a cause of action thereafter arising, whether from contract or *tort*, the jury may allow interest, and fix the time of its commencement. And *ib.* § 18, the Court may do the like in a suit in equity, or in an action where no jury is had. Cases forbidding interest on damages before that statute, *Brugh* v. *Shanks*, 5 Leigh, 598; and *Gibson* v. *Governor* for &c. 11 Leigh, 600.

The Code of 1819, p. 208, § 58, had given a like discretion to Courts of Equity, as to interest. Yet Equity would not decree interest upon merely estimated, or conjectural hires, rents, or profits. *Baird* v. *Bland*, 5 Mun. 492; *Roper* &c. v. *Wren*, Adm'r., &c. 6 Leigh, 38. But an exception to this is made against a guardian, holding his ward's slave or land. He is charged interest on estimated hires or rents. *Garrett*, Ex'r. v. *Carr*, &c. 1 Rob. 196. And see *Wilson* v. *Spencer*, 11 Leigh, 261.

tiff, then resident in Baltimore in Maryland, notes for 143 hhds. of tobacco, amounting, inclusive of warehouse expenses, to £118,926 18s. pretending that it was received from the purchasers of the consignment. That the whole of this tobacco was shortly after destroyed by the British; and the plaintiff believes a considerable part of it, being the tobacco [359] of Holloway and not of the plaintiff, was fraudulently sent, when Holloway apprehended the British would destroy it. That in 1780, the plaintiff likewise consigned to Holloway, the schooner Blossom, with her cargo; the nett proceeds of which, amounted to £33,461 16s. of which, the plaintiff has received 33,171 dollars, continental money, leaving a balance due the plaintiff of £23,510 10s. payable in tobacco, at £70 per cwt. The bill therefore prays an account, and payment of the balance; and for general relief.

The answer admits the said sum of £7,726 2s. 4d. paper currency, on 21st of August, 1781, and that the same was payable in tobacco, at £70 per cwt. It also admits the coffee to have been on hand, upon the 19th of August, 1781; but refers to an account to shew how it was disposed of. Insists, that the tobacco notes remitted were the property of the plaintiff, and not fraudulently sent; but that they were honestly remitted, the plaintiff having then actually sent for 100 hhds.; and, at that time, that there was little or no prospect, that the British would go to Petersburg. That the cargoes were sold at the customary credit of the place, as no directions to the contrary were given; and there are sundry outstanding debts, due from the purchasers. That proper steps have been taken to collect the same; but several of the defendants have plead the act of limitations.

The Court of Chancery referred the accounts to a commissioner; who allowed the plaintiff the charge for the coffee, and the other debits; but credited Holloway for the 143 hhds. of tobacco sent; and reported a balance of £28,929 9s. 7d. payable in tobacco, at £70 per cwt., amounting to 41,328 lbs. tobacco, with interest on the whole balance, from the 1st of September, 1781, until paid. The commissioner refused to make any allowance to the executors, for the outstanding debts, there being, as he alleged, no proof of proper steps [360] taken to collect them; and Holloway, when he rendered his accounts, had not excepted them.

The plaintiff excepted to the report, for having credited the 143 hhds. tobacco.

The defendants also excepted to the report. 1. Because the outstanding debts were not allowed, as the proper steps to

recover them had been taken. 2. Because the estate could at most only have been liable for actual ascertained failures; and none such were shewn: on the contrary, in one instance, that of Banister, the whole dispute was, whether it should be paid in money, or the certificate given for it, by the public? for whose use, the commissioner, as executor of Banister, alleged it was bought. 3. Because the commissioner had debited the defendants without the coffee. 4. Because the commissioner had turned a *debit* of 20 half Johannes, into paper money, at 140 for one, and then re-charged it in tobacco, at £70 per cwt. 5. Because interest was allowed from September, 1781.

The Court of Chancery, disallowing the plaintiff's exception, established the credit to the defendant for the 143 hhds. tobacco; and declared its opinion, that the outstanding debts ought to be credited, if the proper steps were taken to recover them, and they would now give a power of attorney to the plaintiff to collect them. That the half Johannes ought to stand in money, and reserving the question of interest, re-committed the report to the commissioner.

The commissioner, in his second report, corrected the charge as to the half Johannes, stating it at £48 specie; but, in other respects, he reported the balance, as in his former report. In his remarks, he stated: *That* the defendants had filed a list of the outstanding debts, with a power of attorney to the plaintiffs to collect them. *That*, Holloway died on the 19th of October, 1781; soon after which, an agent was appointed to manage the estate; and when he left Petersburg, another agent was appointed; both persons of known [361] ability; and, therefore, that the defendants insisted, they had done all that was incumbent on them. *That*, Banister's debt was for a hogshead of rum bought for public use, and that the agent would not accept of the certificate. *That*, the defendants had produced a memorandum in the hand-writing of Stewart, who is now dead, but was a clerk to Holloway, in order to shew, that the coffee (with many other articles,) was sent into the country, out of the way of the enemy; and, as their testator died soon after, that they presume it was lost.

Holloway's letter, to Curzen, of August 19th, 1781, says, he has about 800 lbs. of coffee on hand, of which a bag is kept for the plaintiff according to instructions.

Stewart's memorandum referred to in the report is headed as follows:

A list of sundry goods, lodged with sundry persons belonging to John Holloway, deceased, 1781.

And it is an entry in these words:

"In the hands of Baker and Blow, some sugar and coffee, at Wine-Oak, belonging to Richard Curzen, S. I. R. to be sent him."

And another in these words:

"Five bags coffee, belonging to Richard Curzen, 2 barrels salt do. James Wilson. Sold John Pride, he says."

There are various letters, accounts, &c. in the record.

The Court of Chancery decreed the defendants to pay the balance, reported by the commissioner, in the last report, to be due to the plaintiff, with interest from the 1st of September, [362] 1781, "upon payment, by the plaintiff, to the defendants of forty-eight pounds of current money of Virginia, for the twenty half Johannes aforesaid, with interest thereupon, from the same first day of September."

The defendants appealed to this Court.

CALL, for the appellants.

Where a consignee, who has no orders to the contrary, sells goods on the customary credit of the place, he is justifiable by the known rule of mercantile law; and, therefore, he is not liable for failures or accidents not arising from his own misconduct.

In the present case the goods were sold on the customary credit, and, therefore, according to the rule just mentioned, Holloway was not liable for future losses, not arising from his misconduct; especially as it appears, that the plaintiff actually approved of what he had done.

There is no ground for imputing the subsequent losses, if any have taken place, to the misconduct of the consignee or his executors. Not the first; because the sales were chiefly made in 1781, and the debts from the situation of the country, could not be collected during his life-time, as he died in October, 1781; and, therefore, no blame attached on him: Not the second: because, if some little time for the funeral, the qualifying of the executors, their making themselves acquainted with the testator's affairs, and for the inclemency of the season, is allowed, it will be found, that they could not have been in a situation, to have commenced the collection, until the spring of 1782; by which time the six months act of limitations had barred the claims; and, therefore, no blame attaches on the executors either.

But the fault was in the plaintiff himself. For, the executors could not regularly have proceeded to collect, without au-

thority from him; to whom the debts belonged, and who might have them collected or not as he thought proper. He did not give this authority though, or call for the debts. But he ought to have done one or the other; and, therefore, if there has been any improper delay, it is imputable to himself.

The executors, however, used as much diligence as the nature of things would admit of. They appointed [363] agents to manage the estate and collect the debts; which agents proceeded in the collection, as well as they could: and, if they failed in their attempts, it was the misfortune of the plaintiff, and not the fault of the executors, who did more than their duty required; and, therefore, instead of meeting with reproach, they have merited the thanks of the plaintiff.

But it is, certainly, a proceeding of the first impression, to attempt to subject the executors to a loss of the debts, when the consignor appears to have taken no proper steps to recover them. The principles of universal justice demand, that the debtor should have been first discussed; because, he might have made satisfaction; and then there would have been no ground, even in pretence, for complaint against the consignee or his executors; who could, at most, only be liable for culpable negligence. But the plaintiff does not venture to charge them with any; nor, indeed, could he; for he was, throughout 1781, willing that the balances should remain in the hands of the debtors.

It is no argument to say, that Holloway did not, in terms, object to bad debts, when he returned the accounts to the plaintiff; for that was unnecessary, because the law implied it. Besides, in his letter of the 19th of August, 1781, he says, he cannot make the accounts more accurate, owing to the confusion his books and papers were in, from the situation of the country: which shews, he was merely making a general estimate, for the plaintiff's satisfaction, without meaning to descend to particulars. In such a state of things, an exception [364] was not to be looked for by the one, nor thought of by the other.

The coffee was clearly an improper charge against the estate; because, the memorandum of Stewart shews, that part was deposited with Baker and Blow to be sent to the plaintiff, who had written for it; and, that another part was deposited with Wilson in the country, to be put out of the reach of the enemy; and that it was afterwards sold to Pride, and not kept by Holloway for himself, as the bill supposes. The conduct of Holloway, therefore, was perfectly correct; and of course nothing like misconduct, with regard to it, can be imputed to

him; but, this article stands involved in the common calamity of the times, which the plaintiff must bear, as he has nothing to object, with respect to it, in the conduct either of the consignee or his executors.

Nothing can be more untenable than the attempt to subject the estate to the payment of Banister's debt. For, it is not pretended to be lost, but the whole question was, whether a certificate, or money should be received. Of course, there is not the slightest color for this charge. Because, if Banister bought the rum for the public, it is a debt due from the public; and, therefore, the plaintiff must receive payment in the mode, in which other creditors of the public are paid. At all events, it is a matter between the plaintiff and the public, or the executors of Banister, and not between the plaintiff and the defendants.

The claim of interest on the part of the plaintiff cannot be supported. It is contrary to the whole course of mercantile proceedings, to demand interest upon an unliquidated balance, and a Court of Equity never allows it. On the contrary, interest, being entirely in the discretion of the Court, is never given, unless the defendant, *ex æquo et bono*, ought to pay it; which cannot be affirmed of the defendants, in the present [365] case; from whom it does not appear, that any demand was made, until several years after their testator's death. But, what renders the claim for it more exceptionable is, that the plaintiff had, late in 1781, consented, that the debts should remain in the hands of the debtors; of course it would be extremely unjust, to allow him interest upon money, which has never been collected, and which remained in the hands of those who owed it, with his own consent. This too, from the moment the account of sales was returned, without allowing a reasonable time for the collection; although it is manifest, from the state of the country, as well as from other causes, that, notwithstanding the debtors might have continued able and willing to pay, no industry could have produced satisfaction, until long afterwards.

Whether the mode, adopted by the decree, of settling the half Johannes be correct or not, is submitted to the Court. But, it appears unconscionable to say, that an advance of that kind should only stand at its nominal amount, when it must have been a favor, and the specie would have commanded a much greater price in exchange for the currency of the day.

PER CUR. The Court is of opinion, that the appellee, having consigned his goods to Holloway, for sale, without particu-

lar instructions not to sell upon credit, the latter was at liberty to use his own discretion on the occasion;* in the exercise of which, he appears to have acted fairly and prudently, so as to have met the approbation of his principal: And, therefore, the outstanding debts were the property, and at the risque of the appellee, and not chargeable to the factor or his representatives; unless, having undertaken the collection, they were guilty of such gross negligence as, in equity, ought to charge them: which cannot be imputed to the factor, who died so soon afterwards; nor to the appellants, who appear, from the facts stated in the Master's second report, to have used proper diligence in employing agents of ability and integrity to make the collection, and to have given probable reasons [366] for its failure: And, therefore, the appellants are entitled, at present, to a credit for the amount of the outstanding debts. That, as to the eight hundred pounds of coffee, the price of which is claimed by the appellee, there appears, at this time, no ground to charge the appellants for that article; since the statement made by Stewart, respecting it, to which the answer refers, is unsatisfactory for a decision either way; and, therefore, that the claim ought not now to be allowed. That the credit for the twenty half Joes. paid Walch, by order of the appellee in August, 1781, ought not to stand, as in the decree, to be re-paid now in specie, with interest; but, ought to be applied at its relative value at the time, towards the discharge of the paper debt. Specie, at that period, not being considered as a circulating medium, but a commodity at market, the value of which was to be settled by contract, or if none such, by the current value at that time, independent of the legal scale; nor, in the present case, has the contract for tobacco, another commodity, any influence on the question. The Master, residing at Petersburg, is presumed to have been well acquainted with the value, and in his first report to have stated the credit accordingly, (having departed from the legal scale, and the contracts for tobacco;) and, therefore, that it ought to stand as there stated, in paper; and that the other articles of debit and credit ought to stand as stated in the last account. That the demand being for an account unliquidated, in which there were considerable articles in dispute, so that it was uncertain on which side the balance would be, no interest ought

[* See *Scott* et al. v. *Surman* et al. Willes' R. 406; *Houghton* et al. v. *Matthews* et al. 3 Bos. & Pull. 489; *Wiltshire* v. *Sims*, 1 Campb. Cas. 258; *Geyer* v. *Decker*, 1 Yeates' R. 486; *Van Alen* et al. v. *Vanderpool* et al. 6 Johns. R. 69; *Goodenow* v. *Tyler*, 7 Mass. R. 36; and see *Levrick* v. *Meigs* et al. 1 Cowen's Rep. 645, in which the general duty of a factor is considered.]

to be allowed on the balance.* The decree, therefore, is to be reversed, and the cause remanded to the High Court of Chancery, for that Court to have the account between the parties re-formed, and a decree entered according to the principles of this opinion, reserving to the appellee liberty to make [367] a future claim for the outstanding debts, or any of them, on proper proof of the receipt thereof by the appellants, or of gross negligence in them in the collection; and as to the coffee, upon proper proof to charge them.

[* See *Kerr* et al. v. *Love*, 1 Wash. 172; *Waggoner* v. *Gray's* adm'rs. 2 H. & M. 603; *Gilpins* v. *Consequa*, 1 Peters' R. 95, 179; *Consequa* v. *Fanning*, 3 Johns. Ch. R. 601.]

GLASSEL *v.* DELIMA.

[368]

Monday, October 27th, 1800.

On a joint notice to all the obligors in a forthcoming bond, the plaintiff may take judgment against one of the defendants.*

Glassel gave a forthcoming bond, with James Somerville and David Blair, securities, to Delima. Upon this forthcoming bond, Delima gave notice to Glassel, Blair, and the executors of Somerville, jointly, that he should move the District Court for judgment. He took judgment, however, against Glassel only. The defendant filed a bill of exceptions, reciting the notice and execution, with the Sheriff's return, in *hæc verba;* and stating, that the defendants excepted to the same as improper, but that the District Court over-ruled the exception.

Glassel appealed to this Court.

WICKHAM, for the appellant.

The question is, was the notice sufficient for the Court to give judgment against the appellant only? A notice should be at least as particular as a declaration; and upon a joint declaration, the plaintiff could not cease to prosecute the suit against some of the defendants, and take judgment against the rest. This is a fault which the statute of *Jeofails* [369] would not cure, and much less will that statute cure the error on a motion; to which the statute does not apply.

* By Code of 1849, p. 640, § 6,—A person entitled to obtain judgment for money on motion, may, as to any, or the personal representatives of any person liable, move severally against each, or jointly against all, or jointly against any intermediate number.