23. Sides

Baltimore Association for the Improvement of the Condition of the Poor

vs.

Elizabeth Coulson & John H. Ing

Copy of Opinion

Filed as part of appellants Statement June 5th 1863.

No 147 Dec Term 1863.

City Circuit Court. Judge Kirby.

His Honor in this ~~following~~ case filed the following opinion:

The Baltimore Association for the Improvement of the Condition of the Poor
vs
John H Sing and Elizabeth Coulson

In the Circuit Court for Baltimore City
Bill for Injunction

The Bill in this case is filed by the Complainants, to obtain an Injunction against a certain Elizabeth Coulson, prohibiting her from proceeding, in the matter of her claim against the estate of Rebecca Monteith either upon a judgment rendered in her favour in the Superior Court of Baltimore City, against the defendant Sing her executor, or in the Orphans Court for Baltimore City, by execution, petition, or otherwise, and also prohibiting the said Sing from proceeding in the said matter, in either of said Courts, or elsewhere in Court or out of Court, by petition payment, agreement or settlement or in any manner whatsoever

The Complainant is residuary legatee in the Will of the said Rebecca Monteith, and is therefore interested in excluding from satisfaction, out of said estate, any claim against it which is not just,

The judgment above referred to, had been rendered in her favour on the 17th day of September 1863 upon an award, made under a reference by rule of Court, in a case docketed by consent to Jany Term 1862 of the said Court,

The claim in the suit, in which this judgment, was rendered, was for services, rendered by Mrs. Coulson, as a nurse to Miss Menteith, for more than a year, while she was suffering from a fractured thigh, and by a daughter, and servant, during that period, and for food, and fuel supplied, during that period. The Complainant objected to the payment of it, when it was first presented against the estate, on the ground, that these services were rendered gratuitously, and without any agreement, on the part of the testatrix, to pay for them, and that it was barred by limitations, at the time of her death. I do not deem it necessary, or proper, to enquire into, the origin of this claim, or whether the objections above mentioned were well founded, for the reason, that it has been merged in a judgment, and I am not at liberty in these proceedings to look behind it, but can only enquire, whether the objections, taken by the Complainant to the manner, in which this judgment was obtained, and the circumstances attending it, are such, as to require, a Court of Equity to interpose, for the purpose of preventing, the satisfaction of it, by execution, or otherwise.

Before proceeding with this enquiry I will remark that this Court cannot, with a view to any relief to be afforded to Complainant, take into consideration, any thing that is set forth in the Bill, in regard to the alleged neglect, or delay, of the executor of Miss Menteith, in the ~~statement~~ settlement of the various accounts rendered by him from time to time in the Orphans Court. The complaints on this subject, as shown by the statements in the Bill,

have been made the ground of various petitions, and proceedings in that Court, upon all which, it has ~~app~~ passed appropriate orders, giving such relief as it deemed just & proper. This Court can consider these matters, only so far, as they may tend to show, that there was something improper, in the conduct of the Executor, in connection with the proceedings, upon which this judgment was rendered. The cause in which this judgment was rendered, was docketted by the consent of the Counsel for Mrs. Coulson, & the Counsel employed by the Executor Charles T. Mayer, Esq. and by their agreement, was by rule of Court, referred to the award of a person selected by them. The law of this state provides "that the Court may give judgment on the award of the person to whom such reference shall be made, and award execution thereon, as upon verdict confession, or non suit. It declares that if it shall appear to the Court that the same was obtained by fraud, or malpractice in, or by surprize, imposition or deception of the arbitrators, or without due notice to the parties or their attornies, the Court may set aside such award, and refuse to give any judgment thereon.
It is to be observed, that the Complainant does not charge, that this award, was obtained by any of the improper means, above enumerated, as grounds upon which, the Court will set aside an award. Its fairness is not in any manner called in question, and the defendant Coulson insists upon her right to have execution of the judgment rendered upon it in satisfaction of this claim. But though the Complainant does not allege that the award was obtained by such improper, and unfair means, it insists "that said judgment was obtained

in an inequitable manner under said proceedings and was a surprise to this Complainant," and "obtained without any notice to it." It is to be observed that the Complainant was not a party, and could by no possibility have been a party, to the suit, in the Superior Court, for the recovery of this claim. Though interested as residuary legatee, in defeating claims brought against the estate, such claims could be enforced, by suits against the executor alone. The Complainant was not entitled, as a party, to any notice of such suit. ~~The Complainant~~ It however had always objected for the reasons above stated to the allowance of this claim, and the payment of it by the Executor, and it alleges in the Bill, that he, when it was first presented to him, objected to it, for the same reasons, and that "he said in conversation with John J. Morris, Esq., who was then acting as Counsel for the association, that at the trial of the case, he said executor should solicit the attendance of said Morris, by whose advice in withdrawing, or persisting in the plea of limitations, he said Executor should be in part, if not wholly governed," and it alleges further, "that neither said association, nor said John J. Morris, nor any person on its behalf, had any notice whatever of said proceedings, and it was entirely ignorant of them, notwithstanding said promise of said Ing to solicit the attendance of said Morris, at the trial of said case" and that said judgment was thus obtained in an inequitable manner, and was a surprize" &c. I have carefully examined the Complainants Bill, in all its numerous allegations, and details, and cannot discover, that there is any other ground upon which it rests

its charge of surprize in regard to the manner in which this judgment was obtained, except that of the Executor's neglect to give it notice, of the reference to arbitration, and of the proceedings before the arbitrator. The Solicitor for the Complainant as appears from the narrative of the proceedings in the Orphans' Court given by him in the bill, had notice that the suit was docketed immediately after it was done; and also, that Mr. Brewer was the Attorney for Mrs. Coulson in the suit, but it does not appear, that its progress, was watched by any one acting for the Association. The Arbitrator was required to give notice only to the parties to cause as they stood upon the docket. The Association was not one of them, and it does not appear that he knew that it was interested in the matter. The question then is ~~this~~, was this a case of surprize in obtaining a judgment, so as to induce a Court of Equity, to deprive the party who has obtained it, of the benefit of it. There can be no doubt that the surprize, or misconduct, which the Court condemns in such cases, is that which is practiced by one of the parties to the suit, against the other, usually by the plaintiff agst. the defendant. In Coutee v. Cook 2 H. & J. 179, the Court of Appeals says "Where a defendant at law applies for an injunction against a judgment rendered against him, but it does not appear that there is any fraud or surprize on him" &c. So also in Dilly vs. Barnard 8 G. & J. 170 "Where a party seeks relief against a judgment obtained against him," and further "a judgment obtained mala fide & by surprize arising from the fraudulent and deceptive conduct of the

adverse party" &c. Does the Complainant stand in a position to plead surprize, against the plaintiff, in whose favor this judgment was rendered, so as to defeat her in obtaining the fruits of it? It is not pretended that she, or her attorney have practiced any surprize or fraud upon a party to the suit. The Complainant was not a party to it. It is not charged in the Bill, nor does it appear in evidence, that either she or her Attorney, knew in any manner, or from any source, that the executor had said that "he would solicit the attendance of Mr. Morris at the trial" &c, and neither she nor her attorney, can be justly charged, with having practised any surprize, or deception upon this Complainant. Whether the executor, has disregarded any other obligation, that one of Courtesy, by not calling upon Mr. M. when the Case was before the Arbitrator, or whether as is alleged this gentleman was absent from the City at the time of the Action of the Arbitrator, it is not necessary for me to decide, because no ~~such~~ relief is prayed against the executor personally, for permitting the wasting of the Estate by allowing to be recovered against it, a judgment which it is said he knew to be without foundation in justice. It does not appear from the statements in the Bill the Mr. M. was to be called upon to assist in the trial of the Case; but it is ~~said~~ stated that the executor said that he would "Solicit the Attendance of that gentleman at the trial by whose advice in withdrawing, or persisting in the plea of limitation, he should be in part, if not wholly governed" Insisting upon this plea, was a matter, altogether within the

discretion of the executor, the law not requiring him to rely upon such plea. He may have considered that as between this association, which looks to the benefit of the poor in the community at large an institution of the most benevolent, and praiseworthy character, and the defendant who is an individual belonging to that class, it was reasonable, and proper, that his discretion in regard to the use of the plea, should be exercised in her favor, and he may have been influenced in this view by the fact that the Association had already received from the estate as much as $2100.- And further Legatees have no right to plead limitation 4 Md. Chan. dec. 456 - the Executor only can plead this bar. In regard to the Question, of fraud which is rather insinuated, than charged, against the Executor, I may say, that whilst the law abhors fraud, it requires it to be distinctly charged & to be conclusively proved. I am of opinion that the proceedings, and proof in the cause, furnish no sufficient evidence of fraud in connection with this judgment, on the part of the executor, or of any fraudulent combination between him, and the defendants' Attorney in the proceedings

Fraud is always suggested by a motive, & I can discover no sufficient motive to prompt a resort to it in this case. The ~~money~~ fund out of which this judgment is to be satisfied, is not in the hands of the executor but invested by the Register of the Orphans Court, and there is no pretence for supposing that there was any combination between the execution, and the plaintiffs attorney, so grossly fraudulent in its character, as to secure any benefit from the judgment to the former. It may be that the execu-

tor's inclination to exercise his discretion in regard to the plea of limitations in favor of the Complainant, may have undergone some change during the progress of the frequent, and protracted litigations with him in the Orphans' Court, and this may account for some of the peculiar features in this case. As to the objection that this claim was forever barred under the 108 Section of the 93 Art. of the Code, so that no suit upon it could be maintained, I am of a opinion that this is not a sound objection. The Executor as the Section provides "May plead this Section in bar, together with the general issue, but if he is bound to do so, regarding the claim as utterly barred because the creditor did not bring his suit within nine months; the executor, though he might become satisfied during that interval, that the claim was just and proper, would be compelled to defeat it by this plea. It appears to me that the discretion allowed to the executor in regard to the ordinary plea of limitations must apply to the plea allowed under this Section. It is the settled law of this State, that limitations can avail only when pleaded, and not having been relied upon by the party entitled to plead it in this case; the judgment cannot be impeached or interfered with in consequence of the omission, or neglect. The plaintiff in the suit is not to be made to suffer on account of it. I will pass a Decree, or order, in conformity with the views above expressed.

Wm. Geo. Krebs.

1863

Copy

Rebecca Montieth's

3rd Administration Account

Mr. Earle
Please pass this with
the statement in
Ing. Ex. of Penna.
Sent yesterday by Mr
Schwarz
Yours &c
W. H. Ing.

(Paid)

Rebecca Monteith's
3d Administration Account

Baltimore City, ss.
The Third account
of John H. Ing, Executor of
Rebecca Monteith, deceased. —

This Accountant charges himself with the balance due on the settlement of his last Account, settled on the 15 day of March 1861 and amounting to	$ 592	16
And with Interest on the sum of $592.16 from the 15 day of March 1861 to the 6 day of May 1862 in pursuance of an order of the orphans' Court for Baltimore City, passed on the 29 day of March 1862 $ 40.56, 1 year, 1 mo, 21 days see memorandum below.		
And with $352.64 Baltimore City Corporation Stock or Loan of 1890 bearing an Interest of six per cent per annum payable quarterly, invested for the benefit of the Estate of the said deceased, in pursuance of an order of the orphans' Court for Baltimore City, passed on the 3 day of May 1862, which cost	350	00
	$ 942	16

And he craves an allowance for the following
Payments and Disbursements. —

Cash paid for $352.64 Baltimore City Corporation Stock or Loan of 1890 bearing an Interest of six per cent per annum payable quarterly, Invested for the benefit of the Estate of the said deceased in pursuance of an order of the orphans' Court for Baltimore City, passed on the 3 day of May 1862, and which cost	$ 350	00

Ditto paid Charles F. Mayer, Esquire, for Professional services rendered the Estate of the said deceased, as per his receipt appears for	50	00
Ditto paid Elizabeth Coulson on account of her Judgment against the Estate in the Superior Court for Baltimore City, amounting to $540:06 with Interest from the 10 day of September 1862, as per receipt of John M. Brewer, her attorney appears for	143	00
Ditto paid Isaac P. Cook, Register of Wills, for Docket Entries and cost of Record to the Court of Appeals, in the case of "The Baltimore Association for the improvement of the condition of the Poor" vs John H. Ing, Executor of Rebecca Monteith, deceased	50	63
Ditto paid United States Government Stamp	"	10
Ditto paid Registers fees and for copy of account	3	55
Payments and Disbursements $	597	28
Balance due the Estate, consisting of		
$352:64 Baltimore City Corporation 6 per cent Stock or Loan of 1890, payable quarterly, at $350:00		
Less Cash advanced by this Accountant " 5:12		
	344	88
Estate accounted for — $	942	16

Memorandum. The item of $40:56 as for interest must be regarded as suspended until the decision of the appeal in the Court of Appeals on that question.

The Estate having been threatened with Caveats to break the Will, this accountant retained Wm. H. Norris Esq. as Counsel to defend the same, at a retaining fee of $50:- for

which when the accountant can communicate with Mr Norris, he will obtain his receipt and will in a future account claim to be allowed that sum.

This Accountant has invited proposals to enclose with a granite curb and wrought iron railing, the deceased's grave Lot in Green mount Cemetery as directed by the will and finds the estimated costs $403:-

To enable this Executor to settle the Estate and to carry out the will of the deceased in regard to her grave Lot he will be obliged to call upon the Poor Association to return him so much of the Legacy paid by the Executor to it, as will suffice for that object.

Jno. H. Ing. Exr. —

Baltimore City, ss. On the 11 day of March 1863, came John H. Ing, Executor as aforesaid, and made oath on the Holy Evangely of Almighty God that the aforegoing account is just and true as stated and that he has paid or secured the payment of every sum or sums for which he craves an allowance which after examination is passed by order of the orphans' Court.

Test. Isaac P. Cook. Register of Wills for Baltimore City.

In Testimony that the aforegoing is a true copy, taken from the original filed and remaining in the office of the Register of Wills for Baltimore City.

I hereunto subscribe my name and affix the seal of my office this Twenty fourth day of March in the year of our Lord Eighteen hundred & sixty three.

Test. Isaac P. Cook. Register of Wills for Baltimore City. —

Cered

13.
$9.10
Filed June 11th 1863

JOHN H. ING,
vs.
THE BALTIMORE ASSOCIATION FOR THE IMPROVEMENT OF THE CONDITION OF THE POOR.

No. 6.

Court of Appeals of Maryland,

JUNE TERM, 1868.

Appeal from the Orphans Court of Baltimore City.

APPELLEES' BRIEF.

The record in this case shews, that Rebecca Monteith, by her will (p. 8) gave the residue of her estate to the appellee, in which she appointed the Appellant her Executor, and declared that at its date, which was April 7th, 1858, she did not owe any debt.

The will was proved on 26th August 1858, (p. 8.) An inventory returned on 3d September 1858, by the Executor, (p. 9.)

Three Citations, and one Attachment for contempt, were issued, on all of which the Defendant was duly served, before he would render any account, (pp. 12 & 13.)

On 31st March 1860—that is, more than one year and a half after he returned the inventory—the Executor rendered his First Account, shewing himself then indebted to the Estate, $1397.53,—(pp. 9 & 10.) Nearly a year afterwards he returned a Second Account, shewing a balance of $592.16, due the estate,—(pp. 10 & 11.)

After the lapse of nearly another year, that is three years and a half after the inventory had been returned, the Appellee filed a petition to compel a settlement of the Estate, (p. 1,) the Appellant answered, (p. 2)—and then amended his answer, (pp. 3 & 4,) and general replications were filed and testimony was taken on behalf of the Appellant, tending to shew that one Elizabeth Colson had a claim for services rendered the testatrix in attending her when she had broken her thigh, in December 1849—that is, more than eight years before she made her will, in which she declared that she owed nothing—(Drs. Smith & Knight, pp. 4 & 5;) and also testimony was offered by the Appellant, himself, shewing that he had said to the Solicitor for the Appellee, that he, the Appellant, did not think the claim just, and that the services were rendered gratuitously, (Mr. Morris, p. 5.)

It is to be noticed that the petition was filed on 3rd March 1862, and the answer on 14th March 1862; and on the same day, that is 14th March, a general replication was filed;—and that in the answer (p. 2) the Appellant says, "this claim is in progress of suit," but in fact it was not so, for the Appellee, himself, gave in evidence a certified copy from the Superior Court, shewing that the suit had been brought on the twentieth day of March 1862, that is, six days after this answer had been filed in the Superior Court—and that it had been docketed by consent, by the Claimant, with the Appellee; and furthermore that it had been docketed back, so as to stand of the January term preceding, (p. 14.)

It is to be observed that there are several statements made in the answers of the Appellee, of which there is no evidence whatever in the case, and the proceeding having been a plenary one on petition, answers and general replication, with testimony taken, these unsupported statements cannot be taken to be true, or be considered at all.

The petition of the Appellee it will be seen, (p. 1,) was filed on 3rd March 1862, and the services rendered by Elizabeth Colson were, in December 1849, (p. 5,) that is more than twelve years before; and it will be seen, that of the property in hands of the executor $440 was bank stock, producing more than six per cent. interest per annum, (pp. 9 & 10,) and the record does not shew whether or not the executor had sold it, when, or for what sum;—but supposing that he had sold it for the appraised value, the case stands no better for him.

The Orphans Court ordered that the Executor pay interest on the balance, $592.16, shewn by his Second Account, from the date of its passage, (p. 6,)—and the appeal is from this order, (p. 7.) The appellant has assigned no error in his Statement submitting the case to the Court of Appeals, except the charge of interest, and that is therefore the only ques- for this Court.

There are indeed other matters suggested in the statement of Appellee: he has filed two or three papers in the case with the Clerk of the Court of Appeals—but it is sufficient, without adverting specially to the impropriety of this course, to say, that these matters are no part of the Record, and cannot therefore be considered by this Court. Besides, if these papers were admissible in this way, it might be sufficient to say that this Court cannot look at matters which occurred subsequently, but must confine themselves to the single question made on the Appeal.

The fact that a fund bearing interest was sold by an Executor, and that no disposition whatever was made of the money, is alone sufficient without evidence of what he did with it, whether he made use of it or not, to charge him with interest which he might or ought to have made. But independently of this, he had no right to keep this money idle, and to

keep an estate open three and a half years—on account of a stale claim more than twelve years old when the petition was filed. Or if, from conscientious motives he chooses to refrain from using the means which not only the Statute of Limitations, but the Testamentary system affords him, of barring this claim and settling the estate—he ought, at least, to have put the money at interest in some way.

Matthew, ch. 25, verse 27.

Williams on Executors, 1132.

Lyles vs. Hatton, 6 G. & J., 122.

Thomas' Adm'x, vs. Frederick Co. School, 9 G. & J., 115.

Coward vs. Worrell, 7 G. & J., 475.

The case of Mickle vs. Cross, 10 Md., 353, cannot be compared with this, for there the Executor repeatedly tendered the money, and it was upon that ground solely, that Le Grand, C. J., concurred—see p. 363. .

In all other cases in which Executors have not been charged interest, they have acted with due diligence and in good faith, which the Executor did not do in this case;—for he sold stocks, bearing interest, unnecessarily —had three Citations, and an Attachment for Contempt, issued against him, before he would settle his First Account.—Delayed three and a half years, without either paying the claimant or the legatee;—threatening one with the plea of limitations to deter her, and setting up the claim against the other, as an excuse for not paying it. And finally, after three years and a half, upon being brought in, upon Petition, setting up in his answer that the claim was in suit, when in fact it was not, and then attempting to make it true, by making haste a few days after this answer was filed, to docket the suit on the claim by consent, back, as of a prior day.

EDWARD OTIS HINKLEY,
Attorney for Appellee.

keep an estate open three and a half years—on account of a stale claim more than twelve years old when the petition was filed. Or if, from conscientious motives he chooses to refrain from using the means which not only the Statute of Limitations, but the Testamentary system affords him, of barring this claim and settling the estate—he ought, at least, to have put the money at interest in some way.

Matthew, ch. 25, verse 27.

Williams on Executors, 1132.

Lyles vs. Eaton, 6 G. & J., 122.

Thomas' Adm'x, vs. Frederick Co. School, 9 G. & J., 145.

Coward vs. Worrell, 7 G. & J., 415.

The case of Mickle vs. Cross, 10 Md. 323, cannot be compared with this, for there the Executor repeatedly tendered the money, and it was upon that ground solely, that Le Grand, C. J., concurred—see p. 303.

In all other cases in which Executors have not been charged interest, they have acted with due diligence and in good faith, which the Executor did not do in this case;—for he sold stocks, bearing interest, unnecessarily—had three Citations, and an Attachment for Contempt, issued against him, before he would settle his First Account.—Delayed three and a half years, without either paying the claimant or the legatee;—threatening one with the plea of limitations to deter her, and setting up the claim against the other, as an excuse for not paying it. And finally, after three years and a half, upon being brought in, upon Petition, setting up in his answer that the claim was in suit; when in fact it was not, and then attempting to make it true, by making haste a few days after this answer was filed, to docket the suit on the claim by consent, back, as of a prior day.

EDWARD OTIS HINKLEY,

Attorney for Appellee.

JOHN H. ING, Executor of REBECCA MONTIETH,

against

THE BALTIMORE ASSOCIATION for the improvement of the condition of the Poor.

No. 6.

Court of Appeals of Maryland,

JUNE TERM, 1863.

Appeal from the Orphans Court for Baltimore City.

APPELLANT'S STATEMENT.

The Appellant feels aggrieved by the order of the Orphans Court requiring him to charge himself with interest on the apparent balance in his hands, as shown by his second account in said Court.

The order of the Court requires Appellant to charge himself with interest in his third account, to be rendered to this Court, on the sum of $592 16 c. from the date of his last account.

To this the Appellant objects:

1st. Not having used the money, he is not chargeable with interest.

2nd. Under the testamentary system, an account or claim having been exhibited to the Executor, which he required the claimant to establish, the Executor had the right to retain in his hands, assets proportioned to the amount of the claim. Code, vol. 1, p. 642, § 108.

3rd. The Appellee caused Appellant to be cited to the Orphans Court to state the 2nd account, and has taken care to run the estate to the expense of having that fact set out at length in the Record.

The presumption is violent the Appellee knew the facts set out in such account and acquiesced in it.

If the Appellee desired the sum of money to be invested, then was the time to have applied to the Court for an order for that purpose.

Acquiescing until the present proceedings, it is not now in the power of the Appellee to insist upon interest in the absence of all proof, or even of an attempt at evidence that Appellant had used the money or derived any profit or advantage from its use.

Memorandum:—Since the action of the Orphans Court, the claim of Mrs. Coulson ripened into judgment, and the whole, or nearly the whole of the funds in the hands of the Executor, have been applied to the satisfaction of her claim.

The collection of the judgment of Mrs. Coulson was hindered by the proceedings taken by the Appellee, who, upon certain averments, disproved by the evidence in the cause, obtained an Injunction in the Circuit Court for Baltimore City, against Mrs. Coulson and the Appellant, which Injunction was on motion to that effect dissolved. A copy of the Opinion of Judge Krebs in the case, is herewith respectfully submitted.

As also the 3rd and 4th administration accounts passed in the Orphans Court by Appellant.

The Appellant submits there was an apparent reason for the Appellant retaining in his hands the apparent balance stated in the 2nd account to be due the estate, he had to do so to meet the claim of Mrs. Coulson; clearly the Executor could not pay it to the Appellee. It now appears that he has over-paid the Appellee a large sum of money, and believes he will be compelled to institute suit to recover such overpayment to enable him to satisfy creditors, and to obtain the needed money to carry out the wishes of the deceased in regard to securing her grave from intrusion.

The Appellant submits that, upon the Appellee rests the burden of proof, that Executor received interest or made use of the money for his own profit or advantage. Upon the hearing of the Appellee's Petition in the Orphans Court, no allusion was made to the question of interest in the argument of the case. Appellant supposed from the Appellee not offering proof or even asking the question, whether the money had been used, that the question of interest had been abandoned. The amount it is true is small, but the principle involved is important.

Appellant asks the Court of Appeals to reverse the decision and order of the Orphans Court, requiring him to charge himself with interest, for the reasons set forth in the decision of the Court of Appeals, in 10 Maryland Reports, p. 352-363. Mickle Adm'r of Campbell, agt. Cross, Adm'r of Neilson.

JNO. H. ING,
Ex'r R. Montieth.

BALTO. *June* 4, 1863.

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The amount it is true is small, but the principle involved is important.
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Balto June 4. 1862

Wm. H. Ing
Ed. R. Mantheth.

Filed June 5th 1863

Argued
Jan 19th 1870
Wm H. Ing Appellant
& Rebecca Mantheth
in Baltimore affirmed
the Orphans Court
the condition of
the Bon.

Appellant claimed
in which to submit
the case.

John H. Ing
Executor of Rebecca Mathews
against
The Baltimore Association for the
Improvement of the Condition of the Poor.

Appeal from the Orphans Court
for Baltimore City.

Appellants Statement.

The appellant feels aggrieved by the Order of the Orphans Court requiring him to charge himself with interest on the apparent balance in his hands as shown by his second account in said Court.

The order of the Court requires appellant to charge himself with interest, in his third account to be rendered to this Court, on the sum of $592.16¢ from the date of his last account.

To this the appellant objects
1st. Not having used the money he is not chargeable with interest.
2d. Under the testamentary system, an account or claim having been exhibited to the Executor, which he required the claimant to establish, — the Executor had the right to retain in his hands assets proportioned to the amount of the claim. Code Vol 1, p 642, S 108.

3d. The appellee caused appellant to be cited to the Orphans Court to state the 2d. account, and has taken care to run the Estate to the Expense of having that fact set out at length in the record.

The presumption is violent the appellee knew the facts set out in such account and acquiesced in it.

If the appellee desired the sum of money to be invested then was the time to have applied to the Court for an order for that purpose.

Acquiescing until the present proceeding it is not now in the power of the appellee to insist upon interest in the absence of all proof, or even of an attempt at evidence that appellant had used the money or derived any profit or advantage from its use.

Memorandum. Since the action of the Orphans Court, the claim of Mrs Coulson ripened into Judgment and the whole or nearly the whole of the funds in the hands of the Executor have been applied to the satisfaction of her claim.

The Collection of the Judgment of Mrs Coulson was hindered by the proceedings taken by the appellee, who, upon certain averments disproved

by the evidence in the cause, obtained an Injunction in the Circuit Court for Baltimore City against Mrs Carlson and the appellant, which Injunction was on motion to that effect dissolved A copy of the opinion of Judge Kelly in the case is herewith respectfully submitted.

As also the 3d & 4th Administration accounts passed in the Orphans Court by appellant.

The appellant submits there was an apparent reason for the appellant retaining in his hands the apparent balance stated in the 2d account to be due the Estate - he had to do so to meet the claim of Mrs Carlson. Clearly the Executor could not pay it the appellee. It now appears that he has overpaid the appellee a large sum of money and believes he will be compelled to institute suit to recover back overpayment to enable him to satisfy creditors and to obtain the needed money to carry out the wishes of the deceased in regard to securing her grave from intrusion

The appellant submits that upon the appellee rests the burden of proof that Executor received interest or made use of the money for his own profit or advantage. Upon the hearing of the

before he would settle his first account.
Delayed three and a half years, without either paying the claimant or the legatee, threatening one with the plea of limitations to deter her and ~~the other~~ setting up the claim against the other, ~~to~~ as an excuse for not paying it.
And finally after three years and a half upon being brought in upon Petition, ~~etc~~ setting up, in his answer that the claim was in suit ~~and~~ when in fact it was not and then attempting to make it true, by making haste ~~of~~ a few days after this answer was filed to docket the ~~case~~ suit on the claim by consent, back as of a prior day. —

Edward Otis Hinkley
Attorney for Appellee.

Filed June 11 1863

9/13
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9 6
12.48

2nd Sheet

or if he chooses to refrain from using the means which not only the statute of limitations but the Testamentary system afford him of barring this claim & settling the ~~claim~~ estate — he ought at least to ~~let~~ ~~put~~ have put the money at from conscientious motives interest in some way. —

Matthew ch. 25 verse 27.

Williams on Executors 1132

Lyles vs. Hatton, 6 Gl & J. 122

Thomas' Adm.r vs. Frederick Co. School 9 Gl. & J. 115

Howard vs. Worrell, 7 Gl. & J. 475

The case of Mickle vs. ~~Nelson~~ Cross 10 Md. 353 cannot be compared with this, for there the Executor repeatedly tendered the money, and it was upon that ground solely that ~~Lo~~ Grand C. J. concurred see pa. 363. —

In all other cases in which Executors have not been charged interest, they have acted with due diligence and in good faith, which the Executor did not do in this case — for he sold stocks bearing interest, unnecessarily ~~delayed three and a half years in settlement of the estate~~ — had three citations and an Attachment for Contempt issued against him,

The appellant has assigned no error in his statement submitting the case to the Court of Appeals, except the charge of interest and that is therefore the only question for this Court. —

There are indeed other matters suggested in the statement of Appellee — ~~but~~ & he has filed two or three papers in the case ~~in the Court~~ with the Clerk of the Court of Appeals — but it is sufficient without adverting specially to the impropriety of this course, to say that these matters are no part of the record & cannot therefore be considered by this Court — besides, if these papers were admissible in this way, it might be sufficient to say that this Court cannot ~~look~~ at matters, which occurred ~~to~~ subsequently, ~~to the sta~~ but must confine themselves to the ~~questions~~ single question made on the Appeal. —

Filed June 11, 1863

The fact that a fund bearing interest was sold by an Executor, and that ~~th~~ no disposition whatever was made of the money, is alone sufficient without evidence of what ~~the~~ he did with it whether he made use of it or not to charge ~~him~~ with interest which he might or ought to have made. But independently of this he had no right to keep this money idle — & to keep an estate open three and a half years — ~~to~~ on account of a state claim more than twelve years old, when the Petition was filed

No. 6

John H. Ing
vs.
The Baltimore Association for the Improvement of the Condition of the Poor.

In the Court of Appeals
June T. 1863.
Appeal from the Orphans' Court for Baltimore City

Appellees Brief

The Record in this case shews, that Rebecca Monteith by her will (pa. 8) gave the residue of her estate to the appellee, in which she appointed the appellant her Executor and declared that at its date which was April 7th 1858 she did not owe any debt.

The will was proved on 26th August 1858 (pa. 8)

An Inventory returned on 3rd September, 1858 by the Executor (pa. 9)

Three citations and ~~one~~ Attachment for contempt were issued ~~were~~ ~~on~~ on all of which ~~were~~ the defendant was duly served, before he would render any account. (pa 12 & 13)

On 31st March, 1860 – that is ~~about~~ more than one year and a half after he returned the Inventory the Executor rendered his first account shewing himself then indebted to the estate $1397.53 – (pa 9 & 10)

~~About~~ Nearly a year afterwards he returned a second account shewing a balance of $592.16 due the estate (pa. 10 & 11)

After the lapse of ~~two~~ nearly another year that is ~~about~~ ~~two~~ three years and a half after

the Inventory had been returned the Appellee filed a Petition to compel a settlement of the Estate (pa 1) The Appellant answered (pa 2) — and then amended his answer (pa. 3 & 4) & general replications were filed and testimony was taken ~~by~~ ~~for~~ on behalf of the appellant tending to shew that one Elizabeth Cockson had a claim for services rendered the testatrix in attending her when she had broken her thigh in December 1849 — that is ~~at~~ more than eight years before she made her will in which she declared that she owed nothing (Mrs. Smith & Knight pa 4 & 5) and also testimony was offered by the appellant himself ~~showing~~ that he had said to the solicitor for the appellee that he, the appellant, did not think the claim just, and that the services were rendered gratuitously (~~the~~ Morris pa. 5) —

It is to be noticed that the Petition was filed on 3rd March 1862 and the answer on 14th March 1862 and on the same day that is 14th March a general Replication was filed — and that ~~and that in that answer~~ in the answer (pa. 2) the appellant says this claim "~~was~~ is in progress of suit;" — but in fact it was not so for the appellee himself gave in evidence a certified copy from the Superior Court shewing that ~~it had~~ the suit had been brought on the twentieth day of March 1862 that is six days after this answer had been filed in Superior Court —

and that it had been docketed by the claimant with the Appellee consent and furthermore that it had been docketed back so as to stand off the January Term, proceeding. (pa. 14.)

It is to be observed that there are several statements made in the answers of the Appellee, of which there is no evidence whatever in the case and the proceeding having been a plenary one on Petition answers & general replication, with testimony taken, these unsupported statements cannot be taken to be true or be considered at all. —

~~Upon~~ ~~Upon these fa~~ The Petition of the Appellee it will seen, (pa 1) was filed on 3rd March 1862 and the services rendered by Elizabeth Colson were in December 1849 (pa 5) that is more than twelve years before. ~~that~~ And it will seen that of the property in hands of the Executor $440. was Bank stock producing more than six per cent interest per annum — ~~and although~~ (pa. 9 & 10) and the record does not shew whether or not the Executor had sold it, ~~or~~ when, or for what sum — but supposing, ~~if it would help his case the~~ that he had sold it, for the appraised value, the case stands no better for him.

The Orphans Court ordered that the Executor pay interest on the balance $592.16 shewn by his second account from the date of its passage (pa. 6) — and the appeal is from this order (pa. 7)