

\*CHAPPEDELAINE, residuary legatee, and CLOSRIVIERE, administrator *de bonis non* of CHAPPEDELAINE, complainants, *v.* DECHENAUX, executor of DUMOUSSAY, defendant.

*Plea of account stated.*

If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant can show it to be erroneous.<sup>1</sup>

ERROR to the Circuit Court for the district of Georgia, in a suit in equity.

The bill stated that the complainants' testator and the defendant's testator, together with three others, viz., Boisfeillet, Du Bignon and Grand Closmesle, became joint purchasers of the islands of Sapelo, Blackbeard, Jekyll, and half of St. Catharine, on the coast of Georgia; that Dumoussay was the acting partner, and kept all the accounts, &c. That an account was stated and signed by the two testators, Chappedelaine and Dumoussay, on the 30th of April 1792, by which the former acknowledged a balance of 667*l.* 10*s.* 1*¼d.* due to the latter; but that the account was erroneous in sundry items particularly set forth in the bill; that there were sundry debits which had accrued since that settlement, and that Chappedelaine had been obliged, by a suit in equity, to refund to Boisfeillet a large sum which Dumoussay had overcharged him. That Dechenaux was the executor of the estate of Chappedelaine as well as of Dumoussay, and, as executor of Chappedelaine, had defended the suit of Boisfeillet. The bill contained a prayer that the defendant might account touching all moneys due, on rectifying the errors; and for all other sums due by Dumoussay in his lifetime, not credited nor accounted for, or which had come to the hands of the defendant, and that he pay over such balance as should appear on settlement of all accounts; and for general relief. The defendant pleaded the settled account in bar of so much of the bill as sought to open the account, and by answer, denied all fraud and error.

\*Upon hearing, the court below ordered a reference to auditors, [\*307 with directions "to make a general statement of accounts between the parties, rejecting any erroneous charges which may appear in their settlement, and adding such as may have been omitted."

The auditors, on the 23d of April 1805, instead of stating an account, reported that they found "a balance due from the defendant to the complainants, including interest upon the liquidated account, up to this date, \$15,586.22." They stated that they had not taken into consideration a claim of the complainants of 1000*l.* which the estate of Chappedelaine was condemned to pay to Boisfeillet, by decree of the court, nor their claim for indemnity for damages said to have been sustained by sale of lands, conceiving those claims not submitted to them, but reserved for the decision of the court.

Exceptions being taken to this report, the court ordered the auditors to "make a statement showing the items of the general account, which they rejected, in whole or in part, and the reasons of their rejection, and also such items as were added as omissions, and their reasons for so doing."

<sup>1</sup> Nourse *v.* Prime, 7 Johns. Ch. 69; Leycroft *v.* Dempsey, 15 Wend. 83; McIntyre *v.* Warren, 3 Keyes 185.

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In obedience to this order, the auditors made an explanatory report, whereupon, the court decreed, that 604*l.* 6*s.*, and 579*l.* 8*s.* 1*d.* be deducted from the liquidated account of the 30th of April 1792; that interest be allowed on the balance at eight per cent. from that date, and that the defendant pay, out of the assets, that balance and interest, and the further sum of \$3823, being the amount stated by the auditors as having accrued since the 30th of April 1792, and costs.

The errors assigned in the record were : 1. That the bill was insufficient in law. 2. That the court had not jurisdiction; because, although the bill stated the complainants to be French citizens, and the defendant a citizen \*308] of Georgia, yet the two testators were citizens of Georgia. \*3. That I. Trubert, who was stated in the answer to be residuary legatee of Dumoussay, was not made a party; and because the other legatees were not made parties. 4. That the stated account has been partially opened, and abatements made to the injury of the legatee. 5. That the exceptions to the report of the auditors ought to have been sustained.

*P. B. Key*, for the defendant, on opening the question of jurisdiction, was stopped by the court.

MARSHALL, Ch. J.—The present impression of the court is, that the case is clearly within the jurisdiction of the courts of the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the circuit court.<sup>1</sup>

*Winder*, for the complainants.—As to the allegation of want of parties, it can only be noticed on being pleaded. The defendant cannot now take advantage of it.

We are not, in examining the account, confined to the errors stated in the bill. But if the general nature of the errors is stated in the bill, it is sufficient; and if such errors are proved, it is sufficient to set aside the account as a bar, and to have it referred to auditors; who are not confined to the precise errors alleged in the bill.

MARSHALL, Ch. J., said, he understood the practice in chancery to be, that the court will notice only those errors in the report of the auditors which appear upon the face of the report, or those expressly set down in the exceptions; and then the evidence on which the items were allowed must appear on the record.

*Harper* and *P. B. Key*, for the defendant, contended, that an account stated and settled by the parties was conclusive, unless the party complaining can show fraud \*or error; and upon him lies the burden of proof. \*309] That when a defendant relies upon an account stated, he shall never be compelled to go into a general account. The settled account can only be opened to the extent of the items charged as erroneous. *Summer v. Thorpe*, 2 Atk. 1; *Pitt v. Cholmondely*, 2 Ves. 565.

March 4th, 1808. MARSHALL, Ch. J., delivered the opinion of the court as follows:—The bill in this case is brought to set aside a stated account

<sup>1</sup> *Childress v. Emory*, 8 Wheat. 642; *Coal Co. v. Blatchford*, 11 Wall. 172; *Carter v. Treadwell*, 3 Story 25.

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which was signed by Dumoussay and Chappedelaine, in July 1792, on the suggestion of fraud on the part of Dumoussay; or, if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account. The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened; and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have been committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous, than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Upon this principle, the report of the auditors in this case, and the exceptions to that report, \*so far as respects the stated [\*310 account, are to be considered.

The first exception relates only to the manner in which the auditors understood the order referring the accounts to them, and need not be considered, since the sole inquiry will be, whether they have, in fact, made any deduction from the stated account, which was not warranted by the interlocutory order—an order made on the principles which this court has already declared to be correct.

The second exception refers to the particular deductions made by the auditors. The first is, that the item in the stated account of 604*l.* 6*s.* 5*d.* is reduced to 333*l.* 0*s.* 8*d.* The stated account between the parties, marked in the proceedings as the exhibit A., contains this item, and states it to be one-fifth of the expenses for disbursements on the island of Sapelo, which was the joint property of a company consisting of five, of which Dumoussay and Chappedelaine were partners. The items which composed this general account are all contained in exhibit F., stated by Dumoussay, on the 3d of May 1792, and assented to by Chappedelaine, on the 23d of July 1792, when the stated account was signed. The total of those disbursements is 4224*l.* 3*s.* 8½*d.* and the balance upon the account is 3021*l.* 12*s.* 1½*d.*, the fifth of which is 604*l.* 6*s.* 5*d.*

In their explanatory report, they auditors say that they took as the basis of this reduction, an account settled by auditors, in a suit decided in the circuit court of Georgia, which was instituted by Boisfeillet, one of the absent partners, against Dechenaux, who was executor both of Dumoussay and Chappedelaine. The auditors in that case were examined, and they depose that their corrections were made on the proof of double entries, false charges, omissions acknowledged by the executor of Dumoussay, and charges not proper to be made against Boisfeillet. This testimony would, of itself, be sufficient to convince the court that injustice was done in the settlement \*of July 1792, but would not show explicitly the amount of [\*311

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that injustice, and enable them to say what deductions from that settlement ought to be allowed, because, as was well observed by the counsel for Dechenaux, items might be properly chargeable to Chappedelaine, of which Boisfeillet ought not to bear a part.

The court, therefore, sought, in the documents connected with the report, for that more explicit information. Upon looking into the exhibit F., there are, upon the face of the paper, obvious errors, which demonstrate the incorrectness of that statement, and the excessive inattention of Chappedelaine. The first item on the debit side of this exhibit, is the sum of 3571*l.* 3*s.* 8½*d.* disbursed for Sapelo. The funds for this disbursement were in part in the hands of Dumoussay, as the remnant of advances previously made by the partners. To this remnant he states himself to have added 2368*l.* 12*s.* 0½*d.* from his private funds. On this advance, made by himself, in Georgia, he charges the company 15 per cent. amounting to 354*l.*, on account of the difference of exchange between money in France and in Georgia, or, as he expresses it, for exchange, freight and insurance. This charge has been rejected in the accounts of all the partners for many obvious reasons. It is sufficient to observe, that as this money was advanced in Georgia, by Dumoussay, and repaid to him, in Georgia, by the partners, there was as much reason for making these charges on the repayment, as on the original advance; and with respect to Chappedelaine, it is still more inadmissible, because he had previously advanced his portion of this money to Dumoussay, and had allowed him 15 per cent. for these charges, in a deduction from that advance, so that this charge, with respect to Chappedelaine, is double.

The third item in this exhibit is a charge of 299*l.* as one year's interest on 2368*l.* 12*s.* 0½*d.* This is more than double the real amount of interest. \*There is also in the credit side of the account, an error of 100*l.* in  
\*312] the addition. The errors apparent on the face of the exhibit F. amount to 611*l.* and these errors are of such a description as strongly to characterize the stated account of July 1792. In the account stated by the auditors, there are omissions of moneys received by Dumoussay, and admitted to be chargeable to him in this account with the company, amounting to 189*l.* 10*s.* 10*d.*

The account containing these incontestable errors was submitted to auditors, and still further reduced by them. Several of the small errors which they have detected are perceived, but the whole cannot be traced by this court, without engaging in the laborious task of auditors, which is incompatible with their duties. To that account, the executor of Dumoussay, who was also the executor of Chappedelaine, was a party, and had a right, with respect to Boisfeillet, to rely upon the stated account of July 1792, signed by Chappedelaine; because Chappedelaine was the attorney in fact of Boisfeillet, and because Boisfeillet had sanctioned that settlement, and had assumed the payment of his part. Yet, in that case, the deductions from that account were made, which the auditors in this case have taken as the basis of their settlement, and those deductions were made in consequence of double entries, false charges, and charges not admissible against Boisfeillet.

The great difficulty in admitting such an account, under such circumstances, consists in the uncertainty of the amount of those charges which were rejected as being inapplicable to Boisfeillet. This difficulty is removed,

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in a great measure, by inspecting the report in the present case. In that report, the auditors take up the items which were rejected on this principle, and charge them to Chappedelaine; so that, in truth, the alterations made in this item are all founded on errors which the auditors have corrected.

The second item of this exception is, that the auditors reduced the sum of 336*l.* 16*s.* 8*d.* admitted in the stated account, as being one-fourth of the purchase and expense of Jekyll, to 311*l.* 9*s.* 6*d.* making a difference of 25*l.* 7*s.* 2*d.* \*This item in the exhibit A., which is the stated account, is the result of the exhibit G., which is the account of Jekyll, [\*313 as settled between Dumoussay and Chappedelaine. There is an obvious error of 4*l.* 19*s.* 10*d.* in the division of 3*l.* 10*s.* in the hire of negroes, and the residue of the sum deducted is on account of the same charges on the moneys advanced for Jekyll, which were made on the moneys advanced for Sapelo, and which are rejected, for the same reasons which were assigned for their rejection in that item of the account.

The auditors also reduced the sum of 990*l.* 3*s.* 1*d.* assumed by Chappedelaine for Boisfeillet, to the sum of 410*l.* making a difference of 580*l.* 3*s.* 1*d.* Nothing can be more obvious, than the propriety of this reduction. Dumoussay charges Chappedelaine with the debt of Boisfeillet, amounting, as he says, to 990*l.* 3*s.* 1*d.*, which Chappedelaine assumes as the attorney of Boisfeillet. In a suit to which the executor of Dumoussay is a party, this debt appears to have been only 410*l.* No man can hesitate to admit, that Chappedelaine must have credit with Dumoussay for the difference between the sum alleged to be due, and the sum actually due from Boisfeillet.

The auditors also struck out of the stated account the sum of 554*l.* 9*s.* 4*d.* assumed by Chappedelaine for one of the absent partners, that being considered, by mistake, as the share of that absent partner in the expenses of Sapelo. The sum actually due by that partner was afterwards paid by himself to the executor of Dumoussay. The court is satisfied from the evidence, that this payment was made to Dechenaux, as the executor of Dumoussay. The *assumpsit* of Chappedelaine was essentially as security for the absent partner, who still remained a debtor; and when the principal did himself pay what he owed to the original creditor, the *assumpsit* of Chappedelaine was of no further obligation. Although this was not an error in the account, when settled, except so far as this charge exceeded the sum with which the absent partner was really chargeable, yet it becomes an item which can no longer be retained as a charge against Chappedelaine, [\*314 and in reforming \*their accounts, it must be excluded from them.

There is also added to the credits of Chappedelaine the sum of 26*l.* 18*s.* which the auditors state to be the difference between the amount of a receipt given by Dumoussay and the sum actually debited to him in the accounts between the parties.

These several errors make up the sum of 1457*l.* 8*s.* 4*d.*, from which is to be deducted the sum of 667*l.* 10*s.* 1 $\frac{3}{4}$ *d.*, admitted in the stated account to be due from Chappedelaine to Dumoussay. The balance standing to the credit of Chappedelaine would be, on the 30th of April 1792, 789*l.* 18*s.* 2 $\frac{1}{4}$ *d.*

The auditors state this balance at 1346*l.* 10*s.* 7*d.* But from this balance reported by the auditors is to be taken the sum of 305*l.* 13*s.* allowed by Chappedelaine on the repayment, in Georgia, of money lent by him to Du-

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moussay in France. This sum has been disallowed by the auditors, but was allowed by the circuit court, and is allowed by this court. This would reduce the report of the auditors to 1030*l.* 17*s.* 7*d.* exceeding the balance which is here supposed, by the sum of 240*l.* 19*s.* 4 $\frac{3}{4}$ *d.*

The greatest part of this excess is produced by one-third of merchandise sold, and not entered in the account, and by a credit for continuing interest up to the 30th of April 1792, on Chappedelaine's money in the hands of Dumoussay, which credits had been omitted in the stated account, without any apparent reason, and must, therefore, have been among the numerous inaccuracies of that account. The residue of this excess is said by the auditors to be produced by numerous minute errors detected by a laborious investigation of all the accounts between the parties. This court cannot pursue them in that investigation. But in a case so replete with errors, which mark excessive negligence on the one side, and which can scarcely be ascribed to mistake on the other, the court is of opinion, that the report of the auditors, stating that these corrections were made on the inspection of the \*315] vouchers and entries which \*were laid before them, ought to be received unless the person taking the exception had himself required the testimony on any particular point to which he objected, to be submitted to the court, or had required a special statement from the auditors, exhibiting the reasons for their opinion on the particular point.

The balance due to Chappedelaine on the 30th of April 1792, is so much of the loan made by him to Dumoussay in France, which remains unpaid. By the contract between the parties, that loan was to carry an interest of six per cent. per annum, until paid. The court, therefore, cannot consider it as a claim on an unsettled account, or as carrying interest at the rate established in Georgia. It is still governed by the law of the contract, and must carry interest at the rate of six per cent. per annum.

To the report, so far as it respects the accounts subsequent to the 30th of April 1792, a general exception is taken, which is sufficiently repelled by the answer of the auditors. They say, if, in the opinion of the defendant below, the auditors admitted any charge against Dumoussay, which was not sufficiently supported by testimony, he ought to have obtained a special statement from the auditors, or have made a special exception, which would bring the testimony on the particular point before the court. The only objection which the court can notice, is the allegation in the exception, that the auditors have proceeded on accounts rendered by Dechenaux, without allowing him a credit which he claimed in those accounts. That credit is the balance appearing to be due to Dumoussay by the stated account of July 1792. But that balance was entirely changed. The item was fully disproved by the testimony laid before the auditors. Dechenaux did not then withdraw his account, and require the plaintiff below to support his claims by other vouchers. It was clearly in the power of the plaintiff to have done this, for he might have forced Dechenaux to produce the entries and vouchers from which he had made out the account exhibited by himself. By leaving this account with the auditors, without objection, he acquiesced in their considering as correct the items it admitted.

\*316] \*This bill was brought to correct the stated account of July 1792, and to settle the accounts between the parties subsequent to that period. The defendant exhibits the accounts subsequent to that period, but

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claims to set against them the balance due to his testator under the settlement of 1792. On those subsequent accounts, that balance has no influence. By introducing it into an account he was compellable to render, he cannot destroy the effect of that account. Had he intended to rely on this circumstance, he ought to have made the point before the auditors, and thus have enabled the plaintiffs to take other measures to substantiate his claim. The auditors say, they "admitted the account presented by the defendant;" but this must be understood, with the exception of the balance which he claimed under the settlement of July 1792. It does not appear, from their report, that the claims of the plaintiff below rested on that account so far as it went; but it is probable, that further research was deemed unnecessary. The court cannot say that in this the auditors erred.

The decree of the circuit court is affirmed, so far as it accords with this opinion, and is reversed as to the residue.

UNITED STATES *v.* McDOWELL.*Jurisdiction in error.*

In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum due upon the condition of a bond, and not to the penalty.

ERROR to the District Court for the district of Kentucky, in an action of debt for \$20,000, the penalty of an official bond given by the defendant, as marshal of that district, for the faithful execution of the duties of his office by himself and his deputies. The defendant pleaded performance generally. The United States, in their replication, assigned a special breach of the condition of the bond, in not paying over to the United States the sum of \$328. \*The judgment below was against the United States, who sued out [ \*317 the present writ of error. But—

THIS COURT, without argument, decided that it had no jurisdiction, the matter in dispute being of less value than \$2000.

MAYOR and COMMONALTY OF ALEXANDRIA *v.* PATTEN and others.*Application of payments.*

If a debtor, at the time of making a partial payment, does not direct to which account the payment shall be applied, the creditor may, at any time, apply it to which account he pleases.<sup>1</sup>

ERROR to the Circuit Court of the district of Columbia, sitting at Alexandria, in an action of debt brought by the Mayor and Commonalty of

<sup>1</sup> This point is settled by numerous decisions. *Cremer v. Higginson*, 1 Mason 323; *United States v. Wardwell*, 5 Id. 82; *Gordon v. Hobart*, 2 Story 243; *United States v. Linn*, 2 McLean 501; *United States v. Bradbury*, 2 Ware 146; *Postmaster-General v. Norvell*, Gilp. 106; *Mann v. Marsh*, 2 Caines 99; *Allen v. Culver*, 3 Den. 284; *Sheppard v. Steele*, 43 N. Y. 52. But, it seems, that the creditor ought

at once to exercise the option given to him by law. *Logan v. Mason*, 6 W. & S. 9; *Watt v. Hoch*, 25 Penn. St. 411. Otherwise, the law will make the application in the way most beneficial to the creditor. *Pierce v. Sweet*, 33 Id. 151; *Ege v. Watts*, 55 Id. 321; *Foster v. McGraw*, 64 Id. 464; *Woods v. Sherman*, 71 Id. 100; *Field v. Holland*, 6 Cr. 8.