DIXON v. RAMSAY.

Case No. 3,932.

{1 Cranch, C. C. 472.}[1]

Circuit Court, District of Columbia. Nov. Term, 1807.

>ACTION AGAINST EXECUTORS—PLEADING.

Counts charging the defendants as executors, upon the promise of their testator, and upon their own promise as executors, in consideration of assets, may be joined in the same declaration, and the judgment upon each count will be de bonis testatoris.

The declaration contained six counts, but made no profert of the plaintiff's letters of administration. The 1st count was on the promise of the testator. 2d. Same, quantum valebant 3d. Money had and received by the testator. 4th. A promise by the defendants as executors in consideration that testator was indebted and in consideration of assets. 5th. Insimul computasset, and a similar promise by the defendants as executors in consideration of assets. 6th. That two of the executors accounted as executors with plaintiff and a like promise. General demurrer to the declaration.

Mr. Taylor, for defendants, contended that the counts were such as cannot be joined, and that such misjoinder may be taken advantage of upon general demurrer, and so may the want of profert. The letters of administration are part of the plaintiff's title to recover, and without profert the defendant is not entitled to oyer of them. Before the statute, the want of profert was fatal on general demurrer, for it was matter of substance. Com. Dig. "Pleader," O 17. There is a difference between the Virginian and the English statute of jeofails. The Virginia act does not specify what shall not be fatal on general demurrer. It must however, be the want of something necessary to the justice of the case. An account stated by executors, as executors, is a personal undertaking; where the default of the executor is the cause of action, the judgment is de bonis propriis. Com. Dig. "Pleader," 2 D 15. If the judgments upon the respective counts are to be against the defendants in different rights, the counts are incompatible, and there can be no correct judgment rendered upon them.

E. J. Lee, for plaintiff, cited the cases of Courtney v. Hunter {Case No. 3,285}; Henderson v. Parson's Ex'rs, at November term, 1805 (not reported); and Faxon v. Dyson {Case No. 4,705}.

THE COURT (DUCKETT, Circuit Judge, absent), without hearing the other side, decided, upon the authority of those cases, that the judgment upon the demurrer ought to be ofor the plaintiff.

[1] {Reported by Hon. William Cranch. Chief Judge.}