REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

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1804. *October.*

Blanton v. Brackett & al.

fendants are expressly charged with a fraudulent combination to defeat the complainant's right to a discount for these damages, yet the circumstance is positively denied by all the parties, and there is not that I can discover, a tittle of evidence to support the charge, although there is abundant to rebut it. As against *Redd* and *Miller* the complainant is not, in my opinion, entitled even to the shadow of relief. Nor has he established his case so far even against *Brackett*, as to induce me to think differently from the chancellor. Taking the whole evidence together, I concur with him in opinion, that the allegations of the bill being denied by the answers, are not supported by the testimony; and therefore that the bill was rightly dismissed.

ROANE, Judge. The agreement relative to *Anglea's* judgment is denied by the answer; which is supported by other testimony, and not disproved by *Blanton's* witnesses. The contract is novel and improbable; and, upon the whole, I am for affirming the decree.

FLEMING and CARRINGTON, Judges, concurred; and the decree was accordingly affirmed.

1804. *November.*

BEDFORD *v.* HICKMAN.

If the contract be for 900 acres, *more or less*, and the tract be found to contain only 765 acres, the purchaser will be relieved, if it appear, that the seller knew of the deficiency at the time of the sale, but did not disclose it.

Hickman brought a bill in chancery, in the county court, to be relieved against a judgment obtained against him by *Bedford;* and stated, that he had purchased a tract of land in Powhatan county, from *Bedford*, for 900 acres, *more or less*, and gave his bond for £ 650, part of the purchase mo-

ney, he having previously paid him £650. That, since the purchase, he has discovered that a fraud was practised on him; inasmuch as it appears by the original deeds, that the tract only contained 709 acres, and, by a survey, that it contains 765 acres. That the plaintiff, at the time of the sale, was ignorant of the deficiency, although the defendant knew it; as he was in possession of the deeds, and was reminded of it by *Taylor*, who told him he ought to communicate it to the plaintiff; but the defendant said *Taylor* was not concerned in the business, and wished the deeds suppressed. That the plaintiff has paid as much as he ought in conscience to pay, as per statement annexed; and therefore prays an injunction.

The answer admits the purchase of the land for £1300; of which the plaintiff has paid all except what now appears due on the bond. Denies fraud, as the defendant had no other knowledge of the quantity, than by the tax roll. States that the defendant sold for *more or less*, and would have preferred a survey, but was in a hurry to get away in order to complete a contract he was treating about, for another tract in Charlotte. Denies that the defendant ever requested *Taylor* to suppress the deeds. States that the plaintiff saw one of the deeds, but the other could not then be found, although it afterwards was, as the defendant was informed on his return to Powhatan. That he then proposed to the plaintiff to make his election to take the land for 900 acres, or have a survey; and that the plaintiff elected to take it for 900 acres. Admits that some considerable time before the sale, he had seen two old deeds in *Taylor's* house, but had no recollection of their contents. That he himself purchased the land of *James Bedford* for 900 acres.

The exhibits are:

1. Copies of the bond dated June 1794; and of *James Bedford's* deed to the defendant for the land, which it states to be, by estimation, 900 acres, *more or less*, and is dated March 1792.

1804. *November.*

Bedford v. Hickman.

2. Copies of a deed from *John Woodson* to *Stephen Bedford*, for 350 acres, dated February 1735; and of a deed from *Michael Woolf* to *Stephen Bedford*, for 350 acres, dated April 1736.

The deposition of a witness states, that when the parties were bargaining for the lands at his house, the defendant said he held it for 900 acres, and his lowest price was £ 1300. That the plaintiff expressed some doubts as to the quantity; and the defendant said he thought, if surveyed, it would hold out more, but he wished to be certain as to the sum, as he was in treaty for another place; and therefore would sell it for 900 acres, *more or less*, if he even lost a few pounds. That on the next morning, the plaintiff declining to purchase, unless he could see the title papers, the defendant took out *James Bedford's* deed, and some sheriff's receipts, which stated the land to be 900 acres; and said he knew of no other papers that would throw any light on the quantity. That his father had held it for 900 acres; and that he paid taxes for 600 acres, exclusive of his mother's thirds. That the plaintiff still declining to buy without a survey, the defendant offered a survey; at which the plaintiff paused. That the plaintiff afterwards advised with the deponent whether he should take it for 900 acres without a survey. That they then went to *Taylor's;* that the plaintiff asked *Taylor* if he knew of any papers which could throw light on the quantity; that *Taylor* searched, but said he could find none; observing that it was always held for 900 acres, but he believed there were nearer 1000 acres. That he has since heard *Taylor* say, the defendant requested him to conceal the title papers, on his proposing to him, previous to the sale, to shew them to the plaintiff; and that that was the reason he did not produce them. That he mentioned this to the defendant, who denied it; saying that *Taylor had given him the deeds sometime previous to the contract, but he had returned them to him again, and had them not in possession more than two hours.* That the defendant held out an idea to the plaintiff, during the whole treaty for the lands, that

they were always held for 900 acres, by his forefathers; and that the two deeds for 350 and 359 acres contained the whole tract.

The deposition of another witness states, that he heard *Taylor* say, that, having had the deeds in possession, he thought the land would not hold out 900 acres; that he put the deeds in the defendant's hands previous to the sale, who returned them, and desired him to take care of them; that he asked him how he could think of selling it for 900 acres? and observed that it was his duty to tell the plaintiff; that the defendant was angered thereat, saying it was nothing to *Taylor*, and why would he meddle in it. That when the defendant, with the plaintiff and *Clarke*, went to him about the papers, they had been gone but a few minutes before he recollected where they were.

A third witness says, that the defendant never desired him to suppress the deeds; that he does not believe the defendant knew the quantity; that the defendant had the deeds in possession not more than five minutes: that he gave the plaintiff his election to take it by survey, or for 900 acres, *more or less.*

A fourth witness says, that when he acted as sheriff, he received four years quit-rents of the land as 709 or 710 acres: and two others, that they received the taxes on it for the years '80, '81, '84, '85, '87, '88, as 900 acres.

The county court granted a perpetual injunction; and the defendant appealed to the high court of chancery, where the decree of the county court was affirmed, and from the decree of affirmance, the defendant appealed to the court of appeals.

Randolph, for the appellant. There is no fraud established against *Bedford.* He thought the land was held for 900 acres; and sold it for *more or less.* He took no steps to impose upon *Hickman*, who refused a survey, and bargained upon his own and *Clarke's* judgment.

1804. *November.*

Bedford v. Hickman.

Call, contra. The appellant did not disclose all the circumstances to *Hickman*, at the time of the contract. He only shewed him *James Bedford's* deed to himself, and some receipts for taxes: But he did not inform him of the two old deeds which made it only 709 acres. He ought, however, to have communicated that circumstance. For it was known to him, as the answer states he had seen them several times at *Taylor's*, and he confessed to *Clarke*, that he had had them in possession for two hours. Besides, as *Taylor's* wife had dower in the lands, and the whole feesimple was sold, it is evident that the contract, though nominally with *Bedford* only, was, in truth, for the joint benefit of both, according to their several interests: and it is clearly proved, that *Taylor* was in possession of the deeds, and pretended he could not find them when demanded before the contract was signed. To make a bargain of hazard binding, it is necessary that all the circumstances should be disclosed, so that the vendee may have a full opportunity of exercising his judgment; otherwise, the parties do not contract on equal terms. *Jolliffe* v. *Hite*, 1 Call, 301. Therefore, every circumstance known to *Bedford* and *Taylor*, or either of them, ought to have been communicated to *Hickman:* and the failure to do so, entitled *Hickman* to the relief he sought. Consequently, the decree of the court of chancery is right, and ought to be affirmed.

Cur. adv. vult.

LYONS, President, at a subsequent day, delivered the resolution of the court, that the decree of the court of chancery should be affirmed.