REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

RICHMOND:
Printed by THOMAS NICOLSON,
M,DCC,XCVIII.

not to be regarded, since the description of the devise is sufficiently plain when he is called *the lessor of the plaintiff.*

The last point is attended with more difficulty. It respects the boundaries of the land upon the special statements in the verdict. There is some inconsistency in the finding, which might be important, if the court doubted about the true boundaries of the land intended to be devised. It is evident that the testator had surveyed this land, and marked down by specified boundaries, the part intended for each of the devisees, and that he must have had the plat before him when he made his will. The boundaries of the other devisees are right; when he comes to describe the parcel in question, he begins right and continues so, with little variation in course or distance, till he gets to s; then by mistake in transcribing the courses, from the plat, into the will, he appears to have overlooked one line viz. s, t, which creates the difficulty. If it be omittted altogether, none of the subsequent lines are right; if it be supplied from the plat, then they are all right and the disposion of the whole tract is compleat. The court has no hesitation in saying, that the testator's intention was to pursue the lines which comprehends the 30 acres not included in the judgment of the District Court, and therefore, that their judgment though right as to the plaintiff's title, is erroneous in not comprehending the land contained within the lines of the survey described by the letters s, t, E, and to s again.

But as that error was in favor of the appellant, the costs of this court ought to be paid by him to the appellee as the party prevailing, although the judgment be reversed.

The judgment must therefore be reversed and entered for the appellee, for the land contained within the survey taken in this cause and described by the small letters m, n, o, p, q, r, s, t, and the large letters E, D, C, B, and to little m, together with his costs in this court. Judgment reversed.

HOOMES Executor of ELLIOTT,

against

SMOCK.

ELLIOTT having brought a suit at law against Stanard upon a bond, Smock, the appellee, became Stanard's appearance

ance bail. Stanard having failed to give special bail, judgment was rendered against Smock in the County Court. On the chancery side of that court, Smock filed a bill, stating, that Beverley being possessed of Stanard's bond, given for a sum of money lost at unlawful gaming, assigned it to Elliott, who afterwards understanding the nature of the consideration for which it had been given, delivered up that bond to Stanard and obtained from him another in lieu thereof, upon which the judgment was obtained. The bill seeks a discovery of those circumstances and prays for an injuction. Elliott by his answer insists that the assignment to him was made for a valuable consideration. That he is ignorant of the consideration for which Stanard gave his bond to Beverley, but that the whole transaction relative to his obtaining the bond, was on his part fair and *bona fide*, and as far as he knows and believes in strict conformity with the laws of the land. He further states that Stanard acknowledged that the debt was justly due, and promised that he would pay it. That he applied to Stanard for payment, which not being made, he proposed to him to take in the bond and an order drawn by Beverley, and to give a new obligation for the whole, to which Stanard readily consented. Beverley, who was also made a defendant, states in his answer, that a bond was given by Stanard to him for money won at gaming, amounting to £ 80 — that he owed 35 barrels of corn to Elliott, which not being able to pay when it was demanded, he assigned the above bond to him, and also drew an order for £ 10: 10, (making together the exact amount of the bond for which this judgment was recovered) in discharge of the corn debt, which Elliott accepted; that Elliott knew those sums were due on account of money won at gaming. Only one witness was examined, who proves the bond for £ 80 to have been given for a gaming debt, and that *after the assignment* but before the execution of the new bond he informed Elliott of this fact.

The County Court perpetuated the injunction, from which Elliott appealed to the High Court of Chancery, and pending the appeal died. The suit being revived by his administrator the decree was affirmed, from which an appeal was prayed to this court.

WICKHAM for the appellant. I contend 1st, that the decree in this cause was not warranted by the proofs exhibited, and 2dly, That a court of equity ought not to relieve in such a case as this, but leave the parties as the law had placed them.

1st,

1ſt, It is a rule, that the anſwer of one defendant is not evidence againſt another; and therefore, Beverley's anſwer muſt be put out of the caſe; if ſo, there is no proof at all of notice to Elliott *prior to the aſſignment*, and therefore he is not liable to the original equity attached to the bond. The caſe of Buckner and others *vs* Smith &c. (ante 296) is a ſtrong authority for the appellant.

2dly, But if notice were proved, the appellee is not I conceive entitled to the relief prayed for. Smock can be in no better ſituation than Stanard would have been, had he been plaintiff in equity. The matter relied upon in equity, to defeat the legal advantage obtained by the appellant, might at law have furniſhed a compleat defence; but after a judgment obtained there, a Court of Equity will not relieve againſt an innocent aſſignee, without notice of the illegal conſideration, ſo as to deprive him of the advantage which that judgment has given him. The equity of an innocent aſſignee who has fairly paid his money for this bond, is at leaſt equal with that of the obligor, and therefore the law muſt prevail.

LEE for the appellee. I admit that in general, the anſwer of one defendant cannot be read for, or againſt another; but there are exceptions to the rule, and this caſe furniſhes an example. For Beverly having aſſigned this debt to Elliott, there is a privity between them, and the latter, deriving his right under the former, is bound by his acts. Beverley's anſwer therefore, which acknowledges that the bond was given upon an illegal conſideration, ought, as againſt Elliott, to be taken as evidence of that fact.

2dly, Whether Elliott had notice or not before the aſſignment of the bond, that it was given upon a gaming conſideration, is immaterial, becauſe the bond is by the law abſolutely void, and can never be made valid by aſſignment. The ſtatute conſiders it as being ſo tainted, that no ſhift or change whatever can purge it of its original ſin. It is the duty of all courts to arreſt the money before it is paid, though the parties may confederate to elude the law, and therefore a court of equity is bound to interpoſe, though a judgment has been obtained. The caſe of Buckner and others, *vs* Smith &c. is entirely unlike to the preſent, for the ground upon which that deciſion was made, was the fraud practiſed by Beverley upon Dixon, by inducing him to purchaſe the bond.

The bill having expreſſly charged notice, and Elliott having declined anſwering it, the facts proved in the caſe and ſtated in his

his anſwer, furniſh ſtrong preſumption that the charge is true. It is a rule, that where a man defends himſelf on the ground of want of notice, he muſt in direct terms admit or deny it, if it be charged. A perſon claiming a gaming debt in a court of juſtice, can never be conſidered as having equal equity with the oppoſite party; becauſe ſuch a claim is in itſelf iniquitous.

LYONS J. delivered the opinion of the court. It has been rightly contended by the counſel for the appellee, that all bonds given for a gaming conſideration are void as between the parties; and it is equaly true that the aſſignee cannot ſtand in a better ſituation than the obligee, unleſs there be ſome particular circumſtances in his favor independent of the mere aſſignment. But if an innocent man ſhall be induced by the obligor to become a purchaſer of ſuch a bond, it is a deceit upon him, and he ought not to be ſubject to the ſame equity to which the obligor was entitled againſt the obligee. In this caſe, Elliot was induced by the debtor to take the bond, who renewed it without diſcloſing his objection; afterwards ſuffered a judgment to paſs at law, and then reſorts to a Court of Equity for relief. The province of that court is to relieve againſt frand, and not to ſanction it, and in general it will leave the parties to the law even if their equity were equal; much leſs will that court interfere, where the equity is altogether on the ſide of him who has obtained a legal advantage. As to the facts in the caſe, they are with the plaintiff at law; his anſwer is contradicted by one witneſs only, without circumſtances to ſtrengthen the teſtimony, for the anſwer of the other defendant as it could not benefit his co-defendant, cannot injure him.

The COURT entered a decree to the following effect, viz: William Elliott by his anſwer having denied notice of the illegal conſideration, upon which, it is ſuggeſted by the bill, the bond from Beverley Stanard was given, and there appearing but one witneſs to contradict the anſwer in this reſpect, without ſufficient circumſtances to corroborate his teſtimony, Elliot ought to be conſidered as an innocent aſſignee of the ſaid bond, and the ſubſequent bond taken by him of Stanard upon which the judgment was obtained was not tainted or effected by the illegal conſideration of the firſt bond. That the decree which injoins the plaintiff below from proceeding to execute his judgment is erroneous. The decree of the High Court of Chancery and County Court, muſt be reverſed with coſts, the injunction obtained is to be diſſolved, and the bill diſmiſſed.

END OF THE FIRST VOLUME.