REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

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1804. *May.*

Read v. Read.

belonged to them at the date of the treaty; and which might possibly have been endangered, on both sides, by the renunciation of allegiance by one of the parties, and the relinquishment of it by the other. Not the treaty of London; because that was only intended to secure to actual owners the lands belonging to them at its date, without any retrospective operation as to those which had been completely lost before.

That the result was, that the appellants, who were neither born within the United States, nor were ever admitted to citizenship here, could not recover; for they had not capacity to take by descent in October 1787, when *Robert Read* died; and they were not embraced within the treaty of London in 1794, as the land had been antecedently lost.

That, therefore, the judgment of the district court was right, and ought to be affirmed.

1804. *October.*

BLANTON *v.* BRACKETT *& al.*

If the agreement stated in the bill be denied by the answer, the latter must be disproved, or the bill will be dismissed.

Blanton filed a bill in the high court of chancery stating, That he had given a bond to the defendant *Brackett;* upon which there was, in March 1797, a balance due of £ 59. 19. 2. That there was an action of slander depending, at that time, in the district court between *Anglea* and the defendant *Brackett;* who expected that some damages would be recovered against him in it. That *Anglea,* being indebted to the plaintiff, agreed that if the plaintiff would wait until that cause was decided, he should have the benefit of the judgment which should be obtained against *Brackett;* who agreed that it should be discounted against the plaintiff's bond aforesaid. That the plaintiff accordingly

waited with *Anglea* until the suit was ended. That *Anglea* recovered £100 damages against *Brackett*, and assigned the judgment to the plaintiff; but that *Brackett* had, in the mean time, become insolvent; and had made a secret transfer of the plaintiff's bond to *Redd*, without any consideration, although the latter had notice of the before mentioned agreement between the plaintiff, *Anglea*, and *Brackett*, by an advertisement in the newspapers. That *Redd*, finding the transfer would be of no use, procured a secret assignment of the bond, likewise without any consideration, to *Miller;* who also had notice of the agreement aforesaid. That *Miller*, acting in concert with the other parties, has brought suit and obtained judgment in his own name upon the bond; but, in fact, for the benefit of *Brackett*, in order that the latter might avoid payment of *Anglea's* judgment. The bill therefore prays for an injunction to *Miller's* judgment.

The answer of *Brackett* denies the agreement as to *Anglea's* judgment; and states that, prior to the judgment, he had, for a valuable consideration, transferred the plaintiff's bond to *Redd;* at whose request, he afterwards assigned it to *Miller*, who was a creditor of *Redd;* and that the defendant has no interest in the bond.

The answer of *Brackett* admits the advertisement in the newspapers, but denies notice of the agreement relative to *Anglea's* judgment; and that the defendant does not believe that it existed. That the defendant refused to take the bond from *Brackett*, who was indebted to the defendant, until he could enquire of the plaintiff how much was due upon it, and when payment would be made. That the plaintiff acknowledged that the balance aforesaid was due upon the bond, and affirmed that he would pay it shortly. In consequence of which he accepted the transfer, and had the bond assigned to *Miller*, to whom he was then indebted; but has since paid him, and therefore has become entitled to the benefit of the judgment on the bond.

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The answer of *Miller* disclaims any knowledge of the transactions between the other parties; declares that *Redd* was indebted to him at the time of the assignment; that the plaintiff often promised payment; but failed to make it, and therefore he brought suit upon the bond. That *Redd* has since paid him; and therefore is now entitled to the judgment.

Depositions of witnesses were taken on both sides; and the court of chancery dismissed the bill upon a hearing. The plaintiff appealed to the court of appeals.

Randolph, for the appellant. The bill charges an agreement to discount the judgment; and, although the answer denies it, the denial is disproved by two witnesses. *Redd* had notice of the agreement before the assignment; and *Blanton*, having never renounced the right to discount, is still entitled to claim it.

Hay, contra. There was no contract for the discount. *Brackett* denies it; and his answer, so far from being disproved, is supported by three witnesses. Contracts for discounts are not good under the act of assembly; particularly against an assignee; who is affected by nothing, but an equity existing at the time of making the bond; or an actual payment before the assignment.

Wickham, on the same side. The answers deny the plaintiff's equity; and they are not disproved: But before the complainant can claim the discount, he must prove the agreement for it. This is not done; and it is improbable that such a contract existed; for nobody would think of stipulating to wait for the chance of damages to be recovered by an action of slander, in discharge of an actual debt, already payable. The pretended discount was therefore an after thought; and was never contracted for.

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Randolph, in reply. The agreement is not only proved, but is valid in equity; and there ought to have been an issue to ascertain it. 1 *Ch. Cas.* 50. The defendant had cause to suspect the plaintiff's right, and ought to have enquired into it.

Cur. adv. vult.

TUCKER, Judge. The charges in the bill, so far as they are material to entitle the complainant to relief against the defendants, are flatly denied by the answers. *Brackett* denies any agreement between the plaintiff and himself as to the eventual damages which *Anglea* might recover against him; and although there is the testimony of three witnesses, which may induce some belief that an agreement of that kind might have been contemplated, yet as there was then no existing debt due from *Brackett* to *Anglea* at any time previous to the assignment to *Miller*, nor any proof that *Anglea* was a party to, or had assented to any such agreement, admitting that there was such an one between *Brackett* and *Blanton*, it might have been retracted; for *Anglea* had no certain demand against *Brackett*, which was capable of being set off against an existing debt, until after the judgment, which was two or three months subsequent to the assignment to *Miller* for the use of *Redd*. It was incapable of assignment both in law and equity: and, if such an agreement was made, as is pretended, between *Anglea* and *Blanton*, without the previous assent of *Brackett*, I should think it maintenance. And, even, if, after the judgment, *Anglea* had made an assignment of it before any replevin or forthcoming bond was given (which bonds our law makes assignable,) such an assignment, I apprehend, would not have been legal, but merely an equitable discount against the bond. On this however I give no opinion, being clearly of opinion that, until *Anglea* obtained judgment, no agreement, in respect to the damages which he might possibly recover, could affect the assignee of *Brackett*, unless there were some fraud between those parties. And although the de-

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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-