REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
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M,DCC,XCIX.

To The PUBLIC.

THE caſe of *Maze* and *Hamilton*, with one other, I had intended to publiſh in an appendix to this volume. But the manuſcript having been unfortunately depoſited in a houſe which was lately conſumed by fire. I have great reaſon to apprehend that it was either burnt, or by ſome other means deſtroyed.

PAGE.	LINE.	
11	41	*For* hinder *read* hinders.
54	26	*Inſert* by *before the words* the owner.
66	4	*Strike out the comma after* mother *and put a period.*
—	12	*Strike out the ſemicolon after* it *and put a comma.*
68	5	*For* empowed *read* empowered.
69	36	*For* 1 *read* 3.
70	17	*For* appellant *read* appellee.
71	2 & 3	*For* appellant *read* appellee.
87	8	*After* teſtimony *inſert* of.
98	17	*After* regarded *inſert* it.
99	31	*After* rule, *ſtrike out the mark of interrogation and put a period.*
106	12	*For* lands *read* land.
122	44	*For* forfeiled *read* forfeited.
139	7 & 14	*For* ſecurity *read* ſurety.
140	4	*For* principal *read* plinciple.
163	32	*Before* ſuperior *read* the.
182	21	*For* laws *read* law.
206	4	*After* it *inſert* to.
—	21	*For* principal *read* principle.
209	14	*For* determination *read* termination.
212	11	*After* but *inſert* where.
224	37	*After* idea *put a ſemicolon.*
225	40	*After* that *inſert* of.
227	3	*Strike out* not.
—	34	*After* endorſer, *ſtrike out a period and put a comma, after* 443 *ſtrike out the comma and put a period.*
242	14	*Strike out the ſemicolon after* fault.
243	24	*After* not *inſert* an.
244	41	*Strike out the ſemicolon after* declarations.
249	2	*For* is *read* as.
255	10	*For* prices *read* price.
—	12	*After* Johnſon, *ſtrike out the ſemicolon and put a comma.*
261	19	*Strike out the comma after the word* Stockdell, *and put a period.*
263	37	*For* law *read* all.
266	25	*For* points *read* point.
270	27	*Strike out the comma & put a period after the word* plea.
278	9	*For* 2 *read* 1.
288	40	*For* ſurvices *read* ſervices.
289	1	*For* ſtronger *read* ſtrong.
—	14	*For* centinental *read* continental.

39 *For*

Page	Line	
289	39	*For* colluſion *read* colliſion.
292	22	*For* deciſſion *read* deciſion.
——	30	*Strike out* of *after the word General.*
——	31	*For* Hooker *read* Hocker.
293	19	*After the word* intended *inſert*)
——	21	*For* legal *read* regal.
295	23	*After* Carolina, *put a comma inſtead of a ſemicolon, and ſtrike out the ſemicolon after the word* loci.
——	38	*For* deſribed *read* deſcribed.
296	8	*Strike out the comma after* bills.
——	35	*For* there *read* theſe.
300	11	*For* legal *read* regal.
301	26	*After* damages, *put a period.*
302	8	*For* is due *read* iſſue.
——	22	*After* verdict *inſert* ought.

NORTON,

against

ROSE.

THIS was a bill exhibited in the High Court of Chancery by the appellant, to be relieved against a judgment at law recovered against him by the appellee, upon an assigned agreement for the payment of money.

The equity stated was, that the plaintiff had bound himself to pay to *George Anderson*, £ 450, being the balance supposed due upon a settlement of accounts; that he had insisted upon certain credits for money paid by *Charles Harris*, to *George Anderson*, to a part of which, he, the plaintiff, was entitled. But that the plaintiff, relying upon *Anderson's* assurances, that no payments had been made to him by *Harris*, and that he was insolvent, executed the following agreement viz: "We *John* "*H. Norton* and *George Anderson*, have this day entered into a "final settlement of all our accounts of every denomination "whether in bonds, open accounts, bills, money, or traffic of all "and every kind, from the earliest period to this day, and we "agree, that there shall be paid to the said *George Anderson* by "the said *Norton*, (as soon as he can possibly effect the same) "£ 450, which is to be considered as full payment for every "debt that may have been due, and is due at the present date "from the said *Norton* to the said *Anderson*, as also for all and "every transaction the said *Anderson* has had with any person "in which the said *Norton* held an interest in any manner "whatsoever. The above payment to be made on, or before the "1st of January next." This agreement was signed and sealed by *Norton*, who at the same time received a counterpart thereof, sealed by *Anderson*.

The bill further states, that after the execution of the above deed, the plaintiff drew an order upon *Wilson* and *John Nicholas*, in favor of *Anderson*, for £ 450, in discharge of the sum mentioned in the above deed, but that it was neither accepted, paid, nor returned to the appellant.

The bill prayed an injunction against a judgment obtained upon the aforesaid agreement by the defendant *Rose*, as assignee thereof, to be allowed all discounts which he could make appear

againſt *Anderſon*, and for general relief. An injunction till further order was awarded.

The defendant *Roſe* by his anſwer denied any notice of the plaintiff's equity, at the time of the aſſignment made to him, and inſiſted that he was a *bona fide* purchaſer of the debt in queſtion for valuable conſideration paid to *Anderſon*.

The depoſitions in the cauſe eſtabliſhed the receipt of a ſum of money by *Anderſon* from *Harris*; but no proof of the plaintiff's title to any part of it, or reſpecting the order drawn upon *Nicholas*, was exhibited.

The cauſe being ſet down as to the defendant *Roſe*, (*Anderſon* not having anſwered,) the court delivered the following opinion, "that the order ſtated in the bill to have been drawn "by the plaintiff upon *Wilſon* and *John Nicholas*, payable to the "defendant *George Anderſon*, could not have been legally diſ-"counted againſt the debt claimed by the other defendants in "virtue of the deed acknowledged by the bill to have been ex-"ecuted by the plaintiff; and that the plaintiff cannot ſet off "againſt the ſaid debt any equitable demand which he may have "a right to claim from the ſaid defendant *George Anderſon*." The bill was diſmiſſed as to the defendant *Roſe*, and the cauſe continued as to *Anderſon*.

From this decree, *Norton* appealed.

WICKHAM for the appellant. The queſtion is, whether a bond, in the hands of an aſſignee without notice, is diſcharged of an original equity exiſting againſt it? I ſhall contend, that it is not: 1ſt, Upon general principles of law, and 2dly, upon the juſt conſtruction of the act of Aſſembly which permits bonds to be aſſigned.

The aſſignment of a *choſe* in action, cannot ſo far change the ſubject of negociation, as to make it the evidence of a debt in the hands of an aſſignee, when in truth, no debt exiſts. If it were originally void, the aſſignment cannot give it validity.

The caſe of *Turton* and *Benſon*, 1 *P. Will.* 497, is concluſive upon this point to prove, that the equity which was originally attached to the bond, follows it into the hands of an aſſignee, with, or without notice.

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Picket and *Morris*, was firſt argued, and one of the points diſcuſſed in that cauſe involving the only queſtion in *Norton* and *Roſe*, the latter was brought on before a deciſion was given in the former.

The ground upon which this court relieves is, that the plaintiff, ought not in equity to recover, because no debt was due. The assignment can only transfer the right of the obligee, and will not create a right.

Thus the question stands upon general principles; but 2dly, upon the just construction of the act of 1748, Ch. 27, § 7, there is less room for maintaining a contrary opinion. The law after authorising the assignment of bonds, and permitting the assignee to sue in his own name, provides, "that in any suit upon such bond, bill, or note, so assigned, the plaintiff shall allow all discounts that the defendant can prove, either against the plaintiff himself, or against the first obligee, before notice of such assignment was given to the defendant."

The act makes no distinction, between legal and equitable discounts. The word *discount*, is much broader than *payment*, and was intended to let in the obligor to any defence against the assignee, which he might have set up against the obligee. Would it not be strange, that the obligor should be protected against the assignee, as to *partial payments* made to the obligee, and yet, that he should be left exposed to his entire demand, where in equity no part of the bond was due? As to discounts, the assignee buys at his peril, and consequently, it becomes his duty to be satisfied upon that subject, before he concludes the negociation. At the same time, and with equal convenience he may, and ought to know from the obligor, if he hath any, and what objections to the payment of the bond. This observation is intended to anticipate the argument of inconvenience, which may probably be insisted upon, and to shew, that bonds were not considered by the legislature in the same light with those negociable papers, which on account of their use in mercantile transactions, are rendered as current as possible, and are on that account, subject to different rules. There is a wide distinction between bills of exchange and bonds; the former are drawn for the transmission of money from one country to another; they pass through many hands, and if every person who became an assignee, were under a necessity of applying to the drawer and indorsers to know whether they had objections to paying the bill, it would stop their circulation altogether. It is on this account, that an equity originally attached to a bill, does not follow it into the hands of an assignee without notice. On the other hand, bonds seldom circulate out of the neighborhood in which they were created; they scarcely ever travel into foreign countries, and there is therefore little or no inconvenience,

ence, in gaining all neceſſary information reſpecting them, from the perſon who is to pay. Whoever therefore takes a bond without enquiry, takes it upon the faith of the aſſignor, and if he be deceived, he muſt ſuffer in the mean time for his miſplaced confidence, and ſeek for reparation from the perſon who had deceived him.

WASHINGTON for the appellee. I ſhall make two points; 1ſt, That the appellant has not eſtabliſhed an equity of any ſort, againſt *Anderſon*. 2dly, if he had, that that equity would not follow the bond into the hands of an aſſignee, for valuable conſideration, and without notice.

The firſt point depends upon the evidence which is contained in the record. The bill ſtates, that the appellant was entitled to a proportion of the ſales of certain goods, which were put into the hands of *Charles Harris*, by *Anderſon*. The proof is complete as to the delivery of the goods, and the amount for which they were ſold; but there is no evidence, that the appellant had any intereſt in them, and conſequently, this important fact reſts altogether upon the allegations in the bill.

As to the order upon *Nicholas*, it is expoſed to the ſame obſervation; there is no evidence reſpecting it, and if there were, the appellant by his own ſhewing could ſet up no equity on that account: for he admits, that it was neither accepted, nor paid by the drawee, and that he had no funds in his hands belonging to the drawer. So that notice of the refuſal, or the return of the order was immaterial to the appellant.

The ſecond point is new in this court, and of great importance to this country, in whatever manner it may be decided. It is admitted, that in the caſe of bills of exchange, the indorſee is not chargeable with any original equity attached to the bill. It is equally indiſputable, that this principle applies to all negociable papers in *England*; and the law of this ſtate, which makes bonds aſſignable, brings them within the reaſon and influence of the ſame principle. The application of this rule to bonds, is to be defended, 1ſt, upon the policy of the thing, and 2dly, upon long eſtabliſhed maxims which prevail in this court.

As to the firſt, it is not difficult to foreſee, that if the aſſignee of a bond muſt take it ſubject to any concealed equity which may be attached to it, the negociability of ſuch papers, would be at an end. The deſign of the legiſlature, in making bonds aſſignable, was to create a kind of circulating medium, in order to ſupply the want of real money, and to accommodate the

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planters of this country. But if it be neceſſary for the perſon who is about to purchaſe a bond, to go from one part of the ſtate to the other, in ſearch of the obligor, in order to obtain information concerning its validity, he would rather relinquiſh it altogether.

As to the principle itſelf, it is interwoven with the beſt eſtabliſhed maxims which prevail in courts of equity. The aſſignee of a negociable paper, acquires a *legal* right to the money, of which the paper is the evidence; of courſe, *he has the law in his favor*. The obligor, may oppoſe the demand, by *the equity* which was originally attached to it. But the aſſignee being a purchaſer for valuable conſideration, and without notice, has *at leaſt* as much equity to receive, as the obligor or drawer has to withhold payment. The equity then being equal, the law muſt prevail, nay, ſo far does this principle go, that in conteſts of a *merely equitable nature*, if either has obtained an advantage, tho' not a legal one, the court will not deprive him of it, but will leave him to make ſuch uſe of it as he can. *Brow. Ch. Rep.* 301. This court, when applied to for relief againſt a judgment obtained by the aſſignee at law, muſt be aſſured that there is *ſuperior equity* on the ſide of the perſon aſking its aid. But if the parties ſtand equal in point of equity, it will not interfere between them. It is admitted, that this principle applies to bills of exchange. When notes of hand were made aſſignable, *they* became of courſe ſubject to the ſame rule, not on account of commercial conſiderations, but becauſe they were thereby brought within a rule of equity, which in its operation is univerſal. *Cunning.* Bills 119. But where the aſſignment transfers *no legal right*, there, if the equity be equal, he who has the *prior equity* muſt prevail. Upon this latter rule, the caſes of *Turton* and *Benſon*, 1 *P. Will.* 496, 10 *Mod.* 450, and *Hill* and *Caillovel*, 1 *Vez.* 123, were decided. The aſſignment of a bond, in England, can only paſs an equity; the meaning of it is, that the aſſignee is to have all equitable advantages from it, which the aſſignor poſſeſſed. But if he had no equitable right to the money, he could transfer none.

Obſerve how the principle runs through all caſes coming within it, tho' totally unconnected with commerce.

If a truſtee ſell land to a third perſon, for valuable conſideration, and without notice of the truſt, the purchaſer is diſcharged from the claim of the *ceſtui que truſt*, becauſe he has the law in his favor, and has alſo equal equity. As to the inconvenience of this doctrine to the obligor, it is eaſily avoided; he

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may give notice of his equity in the public news-papers, or he may institute a suit against the obligee, which would be notice to the whole world, and would thereby render any subsequent assignee, a *lite pendente* purchaser.

WICKHAM. It is admitted, that *in equity*, bonds were assignable before the act of 1748; and that the equity originally attached to them, followed into the hands of an assignee. What then was the object of this law? Not to render bonds subjects of commercial negociations, nor to make them an article of traffic. No merchant would purchase a bond, unless for usurious purposes, since they could never answer the end of transmitting money to a foreign country, as bills of exchange do. The obvious intention of making bonds assignable was, to prevent circuity of action, and to do away the necessity of accompanying them with powers of attorney, as formerly. It enabled men more easily to settle with each other, the debts which they respectively owed. A, being indebted to B, and C, to A, the assignment of C's bond, prevents the necessity of more than one suit.

But what I principally rely upon is, that the act of Assembly, by allowing the obligor to avail himself of all just discounts against the obligee, as well as the assignee, before notice of the assignment, forms a most decided difference between the case of bonds, and bills of exchange. In the first place, it affords a complete answer to the inconvenience which is so much relied upon by the counsel for the appellee, if the assignee should be compelled to make enquiry before he receives it, and which it is supposed, would tend to prevent their negociability altogether. For since every shilling of the bond may have been paid, if the assignment be accepted without enquiry, as to that point, the assignee must suffer for his neglect. The statute therefore, imposes it as a duty upon him, to make the enquiry, let the inconvenience be what it may; or if he do not, he acts at his peril. What is to prevent him from extending his enquiries to other circumstances, respecting the validity of the bond? When it is considered, that this very law, speaks also of bills of exchange, without making similar provision as to discounts, I cannot fail to deduce this principle from it; that the legislature considered the two cases as entirely dissimilar, and by making bonds assignable, they did not thereby intend to regulate their negociability, by rules, which by the law of merchants were applicable to bills of exchange. It is fair to contend, that if the case of an original objection to the bond, be not within

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the letter of this law, which permits discounts to be claimed, it is within the spirit and equity of the provision. If the obligor be suffered to defeat the assignee of a part of his claim, by proving that so much hath been discharged, what should prevent him from a similar advantage, if instead of its having been discharged, it had never been justly due? It is not an unusual thing, to consider cases which are not strictly within the letter of a statute, to be within the equity of it. Thus the act of limitations, does not literally apply to an *equitable demand*, since it speaks only of *actions known in courts of law*; yet the court of Chancery has adopted the statute by analogy, because suits in that court, are equally within the equity of the statute. If no good reason can be assigned, for distinguishing between legal, and equitable discounts, can it be supposed, that the legislature intended a distinction?

As to bills of exchange, they are in every respect different from bonds, and the principle which is contended for as applicable to them, may be supported by strong reasons. They are always remitted to foreign countries; they there pass through many hands, and answer all the purposes of actual money. To subject them to legal, or to equitable discounts, would defeat their use entirely, and of course, they are protected, by the law of merchants, from all objections on the part of the drawer and indorsers, whether they be such, as were originally attached to them, or such, as might afterwards have arisen. The reason, that notes in *England* are considered as being within the same principle, is, that the words of the statute of *Ann*, strongly assimilate them to bills of exchange. But above all, there is no provision in that statute, similar to that, which so evidently distinguishes the case of bonds from bills by our law, and which prevents a *construction*, which could tend to assimilate them to each other.

It is attempted to remedy the inconvenience which the obligor must labor under, if the principle contended for be correct, by saying, that he may give notice of his equity in the public news-papers.

But surely, this would seldom better the situation of purchasers, it would seldom afford actual notice to any person, and it would certainly never be considered as implied notice.

The rule, that where equity is equal, he who has the law in his favor must prevail, is in general correct, but in this case, it is inapplicable. The equity is not equal, because it being the duty of the assignee to inform himself, whether the bond

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be justly due, before he throws away his money, he can never be permitted to found an equity upon his own negligence. If he might have had notice, and ought to have sought it, he is as culpable as if he had actually obtained it. As to *Norton*, the same charge is not imputable to him. It is necessary that there should be confidence between man and man. He was himself deceived by *Anderson*, and was of course a stranger to the injustice which had been done him. I admit, that if a trustee sell land without notice to a stranger, the rule is as it has been stated. But if on the face of the deed, or from other circumstances, the purchaser might have ground to suspect that a trust existed, he would be chargeable with the equity of the *cestui que trust*, on account of his neglect. The case of assignees of a bankrupt, is more analogous to this, than any which the opposite counsel has cited. The legal estate is vested in them by the assignment; they may bring suits in their own names, and being generally, if not always creditors, they are assignees for valuable consideration. Yet it will not be questioned, but that a debtor who has an equity against the bankrupt, may set it up against the assignees.

RANDOLPH on the same side. I will not bottom the arguments which I shall use, upon the policy or convenience of extending, or of limiting the negociability of bonds; but at the same time, it will not be improper that this should be considered. We see that, whilst in Great Britain notes of hand are made negociable, it is not deemed a wise measure to render bonds so. The former were introduced for the purposes of internal commerce, and having been preceded by *Goldsmith's* notes, which circulated like bills of exchange, it was thought wise to place notes of hand upon the same footing, and to assimilate them to the two former. But can it be supposed, that at the time when bonds were made assignable in this country, it was intended to increase the circulation of paper credit? The very reverse was the policy which governed that country, to whom we owed the liberty of passing laws. In the year 1705, notes of hand in *England*, assumed, by legislative authority, the high ground upon which they now stand. Yet the Assembly of *Virginia*, with that law before them, did not think proper to exalt bonds to the same station. And yet this law of our own country, will answer all the beneficial purposes for which it was made, although our construction of it should be found to be accurate.

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If the equity be subsequent in time to the creation of the bond, it is admitted, that it attaches itself to it, and accompanies the bond into the hands of an assignee. Suppose it to be coeval with the bond; the English cases prove that the same consequences follow: Suppose A gives his bond to B, and B gives a like bond to A: though A shall assign the bond of B to a third person, yet would it be contended, that B might not offer A's bond as a discount, notwithstanding it was coeval with his?

The legislature of 1786 revise this subject, and pass a law similar to that of 1748; they still hold out protection to the obligor, against all just discounts which he can establish against the obligee, as well as against the assignee, and they again subject the latter, to the necessity of enquiring into the nature of the debt which he is about to purchase. With a full knowledge, that bills of exchange were exempt from this clog, no disposition to assimilate the one to the other is to be discovered. Could language have expressed, more decidedly, the legislative construction of the former law, and their present determination to distinguish these negociable papers, from each other? They say, that the assignment of bonds, notes &c. *shall be valid*; meaning, that the assignee shall thereby gain a legal right to sue in his own name: and this was the sole object of the former, as well as of the latter law.

But it is particularly worthy of observation, that though notes of hand, according to the statute of *Ann*, were placed upon the same ground with bills of exchange, and of course governed by the same rules, that the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange in this country, and thereby gave a convincing proof, that it was not their intention, to suffer bonds to be governed by those rules, which applied to bills. And after such proofs of the legislative mind, can the court by any principle of sound construction, suffer a case, which is so evidently within the spirit and meaning of the law, to be without the operation of it; or permit the obligor, to avail himself of a discount against part of the debt, and yet leave him unprotected, if he set up a well founded objection to the whole.

It may not be improper in me to mention, that a similar question with this has been determined by the supreme court of *Pennsylvania*, upon a law of that state, similar to the statute of *Ann*, by which notes of hand were made assignable; but the strong words in that statute, "like to bills of exchange" were omit-

ted in the act of the *Pennſylvania* legiſlature; the court determined, that the aſſignee of a note was chargeable with the equity originally attached to it. *Dall. Rep.* 23.

This caſe, though not authority here, ſtill deſerves our reſpect, as being the deciſion of the ſupreme court of a ſiſter ſtate, and as ſhewing the opinions entertained in other parts of the union, reſpecting the former policy of this country, upon the ſubject of negociable papers.

If we aſk, what have been the Britiſh deciſions upon this ſubject, in caſes of bonds, it is agreed on all hands, that the ſituation of the aſſignee is in no reſpect better than that of the obligee. *Turton* and *Benſon*, is an expreſs authority, that the aſſignee is conſidered as ſtanding in the ſhoes of the obligee, becauſe, ſay the judges, it is his fault; if he do not enquire into the validity of the bond, and the nature of the debt, before he takes the aſſignment.

But it is inſiſted that the principle of that caſe is inapplicable to the preſent, becauſe the aſſignment of a bond in *England*, does not transfer a *legal right* to the money. It is obvious, that the diſtinction is not a ſound one, for ſince by the rules of equity in that country, and by the laws of this, the aſſignee is expected to enquire into the nature of the debt before he obtains an aſſignment: his negligence in not making that enquiry forbids him in either caſe to ſay, that he has *equal equity* with the obligor. Of courſe, the aſſignee's *legal right* will not avail him, ſince by his negligence he has deprived himſelf of that equity, which would have counterbalanced the equity of the obligor.

If this caſe be conſidered upon principle, independent of authority, nothing can be more clear, than that the rule laid down in *Turton* and *Benſon*, is bottomed upon the ſoundeſt reaſon. For what could be more abſurd or unjuſt, than that a bond, however fraudulently obtained, ſhould acquire a binding quality by paſſing into the hands of an aſſignee, when, at the moment of the aſſignment, it was invalid or ineffectual? Even in the caſe of a bill of exchange, (the peculiar favorite of Britiſh courts,) if it be drawn for a gaming, or uſurious conſideration, it is void, as well in the hands of an indorſee, as in thoſe of the original payee. And altho' in other inſtances, where the ſame principle of juſtice prevails, it is compelled to yield to reaſons of policy founded in commercial conſiderations, yet, where thoſe reaſons do not apply, the principle can never be done away. If bonds be not eſſential to commercial negociations, as

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they certainly are not, there can be no reaſon for applying the ſame rules to them which prevail in caſes of bills of exchange; and if ſo, why ſhould a bond which has been paid off, which was obtained by dureſs, or fraud, be more binding in the hands of the aſſignee, than it was previous to the aſſignment? In every point of view it ſeems clear, that not only Engliſh deciſions, but the municipal regulations of our own country, favor the doctrine, that an original or ſubſequent equity againſt a bond, follows it into the hands of an aſſignee.

WASHINGTON in reply. The principle, that where equity is equal, he who has gained a legal advantage muſt prevail, is admitted. But it is denied to be applicable for two reaſons:

1ſt, That the aſſignee has not equal equity:

2d, That under the equity of the act of Aſſembly, the rule is in this caſe to be rejected.

1ſt, The aſſignee it is ſaid has not equal equity, becauſe he is guilty of culpable negligence, in not enquiring of the obligor before he takes the aſſignment, into the nature of the debt. This however is a *petitio principii*. That he is obliged to make the enquiry is proved by no caſe, except that of *Turton* and *Benſon*, which can only apply, where, by the aſſignment, a *merely equitable* right paſſes. In ſuch a caſe, the aſſignor can only diſpoſe of a naked equity, and of courſe, the aſſignee can acquire no greater intereſt. If the former has not equitable intereſt in him, he can diſpoſe of none. The *poſterior equity* of the aſſignee, unſupported by a *legal right*, cannot prevail againſt the *prior* and *equal equity* of the obligor. It is this, and not the neglect of the aſſignee which defeats his equity: in a caſe of that ſort, the principle of *caveat emptor* applies in its full force.

But why is not the indorſee of a bill of exchange obliged to enquire? The anſwer is, that for the ſake of commerce, the law of merchants does not require it.

I muſt allow the entire credit of this reaſon to the counſel, ſince there is no caſe in which it is aſſigned as the cauſe of the deciſion. But if it were, it will apply with almoſt equal force to bonds. Though bills are uſed for the purpoſes of remittance, and are therefore *paid in foreign countries*, yet they are *drawn*, and generally *endorſed in this country*; ſo that, it will be as eaſy to enquire, of the drawer in the one caſe, as of the obligor in the other, into the circumſtances of the debt. But why ſhould *inland bills*, and *notes of hand* be governed by the ſame rule of

law,

law, when it muſt be admitted, that the reaſon aſſigned as to foreign bills, cannot apply to theſe caſes, more than to bonds?

It was obſerved by one of the court, that the reaſon for applying the rule I contend for to the caſe of bills of exchange, might be, that every indorſer is conſidered as a new drawer; conſequently, a new contract ariſes which might diſcharge the pre-exiſting equity. With ſubmiſſion, I cannot think that this will furniſh a ſufficient reaſon. If the *indorſer* claimed an equity, it might be ſo; but ſurely, his aſſignment could not diſcharge the prior equity of the *drawer*, merely becauſe that aſſignment created a new contract on the part of the indorſer. The indorſer is ſo far a new drawer, that he obliges himſelf to pay the amount of the bill, in caſe the drawee do not. But the *drawer* is not privy to this latter contract, and cannot therefore loſe his prior rights, becauſe the *indorſee* has gained a new ſecurity. I ſhould rather ſuppoſe, that if this conſideration could have any influence, the indorſee, having obtained additional ſecurity, will have leſs reaſon for defeating the equity of the drawer.

But why does the principle I am attempting to maintain, extend to other caſes, than the transfer of *choſes* in action? For example, an abſolute conveyance by a truſtee, to a third perſon, without notice; a ſale by a mortgagee, having an abſolute conveyance, though in fact intended only as a ſecurity for money, to a ſtranger, without notice; a conveyance by the vendee of land, where the vendor has a *lien* upon it, for the conſideration money; in theſe caſes, the equitable rights of the *ceſtui qui truſt*, mortgagor, and vendor, are defeated, and yet the purchaſer, might have enquired, particularly in the two latter caſes, of the mortgagor and vendor, if they had any equitable claims to the land. But this is not neceſſary; and yet in all thoſe caſes the grantee takes the land diſcharged of the equity, becauſe, having acquired a legal title, and being a purchaſer for valuable conſideration and without notice, he muſt prevail.

For what reaſon ſhould the enquiry be made? The bond upon the face of it furniſhes no cauſe for ſuſpicion; the obligor could but confirm by parol declarations, what he had before ſolemnly acknowledged under his hand and ſeal. Suppoſe the enquiry in this caſe had been made, and *Norton*, had made parol declarations; ſimilar to thoſe expreſſed in the bond, he being ſtill under the deception which his counſel impute to him: could he ſet up an after-diſcovered equity? If he could, then the

the enquiry would be unavailing to the aſſignee; if otherwiſe, then, the obligor could not be benefited by it. The equity which the obligor may have, is always coeval with, or poſterior to the bond. If coeval with it, it is either then, or afterwards known to the obligor; if then known, it is a fraud upon the public to ſend into circulation a negociable paper, which may deceive others, and therefore, every principle of equity is ſtifled by the fraud: if not *known*, but *ſuſpected*, the caſe is the ſame; for then, the bond ſhould expreſs what is ſuſpected, that third perſons may not be impoſed upon. In this caſe, Mr. *Norton* ſtates in his bill, that he knew of the credit, now made the ground work of his application for relief in equity, and inſiſted upon its being allowed; but that he was deceived by *Anderſon*, into a belief, that he was not entitled to it. Why then did he not reſerve the right of claiming this credit, in caſe he ſhould afterwards diſcover that he was entitled to it, and by a memorandum on the bond, give notice to the world, of this latent equity? The charge of neglect therefore, is returned upon Mr. *Norton's* hands, and his counſel very well know the influence it will have in defeating an equity. If the equity be neither known, nor ſuſpected at the time the bond is given, then the principle which applies in all conteſts *de damno evitando*, muſt be reſorted to: it is, that wherever one of two innocent perſons muſt ſuffer, by the act of a third, he who hath enabled ſuch third perſon to occaſion the loſs, muſt ſuſtain it. *Lickbarrow vs Maſon*, 2 *Durnf.* and *Eaſt* 63. As ſoon as the equity is diſcovered, the obligor ſhould immediately give notice of it; this may eaſily be done in the public prints, or by ſuit. *Amb. Rep.* 66. But the anſwer to this remedy is, that the bond may have been previouſly aſſigned, if ſo, then the enquiry would not have bettered the ſituation of the aſſignee, or of the obligor; for the latter, muſt then have acknowledged, what he had before done with more ſolemnity, that he knew of no equity againſt the bond: If not previouſly aſſigned, then the notice would prevent its transfer.

On the other hand, the trouble and inconvenience of making the enquiry, and the difficulty of proving the re-acknowledgment, would put a ſtop to the negociability of bonds, & would entirely defeat the intention of the law which made them aſſignable.

It is contended, that it is eſſential, that the parties to a bond ſhould have confidence in each other. Be it ſo; but let it alſo be conceded, that he who places the confidence, ſhould take the conſequences of having miſplaced it, and not ſeek to throw it

it upon a third person, who was not privy to the transaction. In commercial matters, confidence is peculiarly necessary; and yet this court determined in the case of *Hooe* and *Harrison vs Oxley* and *Hancock*, *(ante vol. 1, p. 19,)* that if an agent, who is authorized to draw bills for special purposes, abuses the trust, and misapplies the money, the principal who gave the confidence must suffer.

It is said, that the statute of *Ann*, assimilates notes, to bills, by the expressions it uses. It declares, that they *may be assigned like bills*, but it does not assimilate them in any of their consequences, or collateral points.

It is then contended. 2dly, That this case is within the equity of the act of Assembly, which, it is said, essentially distinguishes it from the cases which have been cited respecting bills, notes &c.

There is an apparent inconsistency in the arguments respecting this law. It is obstinately insisted upon, that the equity originally attached to a bond, would follow it into the hands of an assignee, upon principles unaffected by this law; if so why was this law made?

The legislature, when engaged in the business of altering a general principle of law, are not to be supposed ignorant of the full extent of that principle. If without legislative interference the obligor could not have protected himself against an assignee even for *actual payments* made before notice of the assignment, (and that he could not, was evidently the sense of the legislature, otherwise their interference was unnecessary,) much less could he set up an original, and concealed equity; for the former case, an express provision is made. There is no ambiguity in the language of the proviso, nor is it even contended, that the case of an original equity comes strictly within it. But it is contended to be with the spirit of the proviso. There are cases, I admit where it is justifiable to take liberties of this sort, with the words which the legislature uses: but there should be an apparent necessity for it, and I hold it to be always unwarrantable, if a reason for excluding the case which is sought to be constructively included, can be assigned. A little reflection, will furnish, a satisfactory reason for the discrimination, between posterior discounts, and original equity.

In the first, the obligor has done what by the terms of his contract he had stipulated to perform. He has made partial payments, or has entirely discharged the debt; it was his duty to do this; and therefore, he who is about to purchase, ought to

suppose

ſuppoſe that to have been done, which the contract ſtipulated to be done; here, there is a cauſe of ſuſpicion growing out of the inſtrument itſelf, ſtrong enough to prompt an enquiry, and if the aſſignee be hardy enough to calculate againſt this reaſonable preſumption in conſequence of the confidence he may repoſe in the obligor, it is perhaps not improper to leave him to his recourſe againſt the perſon who has deceived him.

But it is far otherwiſe with reſpect to an original equity. To preſume that the debt was never due, would be to form a concluſion againſt the words of the contract itſelf, which import the contrary. The obligor has declared the debt to be due, and that he will pay. This ſolemn acknowledgment of its juſtice, he has confirmed with his ſignature and ſeal. If it were not due, he would not, and certainly ought not to have obliged himſelf to pay it, and that too in a manner calculated to deceive thoſe who truſt in this declaration. It is not enough to ſay that he was ignorant of the objections to the claim at the time he gave the bond, or was impoſed upon by the obligee; it was his duty to inveſtigate the ſubject, before he ſent forth a negociable paper, which in every change it underwent, poſſeſſed the power of deceiving, and of injuring fair purchaſers. In this caſe, the aſſignee could have no cauſe to ſuſpect an original equity contrary to the expreſs letter of the contract. To enquire of the obligor, if he meant the reverſe of what he has declared, would be an abſurdity, which the legiſlature could never mean to require of the aſſignee. The difference between diſcounts, and an original equity, is this; in the firſt, the aſſignee purchaſes upon the faith of the *obligee*, ſince nothing but his aſſurances could repel the natural concluſion, that payment had been made; in the latter, he purchaſes upon the faith of the *obligor*, that the debt was due when the bond was executed, becauſe he has ſaid ſo, and that in the moſt ſolemn manner.

The legiſlature therefore, were influenced by the ſtrongeſt motives to make the diſcrimination.

If the legiſlature ſtate a particular caſe, and might by apt language have expreſſed themſelves *generally*, if they had meant to do ſo, it is too much like legiſlating, for the court to make a conſtruction broader than the words which are uſed will warrant.

If an original equity had been intended, the proviſo would have permitted the obligor, "to make any defence in law or equity, which he might have made, in caſe no aſſignment had been made," and it is contended, that the court ſhould conſtrue the word *diſcount*, ſo as to mean the ſame thing. It

It is said, that the act of limitations, though it does not extend to the courts of equity in expreſs terms, is nevertheleſs adopted by analogy. This is true; and I do not object to courts of equity permitting the obligor, to avail himſelf of diſcounts againſt the aſſignee, in the ſame manner, as he might at law; what I contend is, that neither courts of law, nor of equity, can *extend* the conſtruction of the proviſo, beyond the fair meaning of it. The act of limitations is *reſtricted*, or rather *diſregarded* in equity in many caſes; but it is never *extended beyond the periods preſcribed by the law.*

No two caſes can be more unlike, than this, and the caſe of aſſignees of a bankrupt; in the latter caſe, the aſſignees are merely *truſtees*, and are no more entitled to avoid an equity againſt the bankrupt, than the bankrupt himſelf would have been.

ROANE, J.—There are ſome points in this cauſe, which are not controverted by either ſide. It is admitted, that upon the principles of the common law, a *choſe* in action is not aſſignable; that is, the aſſignment does not give to the aſſignee, a right to maintain an action in his own name.

It is alſo conceded, that in *England*, the aſſignee of a bond, takes it charged with every ſpecies of equity, which was attached to it in the hands of the obligee. If a different principle prevail in this country, it muſt grow out of the acts of Aſſembly, which authoriſed the aſſignment of bonds. The acts of 1730, and 1748, upon this ſubject, are preciſely the ſame as to the preſent queſtion. I ſhould have been glad to have ſeen the act of 1705, but I have not been able to meet with it. This caſe, depends upon the juſt conſtruction of the act of 1748. The intention of it, was to alter the common law, ſo far as it prevented bonds from being aſſigned, and to give to the aſſignee, a right to ſue in his own name, in the ſame manner, as the obligee might have done.

It was not intended to abridge the rights of the obligor, or to enlarge thoſe of the aſſignee, beyond that of ſuing in his own name; and ſince it is clear, that prior to this law, an original equity attached to the bond, followed it into the hands of the aſſignee, this law, does not expreſſly, nor by implication, deſtroy that principle. Notes of hand are now aſſignable in *England*, and it is admitted, that the aſſignee is diſcharged of any equity, which exiſted againſt the aſſignor, unleſs the note was given for an uſurious, or for a gaming conſideration.

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The reaſon of this, is not that the principle attached to them is a *legal conſequence of their being made aſſignable*, but becauſe this rule for *commercial purpoſes*, applied to *bills of exchange*; and the ſtatute of *Anne*, declaring notes aſſignable, *in like manner as bills of exchange*, ſhewed an intention, as it was ſuppoſed, to render the former, as highly negociable, and as current in *internal*, as the latter was in *external commerce*. The act of our Aſſembly, embraces equally the ſubject of bonds and notes, but contains no expreſſions tending to induce a belief, that the making them aſſignable, was intended for purpoſes of commerce. The deſign certainly was, to make them transferable to a certain extent; the proviſion points out the limits of their negociability, and fixes a ſtrong mark of diſtinction between them, and bills of exchange. As to the latter, they were always aſſignable, and the indorſement transfered a legal right to the indorſee. They did not owe this quality to ſtatutary proviſions, and of courſe, they continued within that principle which had attached to them, and of which they were not deprived by any ſtatute.

Lord Mansfield lays it down in the caſe of *Peacock vs Rhodes*, *Dougl.* 636, "that the holder of a bill of exchange, or promiſſory note, is not to be conſidered in the light of an aſſignee of the payee. An aſſignee muſt take the thing aſſigned, ſubject to all the equity to which the original party was ſubject; if this rule applied to bills and promiſſory notes, it would ſtop their currency." So in *Cunningham's* laws of bills of exchange, p. 65, the Chancellor refuſed to relieve againſt the aſſignee of a bill, "becauſe it would tend to deſtroy trade, which is carried on every where by bills of exchange, and he would not leſſen an honeſt creditor's ſecurity." And we are informed by *Domat*, 131, *Tit.* 16, § 4, *p.* 231, that the covenant which paſſes between the perſon who gives the money, and him who undertakes to remit it to another place, hath in it ſome particular characters which diſtinguiſh it from other kinds of covenants, that ſeem to have ſome reſemblance with it.

It is therefore, not becauſe the indorſee is an aſſignee of the *legal* right to ſuch bills and promiſſory notes, that the equity is barred by the indorſement, but becauſe of their quality as a *currency*, and from the neceſſity of adopting ſuch a principle, for the convenience of trade and commerce with reſpect to ſuch currency. But bonds, are not to be conſidered as a currency, and within the reaſon of the principle laid down in *Peacock* and *Rhodes*; for that principle is founded upon commercial conſi-

derations altogether, and not upon a distinction between *legal*, and *equitable* assignments.

With respect to the proviso in the act of 1748, it contemplates *legal discounts* only. The words, "the plaintiff shall allow *all discounts* which the defendant can prove," were meant to extend those discounts beyond the credits which might be endorsed on the bond; and the latter words, "before notice of such assignment was given to the defendant," were meant to restrain the discounts to such as existed prior to notice of the assignment. This enlarging and restraining proviso was necessary, in order to express clearly the meaning of the legislature; but neither the proviso, nor any other part of this act, was intended to *extend* to, or to *abridge equitable discounts*, which were not in the contemplation of the legislature who made this law.

The inconvenience, which it is apprehended will result from rejecting the application of the principle contended for, is certainly not real, or if it be, it was not so considered by the legislature. The assignee, it is admitted, takes the bond at his peril, so far at least, as the possible claim of the obligor to discounts may extend. If he chuse not to encounter this risk, or to repose entire confidence in the obligee, he must enquire of the obligor, and from him obtain information, respecting (at least) this part of the subject. With the same convenience, may the enquiry extend to any equitable objections attached to the bond. The two cases are precisely within the same reason, and I can discover no principle of policy or justice, which should so widely distinguish them. The assignee of a note given by an infant, feme covert, or for a gaming, or usurious consideration, does not take it discharged of those objections, but the contrary. In those cases, as well as in respect of discounts, he must take care what he purchases; he acts at his peril, and must therefore act with caution. For what reason then, shall an equity, originally incorporated with the bond, and which should destroy its obligation, be discharged in the hands of an assignee? The provision of this act has long governed the assignment of bonds, and it is but of late years that the existence of such a principle as has been contended for in this cause, has been thought of, as applicable to bonds and notes. This consideration, though it would not direct, has much weight in confirming the opinion which I clearly entertain upon this subject. The appellee may suffer in consequence of it; but this is preferable to the establishment of a principle, which may produce great public mischief, and injustice.

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Although I am clear in the opinion, that an equity exiſting againſt a bond, is not loſt or extinguiſhed by an aſſignment for valuable conſideration and without notice, yet it may be loſt by length of time or other circumſtances. In this caſe however it does not appear, *when* the deception practiſed by *Anderſon* was found out by *Norton*, or that *Norton* delayed an unreaſonable length of time, in coming forward to aſſert his equity. It is true, that his intereſt in the goods ſold by *Harris* is not eſtabliſhed in the proof, but the ground of the Chancellor's decree, being wrong, it muſt be reverſed, and the cauſe remanded for further proceedings, ſo as to let in Mr. *Norton* to the proof of his equity. The decree ſo far as it reſpects the order on *Nicholas*, with reference to the preſent appellee, I think is right.

CARRINGTON, J.—To conſider this caſe upon general principles; the queſtion is, whether an equity, originally attached to a bond, follows it into the hands of an aſſignee without notice. In *England*, notes of hand were not aſſignable, until the 3d and 4th of *Queen Ann*, ſo as to enable the aſſignee to bring a ſuit at law in his own name. Courts of Equity were of courſe reſorted to, where the maker of the note was not precluded from ſetting up any equitable defence, which he might have. Frequent attempts were made by the bankers and traders, to bring them within the cuſtom of merchants, and to place them upon the ſame footing of negociability with bills of exchange. But the judges ſtill conſidered them merely as evidences of debt. At length, the ſtatute was procured, conformably with the wiſhes of the trading part of the community, making them aſſignable, *in like manner as bills of exchange*. The likeneſs thus ſtrongly ſanctioned by legiſlative authority, produced ſimilar deciſions in caſes, where their negociability were concerned.

But no efforts were made in favor of bonds, and they remain in the ſame ſituation *in England*, as they ſtood at common law.

This country was then a part of the Britiſh empire, and our legiſlature, aſſimilated its laws, to thoſe of the mother country, ſo far, as our local ſituation and ſtate of ſociety authoriſed it. In 1705, ſhortly after the Engliſh ſtatute paſſed reſpecting notes of hand, the Aſſembly, paſſed a law, authoriſing the aſſignment of bonds and notes. This law, I cannot meet with, but it was repealed by proclamation in 1730, and in the ſame year, another law was enacted, exactly ſimilar to the act of

1748. With the English statute before their eyes, the legislature did not chuse to adopt it altogether, or to introduce into it a principle, which should defeat the equity of the obligor, as it was secured to him at common law. Those expressions in the statute, which assimilated notes to bills of exchange, were omitted in our law, and in the room of them, others were introduced, which established an opposing principle. The negociability of bonds and notes, was qualified and restricted within bounds, consistent with the commercial station of this country. There was no necessity for exalting those kinds of paper to the high ground, on which the commercial world had placed bills of exchange, and the whole complexion of the law shews, that it was intended to be avoided. The doctrine which has been stated and relied upon, as applicable to foreign bills of exchange, is consequently inapplicable to the present discussion. These considerations have produced conclusions in the public mind, as to the construction of the law in question, the very reverse of what has been contended for by the counsel for the appellee. I should be unwilling to unsettle these long formed opinions, unless the expressions of the law rendered it absolutely necessary.

That a bond fraudulent and void in its creation, cannot be cleansed of its impurity, and rendered valid by assignment is settled by the case of *Turton* and *Benson* and has uniformly been so decided in the courts of this country. No man can by the mere act of assignment transfer a greater interest than he holds; dispose of an interest where he has nothing, or make good and valid, that which was originally vicious and void. In this enlightened age though former decisions are rejected, and a new mode of attaining justice is discovered. But is it true, that the means are adequate to the object? It is urged as a reason for the rejection of former opinions upon this subject, that they tended to impose deceptions upon the public, and to cramp commerce, by destroying the negociability of bonds and notes. As it strikes me, they rather tend to prevent, than to countenance those frauds, and if the other consequences will follow, it is preferable to sacrificing a majority of the public, to the avarice and injustice of a few. But I cannot perceive, how commerce, or that sort of it which is most useful to society can be injured. That their negociability will be restrained I admit, but they will answer the purposes for which the law intended them, by facilitating the collection of debts and thereby affording a convenient, and desirable accommodation to the people of this country.

The

The case now under consideration, comes fully within those principles which seem to me correct. *Norton* and *Anderson* were concerned together in trade, and upon a settlement of accounts, *Norton* claimed a credit for the proceeds of a quantity of goods in the hands of *Harris*. But *Harris* assuring him that he had received no part of those proceeds, *Norton*, unsuspicious of the truth, gave his bond for the balance as it stood. *Rose*, it is admitted, was a fair, *bona fide* purchaser of the bond. He is chargeable only with neglect; he might and ought to have satisfied himself, that the debt was justly due before he received it. If upon an enquiry, *Norton* had assented to the payment, or acknowledged he had no objections to it, this would have deprived him of his equity against *Rose*. It was easy for any person wishing to take an assignment of the bond, to make the enquiry; they would know at once, where to make the application. On the other hand, *Norton* could not give a special notice to the person who was about to obtain it and the public papers would afford a very uncertain channel of information.

Upon the whole I am clear that the decree is erroneous and ought to be reversed.

LYONS, J.—This has been truly said, to be a cause of considerable importance, on account of the precedent to be established. In order to discover the legislative intention, when the act of 1730 (of which that of 1748 is an exact copy, as to this question,) was passed and to comprehend more clearly the consequences of the construction contended for by the appellee, I shall consider this case as if it had been to be decided upon at that time. If *Norton* had given this bond before assignments were sanctioned by legislative authority, it is admitted on all hands, that his equity would have followed the bond, into the hands of an assignee. If so, is it possible that the legislature could have meditated so much injustice, as to exclude him from setting up an objection to the debt, which but for the law, he might have made? Could it mean to protect fraud, and to give validity to an instrument, which was originally void and founded in deception? Whatever would then have been the construction of the law, must be the construction of it at this day. I mention this to shew that the legislature by making bonds assignable, did not thereby mean to deprive the obligors of any equitable objections, which they might have to them. Until this act passed, bonds were not assignable. Bills of exchange could not answer the purposes of internal negociaton,

between

between the planters and the merchants; the former from their situation, were under a neceſſity of having credit from the latter, and to ſecure this, it was deemed proper to make bonds aſſignable, by which means, the factors, who often took them in their own names, were enabled to paſs them away in the purchaſe of commodities, or might, when neceſſary, transfer them over to their principals. This hiſtory of bonds will evince, that as there was no neceſſity, ſo it never could have been the legiſlative intention, to give to them all the high privileges attached to bills of exchange, and particularly that, which has been contended for by the appellee. Independent of this, the law upon the face of it, repels a conſtruction, calculated to deprive the obligor of his equitable objections. It *ſaves to him the right* of oppoſing the claim by all *juſt diſcounts* which he can make, and conſequently could not mean to *deprive* him of an equity, ſtrong enough to invalidate the whole claim. The law, ſo far from being deſigned to grant favors to the *aſſignee*, is calculated to protect the *obligor*; the former, is obliged to admit all diſcounts againſt the obligee, and at his peril to give notice of the aſſignment, under the penalty of being bound by payments made, after the obligee has parted with his right to receive them.

The accuracy of the principle laid down by the appellee's counſel is not queſtioned; its application to this caſe is. For ſince it is admitted, that if the law had not permitted the aſſignment of bonds, an equity exiſting againſt the obligee would have accompanied the bond into the hands of an aſſignee, the ſingle enquiry which remains is, does the law take away this right, previouſly poſſeſſed by the obligor? I have endeavored to ſhew, that ſo far from doing this, the law itſelf diſplays a careful attention to the rights and intereſt of the obligor.

The arguments which were uſed to aſſimilate this, to the caſe of a bill of exchange and promiſſory note, are totally without foundation. The reaſon of the law as applicable to thoſe caſes, is not founded upon the principle ſtated by the counſel for the appellee, but upon conſiderations altogether of a commercial nature.

Upon the whole, I concur in opinion with the other judges.

The opinion and decree of the court, was entered as follows: "The COURT is of opinion, that an aſſignee of a bond or "obligation, takes the ſame, ſubject to all the equity of the o- "bligor, and that the appellant ought to be allowed to ſet off

"and

" and discount against the debt claimed by the appellee as assignee " of *George Anderson*, the other defendant in the decree named, " any equitable demand respecting the said debt, which he had " a right to claim from the said *George Anderson*, the original " obligee." Decree reversed with costs, and the cause remanded to the High Court of Chancery for further proceedings to be had therein, according to the principles of this decree.

PICKET,

against

MORRIS.

IN the year 1785, *Morris*, purchased from *Littlepage*, the moiety of two thousand acres of land in *Kentucky*, at the prices of £ 600, and gave his bond for £ 400, payable at a future day, and a note of hand for £ 200, which has been discharged. *Johnson*; had an equitable title to the other moiety of this land, under a former contract, but upon this condition, that he should allow *Littlepage*, or those claiming under him, to take choice of either of the two tracts on paying the difference in value between them. In 1786, *Littlepage*, assigned this bond to *Stockdell*, at which time, *Morris*, was a creditor of *Stockdell* by bond, in a sum, very little short of the amount of the one which he had given to *Littlepage*. *Stockdell*, proposed a discount of the two bonds to *Morris*, which the latter refused, in consequence of the pendency of a suit against him, *Littlepage* and others, by *Johnson*, in the state of Kentucky, claiming a conveyance of an *undivided moiety of the* 2000 *acres of land*, instead of a *separate tract*, with the difference in value between such tract, and the first choice which *Morris*, by his contract with *Littlepage* had a right to make. After this refusal, *Morris* instituted suit against *Stockdell* upon his bond, and recovered a judgment. *Stockdell*, assigned *Morris's* bond to *Picket*, but whether before, or after the judgment obtained by *Morris*, does not certainly appear.

Picket, instituted a suit upon this bond against *Morris*, in the County Court of *Henrico*. At the trial of that cause, the counsel of *Morris* offered *Stockdell's* bond as a discount, and moved the