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

BY
BUSHROD WASHINGTON.

VOL. I.

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BUCKNER & others, truſtees of BEVERLEY,

against

Smith, Stubblefield, Graham, and Dixon's executors.

THIS was an appeal from the High Court of Chancery diſmiſſing the bill of the complainants who are now appellants.—The caſe was as follows: Beverley during his infancy loſt a conſiderable quantity of tobacco at unlawful gaming with the defendant Smith; who for valuable conſideration gave to Stubblefield an order upon Beverley for 25,000 pounds of tobacco. Beverley accepted the order, and afterwards gave his bond to Stubblefield for the amount. Stubblefield aſſigned the bond to Graham, and Graham to Dixon, each paying for the ſame a valuable conſideration. Upon an action brought by Dixon upon the bond, Beverley confeſſed a judgment. He afterwards conveyed his eſtate to the appellants in truſt, to pay his debts, and to apply the reſidue, towards the ſupport of his family.—The truſtees underſtanding the real nature of this demand, filed their bill in the High Court of Chancery praying an injunction to this judgment, and charging that Stubblefield, Graham, and Dixon, had full notice that the bond in queſtion was given for a gaming conſideration, before they reſpectively acquired an intereſt in it. Stubblefield in his anſwer, denies that he had notice of the conſideration for which the bond was given.—Dixon, juſt previous to his death, drew up the heads of an anſwer, and ſwore to it, denying notice, and ſtating that he was induced to accept of an aſſignment of the bond, by Beverley, who aſſured him that the bond ſhould be punctually paid. His executor's anſwer refers to thoſe heads, as part thereof. The anſwer alſo refers to a letter from Beverley to Dixon, after he had come to full age, giving aſſurances of payment. The only depoſition in the cauſe is that of Smith, one of the defendants, who does not anſwer, nor is his depoſition excepted to. He proves the conſideration of the order upon which the bond was given, to have been for tobacco loſt at gaming by Beverley, and that Stubblefield had notice of it, at the time the order was given, and agreed, that if Beverley ſhould accept the order, he would diſcharge Smith from all reſponſibility.

WARDEN

WARDEN for the appellants. The infancy of Beverley is proven, as also notice to Stubblefield, who does not positively deny it, but only says that he was not concerned in the gaming transaction. It is also fairly to be presumed, that the other defendants knew of it. But whether this were the case or not, Dixon ought not to have recovered; for tho' an assignee *without notice*, might in some cases be a sufferer, by considering him as standing in no better situation than the assignor, yet, this individual inconvenience is very far short of the public mischief, which would be produced by giving validity to a bond of this sort, because it had got into the hands of an assignee. For if the winner could pay his own debts, or make a valuable use of bonds acquired by gaming, it would be easy for him at any time to evade the statute, and to derive every advantage which he could desire, by a violation of the law. The case of Bowyer and Bampton 2 *Str.* 1155 is conclusive upon this subject. It is absurd to contend, that a bond, which the law has declared *void ab initio*, can by any thing subsequent thereto be made effectual.

CAMPBELL for Stubblefield. The appellant's counsel, has not, in the course of his argument, touched the only point in the cause; and that is, will a Court of Equity, after a judgment fairly obtained at law, and where the defendant has waved any legal advantage which he might have had, interfere to set aside that judgment without some special circumstances to warrant it? The case before the court, is not one of those, wherein Chancery can claim jurisdiction. It is not a case of trust, fraud, or accident. It is not a bill for a discovery, even if such a bill in a case like this could be sustained. The plaintiff does not pretend, that he is destitute of other evidence, than what he can draw from the defendants, and if he had stated such a charge in his bill, it would have been contradicted by the record, wherein a deposition appears, which completely proves the fact. Neither is this application warranted by the act of 22 *Geo.* II, C. 25, § 3, which authorises a bill of discovery only where *actual payment hath been made*, and upon a discovery and re-payment by the winner, excuses him from the forfeiture imposed by the law. So that, upon no principle whatever, are the plaintiffs (who stand in no better situation than Beverley did) proper in this Court.

WICKHAM for Dixon's executors. I shall in the first place object, that the bond in question, is not proved to have been given upon a gaming consideration. It is positively denied by the answers,

ſwers, and thoſe anſwers are contradicted only by the depoſition of one of the defendants, whoſe evidence can have no greater weight, than his anſwer would have had, which could not have operated againſt a co-defendant. But paſſing over this, want of notice is poſitively denied by Dixon; and it is a well known principle in this court, that if the plaintiff and defendant are both equally innocent, equity will not interfere, but will leave them to the law. That Dixon was entirely innocent is not denied: no imputation can lie againſt him. But is Beverley ſo? No. In the firſt place, he violated a poſitive law. He then gave a negotiable paper, importing upon its face, the evidence of a juſt debt. This is ſent into circulation, to deceive and injure thoſe, who might unfortunately become its poſſeſſors. But above all, he induces Dixon to throw away his money in the purchaſe of that bond, under aſſurances of its being paid. Shall he then, who hath been guilty of a fraud, find countenance in a Court of Equity againſt the perſon, upon whom that fraud hath been practiſed, and who was thereby induced to throw away his money? It is a rule, that he who acquires a legal title without notice of an equitable claim oppoſed to it, ſhall not have it queſtioned in a court of equity. Thus a purchaſer for valuable conſideration, without notice of a prior equitable claim, may in this court, defend himſelf by relying upon ſuch a purchaſe.—Suppoſe in this caſe, the money had been paid by Beverley, (and the principle will be the ſame after a judgment) could he have recovered it back at law? He might have done it perhaps under the act of 22 *Geo.* II *C.* 25 if he had brought his action within three months.—But otherwiſe he could not, as the law itſelf proves, by affording a remedy, and preſcribing a time within which it ſhould be aſſerted. And if he could not recover it back at law, in an action for money had and received, which is as liberal a remedy as a bill in Chancery, would equity aſſiſt him? I contend it would not.

Upon the whole, I truſt, that the decree will be affirmed; but if it ſhould be ſuppoſed, that the appellants are entitled to relief, I hope it will not be granted againſt Dixon's executors, whoſe teſtator was entirely innocent, and who have the benefit of a judgment at law. For ſince all proper parties are before the court, it would be moſt conſiſtent with the principles of equity, in order to prevent circuity of action, to decree at once againſt the perſon who ought ultimately to ſuffer.

Mr. CAMPBELL obſerved, that as the bill prayed for an injunction, the court muſt either make it perpetual, or diſmiſs the bill.

Mr.

Mr. WICKHAM, in anſwer ſaid, that the bill prayed for general relief, and therefore the court might make any decree which was thought equitable.

WARDEN in reply. Notice is not poſitively denied by Stubblefield, and the anſwer of Smith, not having been excepted to, muſt be conſidered as proper evidence in the cauſe. The court muſt not only conſider the bond, but alſo the judgment as being void, under the act of Aſſembly. This act gives this court expreſs juriſdiction in the preſent caſe, and the policy of it was to compel a diſcovery at all events, that the ſtatute might not by any device, or means whatever, be evaded. For if reſort in ſuch caſes could not be had to a Court of Equity, the conſideration of ſuch bonds could ſeldom be diſcovered, nor could the miſchief ariſing to the public, from ſuch pernicious practices, be prevented. The confeſſion of judgment in this caſe, cannot alter the rights of the parties; for the defendant may not always know, whether he can eſtabliſh the fact, and unleſs he could prove it, it would be unneceſſary to plead, or even to defend the cauſe. It was to obviate this inconvenience, that the remedy pointed out by the act was provided. He cited *Dougl.* 743, which recognizes the caſe of Bowyer & Bampton.

The PRESIDENT not ſitting in the cauſe, LYONS, J. delivered the opinion of the court.—After ſtating the caſe, and that the aſſumpſit of Beverley to Dixon was after he came of age, he proceeded. It is not important to decide upon the propriety of admitting Mr. Smith's depoſition. The principal objection is, that this was a gaming debt, contracted by an infant, which no ſubſequent act of his, nor any transfer could make valid. It is in general true, that an aſſignee of a bond of this ſort, can be in no better ſituation than the obligee, and the caſes cited at the bar ſufficiently eſtabliſh the point. But the preſent caſe is very different upon principle from thoſe caſes, and that difference, is produced by the conduct of Beverley, who by his aſſurances of payment, induced Mr. Dixon to receive an aſſignment of it. He not only concealed from him the legal objections to the bond, but afterwards aſſumed to pay it, and when ſued, voluntarily confeſſed a judgment.

The privileges allowed to infants are intended to protect them from injury, not to furniſh them with the means of deceiving, and of defrauding others; and if negotiable papers, accepted by others, under all the caution uſed by Mr. Dixon in this caſe, were permitted to be ſet aſide, there would be an end put to the negotiability of ſuch papers, and to all confidence between man

and

and man. Why did not Beverley avail himself at law, of the ſuppoſed advantage, which he now relies upon in this court? But ſuppoſe he had pleaded it, and the plaintiff had replied the ſpecial matter, "that he had been induced by the defendant to receive the bond;" upon a demurrer, the law would have been decided in his favor. 2 *Mod.* 279. If he had pleaded infancy, he might have avoided *the bond*, but certainly in another action, the plaintiff upon proving his aſſumpſit after his attaining full age would have ſucceeded. If then, this would have been his fate at law, upon no principle can he expect, that a Court of Equity will aſſiſt him in impoſing upon innocent third perſons a loſs produced by his own fraud.

Upon the whole the court affirm the decree.

MINNIS, Ex'r. of AYLETT and others, *againſt* PHILIP AYLETT.

THIS was an appeal from a decree of the High Court of Chancery, and the queſtion depended upon a clauſe in the will of William Aylett the father of the appellee, wherein he deviſed to the appellee and his heirs, "the plantation on which "he then lived, and all his lands in the county of King Wil-"liam, alſo his land in Drummond's neck in James City coun-"ty." The teſtator at the time of making his will, and at his deceaſe, was ſeiſed of an eſtate of inheritance, in a tract of land in the county of King William, upon a part of which he lived, the reſidue being in the poſſeſſion of others, under leaſes. He was alſo entitled to a leaſehold intereſt for the term of 999 years in another tract of land lying in the ſame county, but of this laſt he was not poſſeſſed. He commenced a ſuit for the recovery of it, which abated by his death. His executors revived the ſuit after his death, and recovered the land. The appellee filed his bill in the High Court of Chancery, againſt the executors and reſiduary deviſees of the teſtator, claiming the leaſehold as well as the freehold lands. The only queſtion was, whether the leaſehold land paſſed under the above clauſe to the appellee, or was comprehended in the reſiduary clauſe in the will. The Chancellor decreed in favor of the appellee, upon his giving bond