REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

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DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh year of the Independence of the United States of America, LEWIS MOREL, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. I. By WILLIAM MUNFORD."

IN CONFORMITY to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of "maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, "supplementary to an act, entitled an act for the encouragement of learning, "by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending "the benefits thereof to the arts of designing, engraving and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

Dangerfield *against* Rootes, Administrator of Baylor.

Tuesday, November 27.

THIS was an appeal granted by a Judge of this Court, under the act passed *January* 27, 1810,(*a*) from an order of the Superior Court of Chancery for the *Richmond* District, dissolving an injunction, which *John Dangerfield* had obtained to stay proceedings on a judgment confessed by him, at the suit of *Thomas R. Rootes*, administrator of *John Baylor*, jun. deceased, on a bond to the said *Baylor*, in his life-time. Pending the suit on that bond, the appellant, (as alleged in his bill,) for a *valuable* consideration, purchased of *John Nicholson* several claims which the latter had (in right of his wife) against the said *Baylor*, as executor and devisee of his father, *John Baylor*, sen., as administrator of his mother, and as executor of his brother, *George Baylor;* but which were much disputed by him in his life-time. Suits in Chancery to recover them had been brought, and by his death had abated.

A debtor ought not to be allowed a set-off (*even in equity*) for *unliquidated* and *disputed* claims against his creditor, purchased by him *after suit brought* by the creditor against him.

(*a*) *Sessions Acts of* 1809, c. 11. s. 2.

The object of *Dangerfield* in making the purchase was to set off those claims against his own debt then in suit: and, in his bill, he alleged that the claims of Mrs. *Nicholson* were debts of the *first* dignity against the estate of the said *John Baylor*, jun. a part thereof, viz. a legacy of 300*l.*, being charged on the estate real and personal devised to him by *John Baylor*, sen.; and the residue (as was alleged) due from him as administrator of his mother, and executor of his brother *George*.

ROOTES, the administrator with the will annexed of *John Baylor*, jun. having filed his answer, denying the plaintiff's equity, and insisting that the money due on the bond from *Dangerfield* ought not to be thus intercepted, since he might thereby be compelled to commit a *devastavit;* the Chancellor dissolved the injunction; being of opinion that "it was settled in the case of *Alexander* v. *Morris and others*, 3 *Call*, 105. to be improper for a debtor, after suit brought, to trump up claims against his creditors, in order to discount them; especially, when purchased at an under rate; and that, if the principle was correct in that case, as between those parties, it should be applied with increased force in this case; since it might have the effect of subjecting the administrator to acts, which, but for that, he might avoid."

Upon a petition for an appeal, it was granted by Judge ROANE,

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for the following reasons assigned by him in his written mandate, addressed to the Clerk of the Court of Chancery: "I am far from being prepared to say that the ground taken by the Chancellor, in dissolving this injunction, is erroneous: yet I think the case deserves deliberate consideration; and, on that ground, I am of opinion to allow the appeal; especially, as the act of Assembly has provided for a *prompt* decision in such cases. The case of *Alexander* v. *Morris*, 3 *Call*, 105. has indeed a general *dictum*, seeming to reprobate discounts, 'trumped up,' after the suit has been brought; but that case may have turned upon the extreme (not to say fraudulent) circumstances, under which the discounts in question were acquired; and it is the best and safest rule of interpretation to test a case by the actual circumstances of it. On the other hand, it is held in the case of *Hudson* v. *Johnson*, 1 *Wash.* 10. 'that it has been always the practice, and very properly, to allow discounts *up to the time of trial*, but so as *not to destroy the plaintiff's action*, and entitle the defendant to *costs*.' There can be no substantial difference between acquiring the bond of an obligor (after a suit has been brought by him) by a *fair* assignment for valuable consideration, (our act having legalized such acquisitions,) and acquiring his bond, subsequently, for money *lent him*, which would undoubtedly be received as a discount, I presume, under this last decision, with the aforesaid restriction, that the *whole sum* in suit is not to be thereby extinguished, and the plaintiff subjected to *costs*. The decision in this case does not even allow the complainant the benefit of the proffered discount, (if substantiated,) and within the limits of the restriction aforesaid: and any construction upon this point, as *at law*, would seem to hold *à fortiori* in equity; keeping, nevertheless, a steady eye upon the real justice of the case. If, under the *English* statutes upon this subject, it was once held that debts *subsequently* acquired might be set off; (see *Douglas's Reports*, 112. *Reynolds* v. *Beerling*, in a *note;*) and it has only been recently decided otherwise in the case of *Evans* v. *Prosser*, (*Douglas's Additions*, p. 10.) whereby it appears to have been a vexed question in *that* country; it at least deserves consideration whether the *former* principle is not the law in *Virginia*, under the more *latitudinous* words of our act on the subject. Those words are, 'that the defendant shall have liberty *on the trial* to make *all the discount he can* against the debt, and, *on proof*, the same shall be allowed him in Court.'

"On the ground of the doubts entertained in this case, I am of opinion to allow the appeal; the complainant first giving bond and security in the amount of double the debt and interest recovered against him by the judgment which was enjoined.

"SPENCER ROANE."

In this Court, a number of points were made in argument, by *Botts*, for the appellant, and *Call* and *Wickham*, for the appellee; but, as the decision here turned on a *single* point, and the doctrine upon it (with the principal authorities relating to it) is sufficiently expressed in the following opinions of the Judges, the arguments of counsel may with propriety be pretermitted.

Saturday, *December* 1. The Judges pronounced their opinions.

Judge TUCKER, after stating the case, proceeded as follows:

In the case of *White*, *Whittle & Co.* v. *Bannister's Ex'rs*,(a) this Court appears to me to have laid down the same doctrine with that expressed in *Alexander* v. *Morris*, and to have gone the full length of the Chancellor's reasons for the dissolution of this injunction. The case of *Brown's Adm'x* v. *Garland*,(b) (though an action at *law*,) contains, I apprehend, a direct application of the same principles. These authorities, I conceive, fully support the opinion of the Chancellor; and I will add the strong and pertinent observation of Mr. *Wickham* in his argument, that if set-offs of this kind were encouraged by the countenance and sanction of this Court, a debtor by bond, or other liquidated demand, who was unable or unwilling to pay his debt, when judgment was recovered against him, would be sure to look out for the most complicated and perplexed claim that he could hear of against his creditor, as that would ensure him a respite of ten or twenty years before the claim could be properly liquidated. The only question before the Court being upon the propriety of dissolving the injunction, I am of opinion the Chancellor's decree ought to be affirmed.

(a) 1 *Wash.* 166.

(b) 1 *Wash.* 221.

I desire to be understood as giving no opinion whatever upon any other point in the cause.

Judge ROANE concurred in dissolving the injunction.

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Judge FLEMING. This case seems to rest upon the single point, whether the appellant has a right to produce the *unestablished* claim (however just) of *Nicholson*, purchased up, for what consideration does not appear, as a set-off against his own bond, long after a suit had been instituted on it?

There are several decisions of this Court which seem expressly against the principle. As *White, Whittle & Co.* v. *Bannister's Ex'rs and others.* In that case the Court would not allow a *judgment* against the executors, assigned to the appellants as a set-off against *rent* due to the estate of their testator; because, said the Court, "if creditors, purchasing from the executors, or as in that case, renting an estate from them, should be permitted to bring forth their claims against the testator, in discount, they might thereby not only gain an advantage over other creditors, but the executors might be involved in the trouble of accounting for the assets on every purchase; and in case of mistakes, might subject themselves to a *devastavit.* The objection has additional weight where the plaintiffs purchased up the debt for the *purpose* of a discount." If, in that case, then, a *judgment* against the executors was not admitted as a set-off, *à fortiori*, shall an *unestablished* claim (however just it may ultimately prove to be) be disallowed. The cases of *Brown's Adm'x* v. *Garland and others*, (1 *Wash.* 221.) and *Alexander* v. *Morris*, (3 *Call*, 105.) go to establish the same principle.

The only case I have been able to find which *seems* to have a contrary tendency, is that of *Hudson* v. *Johnson;* (1 *Wash.* 10.) but, when examined, it appears very different from the case before us. *There* the defendant, on the trial of the issue of payment, produced a *receipt* from the attorney who prosecuted the suit, dated after its commencement, which receipt was allowed as a discount; the defendant having proved, that on application to the plaintiff to know where his bond was, he replied that it was in possession of *Lewis*, his attorney: but the receipt having been given subsequent to the suit, the Court adjudged to the plaintiff his costs.

I am of opinion that there is no error in the decree before us, dissolving the injunction.

Decree *unanimously* affirmed.

END OF OCTOBER TERM.