REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

LOVE *v.* BRAXTON *and* HAM.

1805. *October.*

A purchaser who obtains a conveyance, without notice of a prior equitable lien, will be supported.

The court of chancery, when the evidence is all in the record, may decide the cause, without directing an issue.

And if an issue be directed, and the verdict should not be satisfactory, it may set aside the verdict, and decide the cause without another trial.

The answer must be contradicted by two witnesses, or one witness and strong circumstances.

But the depositions of single witnesses, to different conversations at different places, will not support each other.

Quære. Whether a purchaser will be affected by notice of *rumours* only?

Love filed a bill in chancery against *Braxton* and *Ham*, stating, That, upon the 1st of July, 1783, *Braxton*, being indebted to him, gave him a power of attorney to receive, from *Power*, the proceeds of the sale of a moiety of an estate in England, or to sell it himself, for the purpose of paying the said debt. That *Ham*, with full knowledge of the premises, had since purchased and obtained a conveyance of the estate from *Braxton;* and was about to leave the commonwealth. The bill therefore prays for a writ of *ne exeat*, and for general relief.

The answers state, that *Ham*, who was a foreigner, arrived in Virginia, with a cargo of goods from England, on the 15th of July, 1783; and, on the 18th of that month, entered into partnership with *Braxton;* when it was verbally agreed that *Braxton* should sell *Ham* the English estate, (possession to be delivered on the 29th of September, 1783,) for £6000 sterling, to be paid in goods; which were to be put into the trade, as the in put stock of *Braxton;* who was to have the superintendence of the business, and forthwith entered on it. That a conveyance of the English estate was made to *Ham* by *Braxton*, on the 25th of February, 1784; and that *Ham*, neither at that time, nor at any time before, had notice of *Love's* power of attorney. That the partnership between *Braxton* and *Ham*, was dissolved in March 1784, upon *Ham's* discovering that *Braxton* had drawn out from

1805. *October.*

Love v. Braxton and Ham.

time to time, sums equal to the whole value of his in put stock. That, on the 8th of June, 1784, *Braxton* gave *Love* security upon two tracts of land in Virginia, in lieu of the English estate, which was by mutual consent discharged.

Love's power of attorney contains a stipulation that if *Braxton* revoked it, he should forfeit £3000 sterling.

Several witnesses were examined relative to the notice.

The court of chancery directed an issue as to the notice; and, if found for the plaintiff, that the jury should assess damages.

The jury found, "that *Ham* had purchased the said moiety of the English estate, and paid a considerable part of the purchase money, prior to his knowledge of *Love's* lien; and consequently that the latter was entitled to no damages."

The court of chancery set aside the verdict as indecisive, and awarded a new trial.

The second jury found, that, at the time *Ham* purchased, he knew of *Love's* lien; and assessed damages to the plaintiff.

The defendant filed the affidavit of a witness stating, that seven of the jurymen upon the last trial, had since acknowledged, that the verdict was composed of an average of the different opinions of the twelve jurors.

The court of chancery set aside the second verdict also; and, without ordering another trial, dismissed the bill upon the merits.

Love appealed to the court of appeals.

It was contended, for the appellant, that the second verdict was conclusive that *Ham* had notice at the time of his purchase; and that it ought to have been sustained by the court, as the mode pursued by the jury in estimating the damages was unexceptionable. That it was right to direct the issue; and therefore, if the verdict was to be set aside, the chancellor ought not to have decided the cause himself, but should have ordered another trial of the issue. That it was unimportant whether *Ham* had notice at the time of his purchase, or at the time he took the conveyance, as, in either case, he was affected by it.

1805. *October.*

Love v. Braxton and Ham.

On the other hand, it was contended for the appellees, that, as there was no conflict among the witnesses, and all the testimony stood in the record, the chancellor ought not to have directed the issue, but should have decided the cause himself. *Southall* v. *M'Keand*, 1 Wash. 336. That the merits of the case were clearly with *Ham*; for his answer denied notice: and there was no legal evidence to convict him of it: for the information of *Ronald*, (whose testimony was nothing against the answer,) was not authorized by *Love*, and *Ham* had a right to consider it as a rumour, which he was not bound to regard. *Goulds.* 147. 3 *Ves. jr.* 478. That *Love* himself gave no direct notice, until the 20th of April, 1783, long after the conveyance was made; but kept a studied silence, which put it out of the power of *Ham* to secure himself from other sources. That the power of attorney itself, contained a relinquishment of the estate in case it was revoked; which was to be compensated for by the £3000 sterling, as stipulated damages.

Cur. adv. vult.

ROANE, Judge. The agreement between *Love* and *Braxton* of the 1st of July, 1783, was intended to secure the payment of a debt due by the latter to the former. Where the direct purpose of an agreement is to insure the performance of any act, the penalty to secure it shall not be considered as liquidated damages, and obstruct the specific execution of the agreement. This is supposed to be more strongly the case, where the purpose is to secure the payment of a debt certain, or capable of being ascertained; the principle then falling in with the general attribute of equity, to relieve on payment of the principal sum due, with interest. It is not denied that parties may liquidate their damages; but this case is not of that kind. In this case, a power to revoke is only reserved, at most, by implication; and the term *forfeited*, used in the agreement, as relative to the £3000, is strong to confirm the general idea resulting from the nature of the instrument, *i. e.*, as importing that sum to

1805. *October.*

Love v. Braxton and Ham.

be a penalty, and not the agreed damages. The case of *Howard* v. *Hopkins*, 2 Atk. 371, is supposed to be similar to the present. That was a bill for the specific performance of articles for the purchase of an estate, having a proviso that if either party should break the agreement, he should pay £ 100. The defendant, meeting a better offer, sold the land, yet a performance was decreed; and by lord *Hardwicke*, the stipulated sum cannot let him off from a performance. It might have been put in to pay for the plaintiff's trouble in viewing the land, and in case the defendant should be unable to make a title. That it was the common case of a penalty, which is never held to release from a performance.

The agreement then, notwithstanding the penalty, created a lien upon the English estate in the appellant's favour: But that estate is beyond the reach of our courts, and perhaps, beyond the reach of any court, in consequence of the decree of the English court of chancery relating thereto. If, then, Mr. *Braxton* is now indebted to the appellant, and the latter has not released that lien by subsequent agreements, (both of which questions remain to be decided between him and the representatives of *Braxton*,) the appellant has a right to proceed against *Ham*, if, in depriving him of his lien, the appellee has contravened the principles of equity: or, in other words, if he purchased, or went on to complete his payment to Mr. *Braxton*, having knowledge of the lien aforesaid.

The issue, made up and tried in Williamsburg, admits of two enquiries, 1. Whether this knowledge existed? 2. Whether any, and what damage arose to the appellant from the intromission of the appellee? The jury find the knowledge, and assess £ 1380 damages. This last enquiry respecting damages is involved with Mr. *Braxton's* part of the case. The verdict of the jury, in relation to it, must be taken to be conditional; for surely, if it should turn out hereafter that nothing was due by *Braxton* to the appellant, or that the lien on the English estate had been previously released by him, (both which enquiries are still pending and unde-

termined,) it will undoubtedly appear to the court, and must so have been understood by the jury, that no injury has been sustained by the appellant. It could, therefore, have been wished that this cause should have been decided *in toto*, so as to make an end of it as to all parties, and to the whole subject: But as there seems no probability of Mr. *Braxton's* having a representative, and as it would be unreasonable to hang up *Love* forever in respect of a debt to which, as it now seems, he has a just title, I will give my opinion on the subject between the now parties, with this reservation nevertheless, that the court of chancery, if it is desired, should, by permitting *Ham* to become administrator *quoad hoc*, or in some other mode to be devised by it, enable him to defend himself by taking either of the grounds just mentioned. This, however, will be wholly unnecessary, if that court is of opinion against the appellant upon the other point.

Upon that point under the positive and contradictory testimony which exists, it was emphatically proper for the court of equity to direct an issue. In a case of this sort the court ought not to lose sight of the superior advantage of a *viva voce* examination in relation to the manner of deposing; nor even of the power of the jury, as in other cases, to find a verdict on their own knowledge. Both these clues to truth are lost in a trial by mere depositions. In the present case, it is not indeed stated, that there was other testimony than that now before us: But neither is the contrary stated; which it is supposed the appellee ought to have done, if he meant to appeal from the verdict. In the silence of the record on this subject, it is rather to be presumed that enough testimony was given to warrant the verdict. This inference is corroborated by the silence of the judges in relation to its being contrary to the weight of evidence. It is further corroborated by the consideration that the loose assertions of some of the jury (stated by Mr. *Starke*), only go to the point of damages, and not to the point of the want of knowledge of the lien. I cannot, therefore, in this naked case,

1805. *October.*

Love v. Braxton and Ham.

an emphatic case for weighing testimony and deciding on credibility, agree with the chancellor in departing from the verdict. The loose matter, stated in Mr. *Starke's* affidavit, of conversations by some of the jurymen which they refused to swear to, and which, if sworn to, touched not the point submitted on the first issue, is entitled to no credit whatever. It is infinitely looser than any thing of the kind ever before relied on: It should not, therefore, have weighed with the judge, as it seems by the decree to have done, in departing from the verdict.

With my present impressions, under the existing circumstances of this case, it is not necessary for me to say, on which side, in my judgment, the weight of the written testimony lies. It is at least equivocal, and thus determines my opinion in favour of the verdict, subject to the condition before stated in relation to Mr. *Braxton's* part of the case.

I am therefore of opinion, that the decree ought to be reversed, and entered for the appellant, subject, &c. as before mentioned.

FLEMING and CARRINGTON, Judges. What would have been the effect of *Love's* power of attorney in England, is unnecessary for us to decide, under the view we have taken of the cause.

There was no occasion for directing the issue, as the evidence all stood in the record, and there was neither conflict among the witnesses, nor imputation upon their credit. Therefore, as the chancellor was justly dissatisfied with the verdict, he was at liberty to set it aside, and decide the cause himself; especially as it does not appear that the former witnesses were examined again, or any new evidence introduced, upon the trial. *Southall* v. *M'Keand*, 1 Wash. 337. *Wythe's Rep.* 120.

Delivered from the verdict, the first enquiry that presents itself is, Whether *Ham* purchased with notice of *Love's* power? And we think, the evidence falls very far short of establishing the fact. For the whole proof, with regard to

it, is the testimony of single witnesses, to distinct facts, unsupported by circumstances, against the positive denial of the answer; and therefore not to be regarded.

A slight review of the case will establish this.

Love's power is dated the 1st of July, 1783: *Ham* arrived in Virginia the 15th: And the purchase was made on the 18th. It was therefore next to impossible that *Ham* should have known of the power, as *Braxton* took pains to conceal it, and he had no means of obtaining information.

The question then is, Had he notice of it at any time afterwards, before the money was paid, and the deed was executed?

Ronald says, that, without any authority from *Love*, he mentioned to *Ham* in the city of Richmond, about November 1783, that there was such a power. But the probability is, that the conversation, whatever it was, and whenever it happened, was very loose, and that he was mistaken as to the period. For he speaks of *Ham's* purchase as conditional, whereas there is the clearest proof that it was absolute: And the testimony shews that the interview could not have been at the time he states. For *Shermer*, *Currie* and *Reddick* prove that *Ham* could not have been in Richmond during the month of November, being confined by sickness in Hanover town from the 12th of October; which is confirmed by *Braxton's* letter to *Love* late in November 1783; and by the circumstances, that *Aldridge* was the confidential counsel of *Ham* until the spring of the next year; that *Braxton* was himself endeavouring to purchase *Mary Claiborne's* moiety until March 1784, in order to enable him to keep up the trade with *Ham;* that *Ham* did not think of purchasing until *Braxton* declined; and that he bought it in August 1784. All these circumstances render it probable that the conversation was after the 24th of February, when *Braxton* executed the deed, and the subsequent departure of *Aldridge* from this country in March, as *Ham* might then stand in need of other counsel, before he would embark in the additional purchase. But be that as it may,

1805. *October.*

Love v. Braxton and Ham.

the alledged conversation is supported by no other person, or circumstance; and therefore the deposition of that witness is unavailing against the positive denial in the answer.

Claiborne, the next witness, *thinks*, that in a *jocular* conversation, it was mentioned in the presence of *Ham* and *Aldridge, at his house*, in October or November, by *Shermer*, as coming from *Beal;* but admits that *Aldridge's* letter makes him doubt: And he is completely repelled by *Shermer*, *Aldridge* and *Beal:* The two first positively denying the conversation; and the latter stating, that he does not recollect to have ever mentioned it to *Shermer*. But, if the mistake had not been thus fully shewn, it would have been no more than the declaration of a single witness, contradicted by the answer, and not otherwise supported. For *Ronald* spoke of a different communication, and at a different place; and therefore those two witnesses do not aid each other; because the circumstances to fortify a witness, whose statement is contradicted by the answer, must be clearly proved by indisputable evidence, and not by the deposition of another witness relating different facts, and contradicted in the same manner; for both depositions being annulled by the answer, neither can be resuscitated, and brought to succour the other.

Nor does *M'Roberts* afford them any assistance. He states, that, in 1785 or 1786, after the purchase money had all been paid and the conveyance executed by *Braxton*, *Ham*, who lived in Hanover town, shewed him *Love's* letter of the 20th of April, 1784, in Richmond; and acknowledged that he knew of the power, either at the time of the purchase, or the making the conveyance, which of them he does not recollect. But to say nothing of the improbability, that *Ham* should be travelling about with a letter of so old a date, and should voluntarily make admissions calculated to overthrow his defence to the suit which was already commenced, it is clear, that if either period was mentioned, it must have been that of the *conveyance;* because it was impossible, as before observed, that *Ham* should have been

apprized of it, when he contracted with *Braxton* in July 1783; and accordingly, there is not the slightest evidence that he, at that time, had any such knowledge. But, if the *conveyance* was the time spoken of, it is contradicted by the answer, and is not supported either by *Ronald* or *Claiborne*, both of whom speak of different periods.

There is no other testimony, upon this point, worth attention. For the attempt to shew by *Griffin*, that *Aldridge*, the attorney of *Ham*, had notice, proved abortive.

But it may be more than a question, how far casual conversations, without any exhibition of papers, or authority, from parties interested, to make the communication, would affect a purchaser; for the English decisions seem to countenance the idea, that he is not bound to take notice of rumours. However, we give no opinion upon that point; because it is unnecessary, as there is no evidence, against the positive denial in the answer, that *Ham* ever heard the rumours.

We have no hesitation, therefore, in pronouncing that the notice is not proved.

But, if it were otherwise, *Love* would still not be entitled to relief. For the answer of *Braxton* expressly charges, that the Virginia lands were exchanged for the English estate, in July 1784, after *Ham's* purchase was known to *Love:* and we think the charge is supported by the evidence. For, in the first place, it is not perceived what other motive *Braxton* could have had for entering into the new security, which seems to have commenced in a proposition to abolish the old one. But passing that over, *Warden* proves, that *Love* and *Braxton* applied to him in New Castle, to assist them, as counsel, in settling *all their affairs*, comprehending, as he conceived, the English estate, but that his engagements did not permit him to comply with their request. This is corroborated by *Brooke* and *Ingram*, who, as well as *Ham*, were there at the time; and who say, they understood, that the English estate was given up, and the Virginia lands accepted in lieu of it; that it was the general conversation of

1805. *October.*

Love v. Braxton and Ham.

the day, that *Braxton* proclaimed it; and that nobody contradicted it. Nor does it appear, that *Love* ever denied it, until the institution of this suit, in the latter part of the year 1785, although his silence was calculated to lull *Ham* into security, if he had been vulnerable, and to prevent his taking steps to secure himself. We conclude, therefore, that the Virginia lands were exchanged for the English estate; and that the latter was discharged by mutual consent.

Upon the whole, we are of opinion, that the decree of the chancellor is right; and it is accordingly affirmed.

1805. *November.*

BRANCH *&* *al.* *v.* RANDOLPH.

Upon a sheriff's bond for collection of taxes, a general assignment of breaches in the words of the bond, is sufficient after a writ of enquiry executed.

Under the ordinance of convention, and the act of 1782, the sheriff's bond was properly made payable to the governour.

Taxes collected, might, under the acts of 1794, 1798, have been recovered in the name of the governour.

Branch and others entered into a bond, on the 5th of March, 1784, to *Benjamin Harrison*, as governour of the state, and his successors, in £ 10,000, with the following condition annexed, viz. "The condition of the above obligation is such, that if the above bound *Benjamin Branch* do, and shall truly and faithfully collect, pay and account for all taxes imposed in this said county, by virtue of an act of assembly intituled, '*an act to amend and reduce the several acts of assembly for ascertaining certain taxes and duties, and for establishing a permanent revenue, into one act,*' then the above obligation to be void, otherwise to remain in full force and virtue."

Upon the foregoing bond, a suit was brought in the name of *Edmund Randolph*, esqr., governour of Virginia, who suc-