REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR THE RICHMOND DISTRICT.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)

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1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. The second edition, revised and corrected by the "authors. Volume I. By William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "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, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie-"tors 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."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

AT

A SPECIAL COURT OF APPEALS(1)

HELD

AT THE CAPITOL IN THE CITY OF RICHMOND,

On Thursday, the 20th of November, 1806.

PRESENT

Judges LYONS and ROANE } of the Supreme Court of Appeals.

WHITE, STUART and HOLMES } of the General Court.

Randolph's Executor *against* Randolph's Executors and others.

Thursday, November 20.

ON an appeal from a decree of the High Court of Chancery, whereby a bill of review filed by the appellees against the appellant had been sustained, and relief granted pursuant to the prayer of the bill.

Additional circumstances, merely *confirming* facts proved in the original cause, do not furnish sufficient grounds for a bill of review.

The original bill (which was exhibited, in March 1791, by the appellees as representatives of *John Randolph* against the appellant and others, executors of *Richard Randolph*) stated, that *Richard Randolph* the elder, (father of *Richard Randolph* the younger, and of *John Randolph*) died in 174–, leaving a widow and several other children therein named, (but all since dead,) among whom was the said *Richard* the younger, who was one of his executors; that by his will, proved in 1749, he devised a large estate real and

Where a Jury have found a verdict for the plaintiff in an action of debt on a bond, an *account* of transactions, which (although partly subsequent to the date of the bond) are old and stale, ought not to be allowed, for the purpose of obtaining a discount against it.

(1) A Special Court of Appeals is constituted whenever all or a majority of the judges of the Supreme Court of Appeals are interested in a case brought before them.—See, as to the manner of organising this Court, *Rev. Code*, vol. 1, chap. 63. p. 61. sect. 5, 6, 7, 8, 9, 10.

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personal to his sons, part of which consisted of 50,000 acres of unpatented land in the county of Bedford, one fourth whereof, by a residuary clause in his will, *was given to his said son *John*; that *Richard* the younger took possession of the whole estate, received the profits, collected the debts, sold the above mentioned tract of land, and received the purchase-money; but made up no account of administration; nor did he ever come to a settlement with *John* for his proportion of the residuary estate;—that *John* (being very young at the death of the testator) continued to live with his brother *Richard*, who received the profits of his estate, furnished him with necessaries, and, probably, made him advances of money, even till after he came of full age; that, in 1764, *John* executed his bond to *Richard* for 635*l.* 15*s.* 1*d.*; merely, it is believed, as an evidence of advances made by him to *John*; and not as the result of their mutual accounts, which were afterwards to be settled; that *John*, in negotiating a loan of 4,000*l.* sterling from *Capel* and *Osgood Hanbury* of *London*, paid them, out of that sum, 960*l.* 13*s.* 6*d.* sterling, on account of a debt due them from the estate of *Richard Randolph* the elder; that this payment (which was evidenced by a mortgage, from *John Randolph* to the *Hanburys*, dated in 1768) was made with the privity and approbation of *Richard* the younger, and was chargeable, of course, to him as executor, to be accounted for at the final settlement; that, (*John* and *Richard* the younger being both dead,) *D. M. Randolph* (the son of *Richard* the younger and one of his executors) having acquired by assignment from his father in his life-time the bond of 635*l.* 15*s.* 1*d.* instituted a suit thereon in the General Court, and recovered a judgment for the full amount, although the accounts of the administration of *Richard* the son had never been made up, and *John* had never been reimbursed for the payment to the *Hanburys*; that *D. M. Randolph* refused to render any account of the administration aforesaid, or to allow any credit for the said 960*l.* 13*s.* 6*d.* although the circumstance that the bond had lain more than 20 years without any demand of payment furnished a strong presumption that some right to a set-off existed; and although it was evident, (since the payment to the *Hanburys* was subsequent to the date of the bond, and to discharge a debt properly payable by *Richard* the younger, in his character of executor, out of the estate of *Richard* the elder, which was amply sufficient; since no account of his administration had been made up;—and a receipt from the *Hanburys* to *John*, also subsequent to the date of the bond, which receipt had been

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mislaid, expressed the said payment to have been made on account of a debt due from *the estate of *Richard* the elder;) that some future settlement was intended to have taken place between *Richard* the younger and *John;* and that *D. M. Randolph* knew those objections to the discharge of *John's* bond before he accepted an assignment of it.

The prayer of the bill was for a full discovery and answer by *D. M. Randolph* as to the consideration for which the said bond of 635*l.* 15*s.* 1*d.* was given, and the consideration of the assignment to himself; for satisfaction for the payment of 960*l.* 13*s.* 6*d.* made as aforesaid to the *Hanburys;* for an account to be taken of the administration of *Richard* the younger on the estate of *Richard* the elder, and a settlement of all accounts between the estates of *John* and of *Richard* the younger; for an injunction to the judgment of the General Court rendered on the bond of 635*l.* 15*s.* 1*d.*; and for general relief.

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To this bill was annexed the affidavit of *Jerman Baker*, stating, that, about the year 1774, he was appointed, by the Court of *Henrico* County, a commissioner to examine the account of the administration of *Richard* the younger on the estate of *Richard* the elder; that some progress was made in the settlement, but the interruption of business occasioned by the war prevented it from being finished; and he believed that *Richard* the son never made any settlement of his executorship, nor of the accounts between him and his brothers.

The answer of *David Meade Randolph* states that, in 1785, he accepted from his father, *Richard Randolph*, an assignment of the said bond, as an indemnity for a securityship, and for advances of money previously made; that his father, he believes, was the only acting executor of *Richard Randolph* the elder, the payment of whose debts nearly absorbed his whole estate; that of the *Bedford* lands he knows nothing, but had understood they were barren and not worth sixpence an acre; that he knows not whether they were ever patented or sold by his father; that *John* was an expensive young man, and lived with *Richard* till his marriage, which was some time after he attained his full age; that *Richard* annually furnished him with large sums of money, and imported goods for him to a considerable amount; that an account annexed from the books of *Richard* shewed that in 1762 and 1769 a larger sum was due from *John* than the amount of the said bond, and that both anterior and subsequent to 1769, there had been but little variation in the state of their accounts; that although *Richard* might not have settled the accounts of

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*his executorship, yet the circumstance that the bond had been given by *John* after he came of age was an evidence that it was due, and that a Court of Equity, after such a lapse of time, will presume so; that *Virginia* estates, especially at a distance, are well known to be unprofitable; that the various circumstances of *John's* being the brother of *Richard;* of the occlusion of the Courts by the war, and the consequent exception of time from the statute of limitations, sufficiently accounted for the bond's having lain so long undemanded; that *John* must have been 26 or 27 years of age when he executed the mortgage to the *Hanburys;* and the payment made to them is supposed by the respondent to have arisen from the knowledge of *John* that he owed so much to his father's estate; that the facts stated in the bill appear to be the suggestions of *Jerman Baker*, who knew much of these transactions, and who, upon seeing the bond before suit was brought, observed that he was satisfied it was due.

The exhibits filed were, 1. The will of *Richard Randolph* the elder, dated in 1747, and proved in 1749. 2. The mortgage from *John Randolph* to the *Hanburys* dated in 1768, reciting the loan of 4,000*l.* sterling, and the payment by *John* to them of 960*l.* 13*s.* 6*d.* on account of the estate of *Richard Randolph* the elder, which mortgage was recorded, in the same year, in the General Court. And 3. An account of *J. Hanbury & Co.* against the estate of *Richard Randolph* the elder, for balance of a certain *John Randolph's* account amounting, in May 1751, to 493*l.* 10*s.* 8*d.*

Upon a hearing, in *March*, 1799, the bill of *J. Randolph's* representatives was dismissed by the Chancellor;—and, on an appeal to the Supreme Court of Appeals, that decree was affirmed. (See 2 *Call*, 537.)

But in *May*, 1801, those representatives were permitted to file a bill of review; which states, that all the foregoing proceedings took place; that since *March*, 1799, when the original suit was finally heard in Chancery, they have discovered a paper, unequivocally shewing the payment aforesaid to the *Hanburys*, about four years after the date of *John's* bond, for the benefit of *Richard* the younger; that *Thomas Randolph*, executor of *John*, has never heard of this paper, and, from infirmity, has taken no part in the transactions of the estate; that *John's* representatives ought not to be bound by a decree, in which the said *Thomas Randolph* was a nominal plaintiff, and the suit itself was unattended to; that *Richard* the younger was the *guardian* of *John*, who attained full age in 1763; that

**John's* bond to *Richard* the younger was dated in 1764; and in 1768, *John* paid to the *Hanburys*, for *Richard* the younger, at the mansion-house of the latter, 960*l.* 13*s.* 6*d.* sterling; that *John* lived for more than ten years after the date of his bond; and no payment was demanded of him; nor was it assigned to *David M. Randolph* until 20 years afterwards; that the executrix of *John* often called upon his creditors to present their claims, and she never heard of this, although *Richard* the younger was under great pecuniary embarrassments, and was not restrained by any cordiality between the families; that the *John Randolph* mentioned in the account exhibited by *D. M. Randolph*, plainly related to a different *John Randolph*, who had been a ward of *Richard* the elder.—The prayer of the bill is for a review and reversal. An amendment was filed to the bill of review; stating, that *John's* minority continued fourteen years; that he was educated at an expense of not more than 50*l. per annum;* that his education and maintenance were to be at the cost of his father's estate; and he was not to have possession of his estate, which was very productive, until full age; that the residuary estate of *Richard* the elder was very productive.

The answer of *D. M. Randolph* to the original bill of review, says, that he pleads the former decree; that he doubts not the receipt of *Hanburys'* agents, set forth in the bill; that he admits *Thomas Randolph* of *Dungeoness* to be a nominal defendant; that he insists, however, that the present claim is not varied from the one already decided, and now sought to be reviewed; and is merely argumentative. In his answer to the amended bill, he denies the productiveness of the estate of *Richard* the younger; and repeats in substance, what he had before said in his first answer; admitting that the accounts of the administration of *Richard* the younger had never been settled.

The deposition of *St. George Tucker*—He intermarried in 1778, with Mrs. *Frances Randolph*, the widow of *John*, but meddled not with the settlement of the accounts. *John's* executors paid 30 or 40,000 dollars into the treasury, in satisfaction of his mortgage to the *Hanburys*. She often complained, that *John's* estate should have been mortgaged to them, for paying a debt of *Richard* the younger and his brother *Ryland*, and urged *John's* executors to bring a suit. She said, that *John*, though dissatisfied, had been restrained, by affection for *Richard* the *younger, from suing him; that she always considered * 186
John's mortgage to the *Hanburys*, as an accommodation to *Richard* the younger. The delay of a suit against *Rich-*

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ard the younger may be ascribed to the death of one executor, the necessary absence of another, and some backwardness in the counsel spoken to, to sue an old friend. *Tucker* never heard of the bond in question, until 1785 or 1786; and Mrs. *Frances Tucker* declared, that she had never before heard of it. At length, in *December*, 1787, *Tucker* issued a subpœna in Chancery in this business; about which time Mrs. *Tucker* died. The bill was filed in *April*, 1788, and contained the information received from her; but the suit was transferred by the defendants to the Circuit Court of the *United States*; and abated by the death of Mrs. *Tucker*.

The deposition of *Everard Meade*—The estate of *Richard* the elder was very productive, and made 100 hogsheads of tobacco every year. He was intimately acquainted with *John*, and often heard him say, that *Richard* the younger was indebted to him, and that he was afraid that he should be obliged to sue him.

The deposition of *Paul Carrington*—He speaks of the fertility of *John's* lands, and the great crops which were made on them, and were received by *Richard* the younger. The detail is minute, and tends to shew, that *John* never could have received satisfaction from *Richard* the younger.

The exhibits are—

1. The account of the agents of the *Hanburys* for 960*l.* 13*s.* 6*d.* sterling, against the estate of *Richard* the elder; and their receipt of that sum from *John Randolph*. 2. A similar account and receipt for a payment made to the *Hanburys* by *John* for *Ryland Randolph*. 3. A letter from *John Randolph* to *Richard* the younger, dated *February* 19, 1775, speaking of the obligations of the former to the latter. 4. A letter from *Jerman Baker* to *John Randolph*, dated *December* 11, 1772, desiring him to bring all the papers between him and *Richard* the younger. 5. Another letter from *Baker* to *John Randolph*, *June* 30, 1772. It speaks of *Richard* the younger having been with *John*, and *Baker* supposes that they have determined on some mode of settling their accounts; and that he, *Baker*, will go to the house of *Richard* the younger, and get the papers necessary for making out the account. 6. *John Randolph's* will, dated *July* 25, 1774, and codicil, dated *October* 3, 1775. 7. Several judgments of *Watkins* against *Richard* the younger, and of *Ware*, executor of *Jones*, against the executors of *Richard* the younger. 8. The
* 187 decree of the *Court of Appeals. 9. Copies of the bill and amended bill, to which *St. George Tucker* refers in his deposition.

The High Court of Chancery determined upon these proceedings on the 10th day of *September*, 1801, that the bill of review should be sustained, and the injunction to the judgment of *D. M. Randolph*, on the bond of *John*, should be perpetual. From which decree an appeal was taken to this Court.

Call, for the appellant. The first point to be considered is, whether it be in the power of a Court of Chancery to allow a bill of review to a case decided by this Court. In *Curry* v. *Burns*,(*a*) this question was much agitated but not decided.

(*a*) 3 *Call*, 183.

But, if a bill of review were allowable in such cases, I shall next contend, that sufficient matter was not furnished in this case whereon to ground it. This bill of review presents the same case as the original bill. It seeks the same discovery and relief. The answer is the same; the witnesses are the same; and the plaintiffs were as conusant of the first cause as of the present.

The new evidence introduced is unimportant. The receipt for the nine hundred and odd pounds paid to the *Hanburys* proves nothing more than had already been proved by the mortgage. The large crops spoken of by *T. Carrington* must have been presumed before, from such a large estate. This circumstance had no weight in the original suit, because, from the length of time, it was a fair presumption that all accounts respecting them had been settled. [Here Mr. *Call* referred to the argument in the original cause. 2 *Call*, 545.] But Mr. *Carrington* does not speak of large crops from his *own knowledge*. It is, in fact, nothing but hearsay evidence.—The deposition of *St. George Tucker* is irrelevant. He recites the mere hearsay declarations of his wife; that there had been no settlement of accounts between *John* and *Richard*. This, however, seems to be contradicted by *John's* giving his bond for the money, and a mortgage on his land, to secure the payment to the *Hanburys*. The bill filed by *Tucker* does not even state that there had been no settlement of those accounts. The presumption is, that *John Randolph* was indebted to the estate of *Richard* the elder in this sum, and gave his own bond for the amount; for, the estate of *Richard* being sufficiently ample, there was no temptation to the *Hanburys* to transfer the debt.—The letters of *Jerman Baker* were objected to in the High *Court of Chancery, and they are objected to here, because they are not evidence, but only a correspondence between third persons. The affidavit of *Baker* is the same as that

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filed in support of the original bill; and is merely an *ex parte* proceeding.—The first suit brought by *Tucker* has no influence, because it did not demand an account, but only a repayment of the nine hundred and odd pounds. But, even if it had demanded an account, the argument, from the length of time, would have been irresistible: for the suit was brought in 1788, and the testator died in 1749.

It is not enough to produce *new* evidence on a bill of review; the party must shew that he could not command it in the original suit. All the depositions taken in this case might have been taken before. But new testimony, (if admissible,) must make a *new case;* and ought to be sufficient of itself to found a decree, without the aid of the former testimony. Would the *new* testimony in this case warrant a decree in favonr of the representatives of *John Randolph?* [On the doctrine of bills of review, Mr. *Call* referred to *Hinde's Practice*, 56, 57. and his own argument in *Curry* v. *Burns*, 3 *Call*, 188.]

Other circumstances must be considered, if the *merits* are to be discussed. It will be said, on the other side, that they do not demand an account;—they only *presume* that the bond has been paid. Let it be remembered, that *a Jury* (whose province it emphatically is to judge of presumptions) has sworn that it was not paid. If they mean to *presume* that the profits of the estate were sufficient to absorb the bond, then they only ask, in another form, for an account. After such a lapse of time, all the books agree that an account cannot be demanded.(*a*) In like manner, if legatees sleep an unreasonable length of time, and do not demand their legacies, a Court of Equity will presume them paid.(*b*) So will a mortgage be presumed to have been paid after 20 years;—unless there be strong circumstances to rebut the presumption. And, though there is no limitation to a bill of review, yet after 20 years, a Court of Equity will not reverse a decree.(*c*) If the Court will presume an *ascertained debt* to have been paid after that length of time, there is much stronger reason for presuming the payment of *the profits of John Randolph's estate.*—After a certain period, merchants' accounts are presumed to have been settled, notwithstanding they are excepted out of the statutes of limitations.(*d*) The same rule is well known to apply to a bond. An account of rents and profits cannot go beyond six years, in **England;*—by analogy to the action for mesne profits.(*e*) We shall be told of the tobacco mentioned in the will of *Richard Randolph, the elder*, as being in *England.* This circumstance has no weight; because he lived two years

(*a*) 4 *Bro. Ch. Rep.* 258. *Hercey* v. *Dunwoody*, 2 *Ves.* jun. 87. S. C.

(*b*) 2 *Ves.* jun. 11. *Jones* v. *Turberville.*

(*c*) 3 *Bro. Ch. Rep.* 639.

(*d*) *Watson's Law Partn.* 212.

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(*e*) 5 *Ves.* jun. 744. *Reade* v. *Reade.*

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after the making of his will, and probably drew the proceeds of the tobacco himself; or, it might have gone towards the support of his family, and a provision for his daughters.

If it be said that *John Randolph* was to be supported out of the estate; it may be answered, so were all the family.—If his estate went to maintain others, the estate of others went to maintain him. The legacies were to be paid after the expenses of the family were deducted; and *John* being the youngest child, his estate was therefore exhausted.

The letters from *John Randolph* to his brother *Richard*, speak of his obligations to him; and are evidence that *Richard* had done him justice.

Hay, for the appellees. It is to be regretted that Mr. *Call* should have entered into an investigation of the subject, upon points, which he was well aware would not be insisted on by the opposite counsel. This Court having decided that the giving of a bond precluded a settlement of accounts prior to its date, it must have been obvious that no account of the profits of *John Randolph's* estate, anterior to the bond, would be demanded by his representatives. Our only object is to obtain a credit for the payment of the nine hundred and odd pounds made by *John Randolph* to the *Hanburys*, on account of a debt due them from the estate of *Richard Randolph* the elder;—to be applied, as far as necessary, to the bond given by *John* to *Richard Randolph the younger*, the executor of *Richard the elder*.

He then proceeded to discuss the merits.

In this cause, the counsel for the appellees admit, that the judgment of the Court of Appeals, in the original suit, is conclusive, so far as it decides questions arising from *the facts in the record then before the Court*.

But they contend, that the cause, now before the Court, is essentially different from that formerly determined.

This difference rests on two points:

1st. Since the decision of the original suit by the High Court of Chancery, and the translation of the cause to this Court, a written document (admitted, in the answer *to the bill of review, to be genuine) has been discovered, and is now exhibited. * 190

This document proves, that on the 20th day of *February*, 1768, (almost four years after the date of *the bond*,) *John Randolph* exonerated *Richard Randolph*, jun. from a debt of 960*l.* 13*s.* 6*d.* due from him (as executor of his fa-

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ther) to *Capel & Osgood Hanbury:* for which debt a suit was then depending in *York* County Court.

From the evidence in this cause, it is to be presumed that this debt was contracted by *Richard Randolph*, jun. after his father's death. It was a debt, therefore, for which he was individually responsible. The evidence here meant is found in the will of *R. Randolph* the elder, which makes no mention of debts, though written apparently with great caution, and speaks of a large quantity of tobacco in the hands of *C.* and *O. Hanbury*, as well as others. In fact, it is to be inferred from this very clause in the will that *R. Randolph* the elder was a creditor of the *Hanburys*, and, therefore, that the debt in question must have been contracted by *R. Randolph*, the executor, after his father's death.

This debt then of 960*l.* 13*s.* 6*d.* due from *R. Randolph*, jun. being a debt for which he was individually responsible, the payment of it by *J. Randolph*, at his request, makes the latter a creditor of the former for so much.

A clearer position than that just stated cannot be presented to the mind: and, to make it an argument, conclusive in this cause, nothing more is necessary than to prove the truth of the facts on which it rests.

The first part of the proposition, "that the debt of 960*l.* "13*s.* 6*d.* was a debt for which *R. Randolph*, jun. was *in-* "*dividually* responsible," it is presumed, is already shewn to be true. But, even if this part of the proposition should be changed; and it should be stated, merely, that *R. Randolph*, jun. was indebted *as executor* of *R. Randolph* the elder, for transactions in the life-time of the latter, the inference will not be affected. For, if an executor is sued for a debt contracted by his testator, and a friend pays the debt, *at his request*, this friend is the creditor of the executor, who is, unquestionably, *personally* and *individually responsible to him.*

The second part of the proposition, "that the debt was "paid by *John Randolph*," is now demonstrated to be true by the actual production of a receipt in full to *R. Randolph*, jun. from the persons to whom he was indebted;—an important fact not appearing in the other cause.

* 191 *The third fact embraced by the proposition is no less material; and, in my estimation, no less *absolutely certain.* The consent of *Richard Randolph*, jun. to this payment, is not proved by any written document; but, that *J. Randolph* stepped forward, and assumed the payment of the debt, *at the request of R. Randolph*, jun. is a very obvious inference from the facts proved, or admitted, in the cause.

In the first place, it is improbable that *J. Randolph* should have taken this debt upon himself, unless his aid had been solicited by his brother, *R. Randolph*, jun.

Secondly, *R. Randolph*, jun. having *J. Randolph's* bond for about 760*l.* (*i. e.* 635*l.* 15*s.* 1*d.* with interest from the 3d *April*, 1764,) had a right to require his aid in the payment of this debt.

Thirdly, *R. Randolph*, jun. *wanted* aid: for it appears, from the account above mentioned prefixed to *the receipt*, that he was actually sued in *York* County Court for this debt: and the writing by which that aid is given, bears date at *Curles*, the place of his residence.

Lastly, his possession of this bond, for more than 20 years, without suit or demand, and at a time when he wanted money, is a proof that he considered it as paid.—The bond is dated 3d *April*, 1764, and is assigned 3d *March*, 1785;—20 years and 11 months afterwards.

Notwithstanding the answer to the amended bill, the fact that *R. Randolph*, jun. was embarrassed in his affairs, and that he wanted money, is supposed to be proved. The answer to the original bill (in stating the consideration for the assignment of the bond to the defendant) expressly declares that the assignment was intended by *Richard Randolph*, jun. as an indemnity to the defendant for his securityships and advances of money for his father, the said *Richard Randolph*, jun.—Surely a man may truly be said to be embarrassed and to want money, when he applies to a son just entering into the world, for pecuniary aid, and when that son is in danger of suffering from his father's misapplication of a brother's effects.

John Randolph viewed this transaction in the same light in which (as has been urged) *R. Randolph* viewed it. This remark is founded on the circumstance that *J. Randolph* kept possession of the *receipt*. Why did he retain it, unless he regarded it as a document proving a claim against his brother? The reason why he did not urge this claim, is obvious. He had only executed to the *Hanburys* a mortgage; and it would have been harsh in him to have pressed his brother for the difference between the bond and mortgage; (*i. e.* about 480*l.*) until he had actually paid *it. But he did not pay it. (The payments which have taken place, have been made by his sons.) Thus we see clearly why no demand was made upon the bond by *Richard*, jun. and why no demand was made for the surplus by *J. Randolph*, on the mortgage and receipt, although *John Randolph* always regarded himself as a creditor of his brother. * 192

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There is nothing, then, in this case, which places it beyond the operation of a rule supposed to be universally true; that where a debtor, whose bond is payable, advances money to his creditor, or to another, at his creditor's request, he is entitled to a credit against his bond, for the advance thus made; unless it can be shewn that he has got credit in some other way. The defendant's counsel (feeling the force of this argument) suggest that the sum of 960*l.* 13*s.* 6*d.* was *J. Randolph's* own debt; that is, his proportion of the debt due to the *Hanburys* from the estate of *Richard* the elder.

That this suggestion is consistent with the unequivocal and correct declaration in the amended answer, "that the "execution of the bond by *J. Randolph* to *R. Randolph*, "jun. is, both in law and equity, to be considered as a set-"tlement of all preceding transactions," will not, perhaps, be urged by the defendant's counsel.

But a *suggestion* is not sufficient, according to the doctrine above laid down: the suggestion must be shewn to be true.

As far as proof is exhibited on this point in the cause, the fact seems to be directly otherwise. The estate of *R. Randolph*, sen. is charged, in the account prefixed to the receipt above mentioned, with the amount of an account proved—894*l.* 11*s.* interest—64*l.* 15*s.* 6*d.* and costs of suit 1*l.* 7*s.*=960*l.* 13*s.* 6*d.* This sum, then, was manifestly the *whole* debt due from the estate of *R. Randolph*, sen. being actually the debt for which suit was brought, and the payment of which, the receipt acknowledges to be a full satisfaction. This *John Randolph* undertook entirely to discharge. If *J. Randolph* had undertaken to pay *one fourth*, there would then have been some colour to the supposition that he was paying only his proportion of the debt.

On this subject a remark occurs, perhaps worthy of notice. *R. R.* sen. died, (as has already been argued,) not only clear of *debt*, but possessed of money or tobacco in the hands of his merchants. This was made a fund for the payment of his daughters' fortunes; 3,000*l.* sterling, (the only charge on the estate,) being to be paid by the proceeds
* 193 of the sales of land claimed under an order of *Council. These two funds united the testator thought adequate to the payment of the legacies. He even disposes of the surplus. Now, if the suggestion relied on be correct, the management of *R. R.* jun. must have been wretched indeed, or his extravagance excessive. After a minority of fourteen years, *J. R.* is found to owe to his brother *R. R.* jun. upwards of 600*l.* currency, and to the *Hanburys* up-

wards of 900*l.* sterling, while *R. R.* jun. was in possession of an estate which had maintained his father's family, kept them clear of debt, left money in hand, and was actually increasing in value every year, by the accession of new labourers. Is this credible? In addition to this, it must be observed that *John Randolph* was entitled to his maintenance and education out of the estate generally, and was not, until he attained full age, to have the lands and slaves devised to him. *R. R.* jun. could not therefore, in law or equity, either as guardian, or executor, charge *J. R.* with any part of his transactions with the *Hanburys* or any other persons: and, even if he could, it is to be presumed, (as this defendant himself remarks,) that all transactions were settled when the bond was given in April, 1764.

There is another debt comprehended in the mortgage.—Did *John Randolph* owe 1,500*l.* sterling to *Ryland* also? or did he generously pledge his estate for both his brothers?—He owed neither.

How is this reasoning repelled? The attempt to repel it is not made; but refuge is sought in the argument of counsel, and in the decision of this Court, at the former hearing.

This cause, say the appellant's counsel, is precisely the same as it was before: in other words, the facts, that *J. R.* paid *to the Hanburys at his brother's request* 960*l.* 13*s.* 6*d.* for which his brother was sued; that he procured their receipt in full for his brother; and, in order to secure the *Hanburys*, executed a mortgage; are, in substance, the same with, and no more than, the naked fact of the execution of the mortgage! A difference, no less material, than obvious, at once presents itself. The execution of the mortgage by *J. R.* for a debt recited to be due from *R. R.* jun. as executor, (which was all that appeared before the Court at the hearing of the original cause,) did not, in law or equity, exonerate *R. R. A.*'s promise, bond, or mortgage to pay *B.*'s debt to *C.* does not exonerate *B.* The evidence now produced proves that *R. R.* jun. was *sued for the debt in the mortgage mentioned, and that he was completely relieved by his brother *J. R.* * 194

The mortgage itself, though it stated, did not *prove*, that any debt was due from *R. R.* jun. to the *Hanburys*. It was *probable*, but not *certain*. The evidence now exhibited *does prove*, (as has been already shewn,) that a debt was due; and that *J. R.* paid it at the request of *R. R.* jun. Besides, the answer admits it unequivocally. *R. R.* was actually sued; and *the debt was settled at his own house*. What did the mortgage prove against *R. R.*? Nothing.

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At the former hearing, there was no evidence that *J. R.* ever paid a farthing of the mortgage. It is now alleged, without contradiction, and can be proved to be true, that the greater part, if not the whole of the mortgage, has been paid. But this is not material; because *R. R.* jun. *was*, at all events, exonerated.

Are these distinctions *merely nominal?*

2. A second point, not appearing before the Court in the original suit, but which *now* appears, is this: There never was a fair trial of the cause at law. The ground of defence against the bond is that payment has been made. This is a question of fact peculiarly proper for the decision of a Jury: and this Court, if not satisfied, will refer it anew to a Jury, if there has been no default in the party requiring this reference.

In the case now before the Court, the writ was served on Mr. *Tucker*, the husband of the executrix—perhaps on the executrix herself. But she died long before the judgment, and of course Mr. *Tucker* ceased to be a party. The other defendants were *nominal* defendants only, and, in fact, on them no process was ever served. An appearance was entered for them; but the judgment passed without any defence; nor after the death of Mrs. *Tucker* was there a person in being competent to make any. *D. M. Randolph*, in his answer, admits that *Thomas Randolph*, the executor of *John*, was only a *nominal* plaintiff, and that it is probable he never knew of the institution of the suit.

It has been objected that a bill of review cannot be had after a decision by the Court of Appeals. This position is true in one branch of the subject; as to *error of law apparent on the face of the decree;* but, unquestionably untrue, as it relates to a bill of review *on the discovery of new matter.*(*a*) Even the discovery of such new evidence as has been exhibited in this cause, would be a ground for a new trial at law.(*b*)

(*a*) See *Mitford's Pleadings*, 78, 79. 4 *Vin.* 413.

(*b*) 2 *Wash.* 36. *Ambler* v. *Wyld.* 2 *Blacks.* 955. *Broadhead* v. *Marshall*, &c. 3 *Burr.* 1771. *Fabrilius* v. *Cook.*

* 195 *But it is said that *John Randolph* assumed this money to the *Hanburys because he owed it.* Mr. *Call* forgot that *Richard Randolph* was at that time in possession of *John's* bond; and that, of course, he had a right to expect, from the *justice*, if not the *friendship* of his brother, some assistance in the payment of the debt to the *Hanburys*, for which *Richard* was then sued. But do not people often assume to pay money for others when they are not indebted to them? It appears from the same mortgage that *John Randolph* also undertook to pay a large debt for his brother *Ryland.* It is asked, what temptation could the *Hanburys* have to agree to a transfer of the debt from the

estate of *Richard Randolph* the elder, (which was very ample,) to *John?* The mortgage furnishes a sufficient reason. It was to get a permanent security, and interest upon their money, according to the usual course of business at that period. We are entitled to a discount for this money against the bond: the other side must shew that *John Randolph* owed it. The execution of the bond in 1764 precluded both parties from an investigation of prior accounts. How was it *possible* for *John Randolph* to have owed this money? He was entitled, under his father's will to a maintenance out of the estate; and can it be possible, (considering the productiveness of his father's and his own estate,) that his proportion of a debt to the *Hanburys* could have been *nine hundred and sixty pounds!* But neither in law nor equity could *Richard Randolph* (who was his *guardian*) charge him beyond the profits of his estate.

We are told that no evidence can be adduced on a bill of review which might have been had in the original suit; and that all the testimony now brought forward was equally in the power of the party before.—To this it may be answered that the original bill was filed by *Jerman Baker* merely as the friend of *John Randolph's* representatives; that *Thomas Randolph*, his executor, knew nothing about the affairs of the estate, as is confessed in the answer; and that the representatives of *John Randolph* were all, at that time, infants. Who, then, was to step forward in behalf of this orphan and helpless cause?

It is argued that it is impossible to distinguish between a demand of an *account*, and the present claim for a *discount*. The account demanded in the original suit was of transactions before the date of the bond. The Court decided that after such a length of time, and a bond had passed from *John Randolph* to *Richard*, the subject must forever rest. *What we now claim is a *discount* against the bond, upon a transaction *subsequent* to its date. * 196

As to the great affection expressed by *John Randolph* for his brother *Richard*, it only proves that he would the more willingly come forward, as his friend, to relieve him when sued.

Randolph, on the same side. The answer of *David M. Randolph* admits that no settlement took place between his father *Richard Randolph* the younger, and *John Randolph*. Consequently the bond of 1764 is not affected by the presumption arising from the length of time. As long as that bond exists, *John* has a right to a discount for so much as

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he made himself liable for on account of the estate of his father; for though *R. Randolph* the younger was the executor of his father, yet the debt being contracted after the testator's death, the executor was personally responsible. In 1763 *John Randolph* came of age; In 1764 the bond was given before he was acquainted with his rights under his father's will. The immense estate which passed through the hands of the executor, *Richard* the younger, (of which he never rendered any inventory or account) sufficiently proves that *John* must have been entitled to something considerable.

In 1775, *John Randolph* died: his bond to *Richard* was given in 1764: in 1768, he executed the mortgage to the *Hanburys*, payable in ten years: until the expiration of the time specified in the mortgage (*i. e.* 1778) *John* could not demand *the surplus of Richard*. A further reason for his waiting was, that the money due on the mortgage was paid in the public treasury. If that payment had exonerated *John Randolph*, then *Richard* would have been liable for the surplus, according to the scale of depreciation only. It was not until long since the revelution that what would be the effect of those payments was decided. The bond from *John Randolph* to *Richard* was not known to exist till the year 1785, when Mrs. *Tucker* mentioned the claim of *John* on the estate of his brother *Richard*. Her husband, for some time, declined any interference in the business; until, at length, (on her repeated solicitations,) a suit was brought in 1787, or 1788. This suit abated by her death; and her husband (who was only a nominal party) ceased to have any interest in the subject. If the general doctrine of presumptions may be repelled by particular circumstances,

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surely the particular circumstances enumerated in this *case will form a sufficient apology for the delay on the part of *John Randolph's* representatives.

The mortgage left it doubtful whether the money was paid or not. But the receipt, dated at *Curles*, (the place of residence of *Richard Randolph* the younger, and subjoined to an account, headed, "Dr. the estate of *Richard Randolph* deceased," &c. proves clearly that *Richard Randolph* the younger (against whom suit had been brought for this same debt) was liberated by means of his brother *John's* undertaking to pay it.

None of the authorities cited by Mr. *Call* go to shew that a bill of review will not lie in such a case as the present. In *Curry* v. *Burns*(*a*) it was not decided whether a bill of review might be brought, after a case had been determined in this Court; and *Mitford*(*b*) only doubts whether it will

(*a*) 3 *Call*, 183.
(*b*) *Page* 79.

lie for an error in the decree itself after affirmance in parliament;—but expressly says that it has been permitted, upon discovery of new matter after such affirmance. It would be a mere mockery (said Mr. *Randolph*) to allow us a bill of review on the ground of new evidence unless we were permitted to shew how such evidence would affect all the circumstances in the original cause.—If all the evidence and circumstances in this cause be considered, there can be no doubt but we are entitled to a discharge from the payment of the bond which gave rise to the original suit.

Wickham, in reply. The counsel on the other side have considered this cause, as if it had never before been decided by this Court, or by any other. Many of their arguments might have deserved attention, if most of the points had not been originally settled. But, after the prior decision, (upon the same evidence in substance,) the door is forever closed. Nothing is now produced, except what might have been brought forward before, either in a Court of Law or Equity. It is said, however, that the cause was neglected by the representatives of *John Randolph*. This is not to be presumed.—On the contrary it appears that Mr. *Baker*, who defended them at law, not only, after the judgment, drew the bill of injunction, but made affidavit to it.

There is no evidence that the new matter was *discovered* since the determination of the original suit. Additional circumstances to facts before in issue do not furnish a ground for a bill of review. The bill *ought not to have* **been allowed* at all. But it is contended that, the bill having * 198
been granted, the parties may go at large into the evidence.—This Court sits here to correct the errors of inferior Courts in every particular; and in the exercise of that power, they will judge whether the bill of review ought to have been granted, (on the new evidence brought forward in support of it,) or to have been refused.

What is this new evidence? The deposition of *St. George Tucker* contains only the declarations of his wife founded on the information received by her from her former husband, *John Randolph*. The deposition of *Paul Carrington* proves, indeed, that *John Randolph* was in possession of a large estate; but it does not say that (like most rich planters) he might not have been largely in debt.

But their great reliance is upon the *receipt*. This does not materially vary the evidence arising from the mort-

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gage. There could have been no doubt (when this cause was formerly before the Court) that *John Randolph* had undertaken to pay this debt to the *Hanburys*. It is said, however, that the mortgage was only a collateral undertaking that the money *should be* paid. This was not a collateral undertaking on the part of *John Randolph*; but the debt was made his own. Could the *Hanburys* have demanded this money of *Richard Randolph*, after the mortgage? The Court never would have dismissed the original bill, if it had been supposed that *John Randolph* merely *undertook to secure*, by a mortgage on his own estate, a debt due from *Richard*. The bill was dismissed because the Court thought the debt was his own.

But it is argued that it does not appear that *John Randolph* owed any thing to the *Hanburys*. How does it appear that *Richard* owed them any thing? There is an account exhibited against *John*, and also against the *estate* of *Richard* the elder, and a *mortgage* given by *John*; but there is no account against *Richard* the younger, in his individual character; nor is there any evidence that the money secured by the mortgage, was to be paid for the benefit of *Richard*.

There is no evidence that *Richard Randolph was* sued in *York* County Court for the debt which *John Randolph* secured by the mortgage on his estate. The *extract* certified by the clerk of the Court is not evidence, because not *the best*: and the rules of evidence (which are the same in equity as at law) always require the best evidence the nature of the case will admit of.

* 199 *In the former argument it might have been asked, (as it may be now,) how came *John Randolph* to pay *Richard's* debts? To this inquiry it may be answered, that not only all investigation of this subject is closed by the *deed* of *John Randolph*, but that the several sons of *Richard Randolph the elder*, being indebted to the *Hanburys* for dealings charged to his *estate*, paid their respective proportions as they came of age; and that *John* (being the youngest) made provision for his part last of all. But why did not the appellees go to the *Hanburys* and ascertain the origin of this account? We (having in our favour a judgment at law, a decree in equity, and an affirmance by this Court of that decree) were not bound to make the inquiry.

It is asked, how is it possible that *John Randolph* could have been in debt, considering the affluence of *Richard Randolph the elder*? and his will is resorted to, in order to shew the situation of his estate. This is a very uncertain criterion by which to judge of men's circumstances.

Many large estates are bequeathed by persons who have little remaining after the payment of their debts.—He was, probably, much in debt.—It was the fashion of the times. If men were *active*, the temptation to speculate in lands and negroes generally involved them in large purchases of that kind of property;—if *indolent*, they were in debt of course. "Why did *John Randolph* give his "bond for this money?" The only rational presumption is, that the debt being due for advances made and articles furnished for the sons of *Richard Randolph* the elder, *John* was only called upon by the executor to give his bond for his own part.

But, say the counsel for the appellees, *Richard Randolph* was personally liable; and the payment made by *John* must have been for him.—This does not appear. The account of the *Hanburys*, headed "Dr. the *estate* of "*Richard Randolph*," &c. is conclusive evidence that the money was not due from *Richard*, (the executor,) but from the estate of his father. Every person, conversant with the mode of doing business in those times, knows that it was the constant practice to make advances for the use of the whole family of a deceased person, and to raise an account against his estate. Suits in Chancery against the children for their respective parts, have been common. The probability is, that this debt was contracted by *Richard* at the instance of *John*, and for the purpose of establishing a credit, by which he might purchase slaves with bills on *London*.—The expenses of settling every new *estate in this country, were usually provided for by a * 200
credit in *England*.

The bond of *John Randolph* to *Richard*, together with interest, amounted, at the time when the former gave the mortgage to the *Hanburys*, only to between seven and eight hundred pounds *currency*—whereas the mortgage to the *Hanburys* was for nine hundred and odd pounds *sterling*. If the mortgage was to go as a satisfaction for the bond, would not *John Randolph* have taken some voucher for the excess? and would he not also have taken up his bond?—But he did neither; and this is conclusive proof that the mortgage related to a different transaction.

Curia advisare vult.

Saturday, November 22. The President delivered the opinion of the Court—"That the bill filed in this cause, "for reviewing the decree and proceedings therein men-

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"tioned, ought not to have been received or allowed by "the High Court of Chancery; as it does not shew any "new matter, or disclose, or refer to any new evidence, "sufficient to ground a bill of review, or reversal of the "decree prayed by the said bill to be reviewed and re- "versed, nor does the new evidence taken and produced "in this cause, in any manner prove or warrant the same."

Decree of the High Court of Chancery reversed; injunction dissolved, and bill dismissed with costs.