REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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SKIPWITH *v.* CLINCH.

Rule as to *new* appeals.

In this case the Chancellor had made a decree at the September term, 1800, upon a forthcoming bond, from which decree Skipwith appealed to this Court. The Court of Chancery allowed time for giving the appeal bond, which extended beyond the last term of this Court. And it being a case for delay, Wickham, for the appellee, now moved to bring it on, contending that this ought to be considered as the second term after granting the appeal. For, the time allowed Skipwith for giving the bond, was for his own benefit, and, therefore, that he should not be permitted to turn it to the disadvantage of his creditor.

But the Court, after enquiring into the practice, denied the motion; being of opinion that this was to be considered only as the first term after the appeal.*

[* See *Lee* v. *Frame*, 1 H. & M. 22.]

RANDOLPH'S EX'R. *v.* RANDOLPH'S EX'RS. [537]

An account of stale transactions refused: Especially where it appeared, that a bond was given by the plaintiff's testator, to the defendant's testator, after the transactions took place. (The transactions had been 30 years, or more, before the bill was filed.*)

This was an appeal from a decree of the High Court of Chancery, where Thomas Randolph, surviving executor of John Randolph, deceased, brought a bill against David Meade Randolph and others, executors of Richard Randolph, deceased, stating:

That Richard Randolph, the elder, died in 174 , leaving a widow, some daughters, four sons, to wit: Richard (his eldest

* Sixteen years after an executor had finally distributed the estate, all the legatees being of age at that time, an account of his actings ought not to be required. *Hudson and others* v. *Hudson's* ex'r., 3 Rand. 117.

An account of administration, after the lapse of 20 or 30 years, held a stale demand, and therefore denied. *Park's* adm'r. v. *Rucker*, 5 Leigh, 149.

So, when the executor had been dead 28 years, and the youngest of the plaintiffs, legatees, had been of age for 15 or 20 years. *Carr's* adm'r. &c., v. *Chapman's* legatees, 5 Leigh, 164. So, as to a remote division of slaves, *Colvert* v. *Millstead's* adm'x., 5 Leigh, 88. And as to partition of land, *Carter's* ex'r. v. *Carter* and others, 5 Mun. 108.

son, and one of his executors,) Brett, Ryland and John; all of whom are since dead. That the testator devised lands and slaves of considerable value to his said sons; and being possessed of a great personal estate, and having debts outstanding, more than sufficient, as he supposed, to pay his debts, as well as of a large tract of land in Bedford, containing upwards of 50,000 acres, *then unpatented.* He devised all the *residuum* of his estate (which included the said tract of unpatented land) to be equally divided between his said four sons.

That the said Richard, the son, qualified as executor; received the profits of a considerable part of the estate allotted to the younger sons; collected the debts due the testator; and sold the said tract of unpatented land; but never made up any account of his administration; nor did he ever account with his brothers, for their proportion of the residuary estate, although considerable.

That the said John Randolph being very young, at the death of the testator, lived with the said Richard, his brother, for many years; and some time after he came of age. That the said Richard received the rents, and profits of his estate,
[538] furnished him with suitable and necessary things, and probably made him advances in money.

That on the 3d of April, 1764, the said John Randolph gave the said Richard his bond, for £635 15s. 1d. current money; but the plaintiff has reason to believe, that this bond did not include a full and final settlement of all their accounts, to that period; but was rather intended as an evidence of the advances, made by the said Richard to the said John; subject nevertheless to a further settlement, when the accounts of the estate of the said Richard Randolph, the elder, should be made up. For, the said John Randolph, having entered into an agreement with Messrs. Capel & Ozgood Hanbury of London, for a loan of £4,000 sterling, the said John Randolph, out of that sum, paid the said Capel & Ozgood Hanbury, the sum of £960 13s. 6d. sterling, due them from the estate of Richard Randolph the elder, and chargeable of course, to his executor; with whose privity and approbation the same was paid; and the plaintiff has no doubt, the same was to be accounted for to him, at the final settlement.

That this payment is proved by a mortgage from the said John Randolph to the said Capel & Ozgood Hanbury, dated the 22d of February, 1768.

That the said John Randolph and the said Richard Randolph his brother, being both dead, a suit was instituted in the General Court, by David Meade Randolph, a son, and

one of the executors of the said last named Richard Randolph, upon the bond aforesaid, which had been assigned him by his father, in his life-time; but the plaintiff knows not for what consideration. In which suit, the said David Meade Randolph, afterwards, obtained judgment in the District Court, in April, 1790, for £1,271 10s. 2d. and costs: which he threatens to enforce without any deduction; although the said John Randolph never received any satisfaction for the said £960 13s. 6d. paid Capel & Ozgood Hanbury as aforesaid, as the plaintiff believes; nor hath the said Richard Randolph's [539] administration account ever been made up, so as to ascertain whether any thing was due thereout to the said John Randolph.

That the plaintiff hath requested the said David Meade Randolph to account concerning the administration aforesaid; to give credit for the said £960 13s. 6d. sterling, paid Capel & Ozgood Hanbury; and to let a full and fair settlement of all accounts between their testators, take place. But he refuses to do so, insisting that the said sum of £1,271 10s. 2d. is not subject to any deduction, and that the said John Randolph had no set-off against the said bond; although the plaintiff alleges, that the bond having lain more than twenty years, without any claim made thereon, affords a strong presumption, that some right to a discount did exist; and, as the payment to the said Capel & Ozgood Hanbury was made some years subsequent to the date of the said bond; and to discharge a debt properly payable by the said Richard in his character of executor, out of the estate of his testator, which was amply sufficient for the purpose; as the account of his administration had never been made up; and as the receipt granted to the said John Randolph, for the money paid to the said Hanburys, expresses (as the plaintiff hath been informed and believes,) that it was to discharge a debt due from the estate of Richard Randolph the elder, and was subsequent in date to the bond, the plaintiff has no doubt but that some such settlement as above mentioned, was to have been made between the said John and Richard; which might have been prevented by the death of John, and the succeeding confusion occasioned by the war; and might have been further interrupted by misplacing of the receipt, the existence of which the plaintiff doubts not, and trusts he shall be able to prove, as well as the payment of the said £960 13s. 6d. sterling, in manner above mentioned.

The bill therefore prays a full answer to the pre- [540] mises, interrogates the defendant David Meade Randolph, as to the consideration of the said bond, the payment

of the said £960 13s. 6d. sterling, and the consideration of the assignment to himself: It likewise prays a full settlement of all accounts between the said John and Richard, as well those of a private nature, as those which may relate to the estate of Richard Randolph, the elder: that credit may be allowed the said John Randolph, for the said £960 13s. 6d. sterling, with interest from the time of payment: that the defendants may make up an account of their testator's administration, on the estate of the said Richard Randolph, the elder, and credit be allowed the said John Randolph for his proportion of the residuary estate, if any; that the said David Meade Randolph may be injoined from further proceedings on his judgment; and for general relief.

To this bill Jerman Baker made an affidavit, "That some time previous to the late war, about the year 1774, he thinks, he was appointed, by an order of Henrico Court, a commissioner to examine the account of the administration of Richard Randolph upon the of his father Richard Randolph, the elder. Progress was made in the settlement; but in consequence of the interruption occasioned by the war, the same was not finished; nor doth he believe that an account of the administration aforesaid was ever made up, and rendered by the said Richard Randolph; nor any settlement made with his brothers Brett, Ryland and John, who were interested in the estate of Richard Randolph the elder."

The answer of David Meade Randolph states, that the said Richard Randolph, his father, a little before his death, (in consequence of the defendant having been his security for several sums, and also for his administration of Ryland Randolph's
[541] estate, and having also paid for him £ ,) assigned the said bond to the defendant, on the 3d of March, 1785, to the use, expressed in the assignment, but the same was intended as an indemnity to the defendant for his securityships and advance aforesaid. That his father was executor, and he believes sole acting executor of the said Richard Randolph, the elder; but believes the said John was entitled to nothing, or very little, as one of the residuary legatees, for the defendant has often heard his father say, that after the testator's debts were paid, there was nothing to divide; except a debt due from Col. R. Bland, and from his brother Brett Randolph, the amount of which the defendant does not know, but the same were never received. That the defendant knows not whether the Bedford lands were ever patented, or sold by his father; in short, he knows nothing about them; but, when the defendant was in that county, he understood they were

barren, and not worth 6d. per acre. That the said John lived with the defendant's father, until his marriage; which was some time after he came of age. That he was an expensive young man, and the testator furnished him with very large sums of money from time to time; and imported goods for him to a great amount, from year to year, as appears by the annexed account, from the books of the said Richard; and by which, in 1762, there was a balance due the testator of £645 15s. 7d. That the said account is carried down to 1769, when the balance due was £641 13s. 11¼d.; and, by inspecting the account, it appears that the said Richard continued to make advances to him, and has credited him for considerable sums, but the balance almost always continuing nearly the amount of the bond. That it is probable the said Richard never may have made up any account of his administration on the estate of the said Richard the elder; but the said John, who had attained his age of 21 years, some time before the bond was given, never would have entered into it, if he had not been satisfied that his brother Richard, as executor of his father, owed him nothing; and at this distance of time [542] a Court of Equity will presume so, unless there was any suggestion or proof of undue influence; for which there is not the smallest ground, either from the character or conduct of the said Richard. That, although the estates devised the said John were considerable, yet it is well known that Virginia estates, at a distance, are not profitable; that the said Richard's under his own eye, were not so; and, it is probable, that the expenses of the said John were more than the profits of his estate. That, as to the length of time which elapsed after the date of the bond, before any steps were taken, with respect thereto, it was to be observed that the said John was the brother of the said Richard; who always had an aversion to quarrel, as well as to bring suit against his brother. Besides, eight or nine years of the time were during the war: near six of which are, by the act of Assembly, but one day; so that no conclusive argument is to be drawn from the length of time. That, instead of a deduction for the £960 13s. 6d. sterling, the defendant is advised a contrary conclusion ought to be drawn; because, the said John Randolph must, at the time of executing the said mortgage, have been at least 26 or 27 years of age; had been some years married, and must have known whether it was incumbent on him to have secured that sum to the Hanburys, and therefore took upon himself to pay the amount of his father's debt to the house. Which assertion is corroborated by an account from the house of John Hanbury

& Co. dated in 175 ; by which there was then due to the said house a balance of £493 10s. 8d. from the estate of the said John, arising, as the defendant presumes, for necessaries imported for the use of his estate; and, it cannot be presumed that the said John would have given his bond for £600, if nothing was due from him; and afterwards mortgaged his estate for upwards of £900 sterling, if not due also. That
[543] the facts stated in the bill, appear to be the suggestions of Jerman Baker, who knew a great deal of the transactions between the said John and Richard; and to whom the defendant shewed the bond before he brought suit. That Baker looked at it for some time, as if endeavoring to recollect the transaction, and then observed, that he was satisfied the money was due, and must be paid; or words to that effect.

In June, 1796, general replication and commissions:

In January, 1797, the cause was set for hearing.

There is, in the record, a copy of the will of Richard Randolph, the elder, dated the 18th of December, 1747, and proved and recorded in June, 1749.

There is also a copy of the mortgage from John Randolph to the Hanburys, dated the 22d of February, 1768. Which reciting, that "whereas the said Capel & Ozgood Hanbury have agreed and undertaken to advance and lend unto the said John Randolph the sum of four thousand pounds sterling money of Great Britain (including the sum of fifteen hundred and seventy-four pounds, six shillings and six pence sterling money, due from Ryland Randolph, Esquire, to the said Capel & Ozgood Hanbury; and, also, the sum of nine hundred and sixty pounds, thirteen shillings and six pence sterling money to them due, from the estate of Richard Randolph of the county of Henrico, Esquire, deceased,") proceeds thus: "Now this indenture witnesseth, that for and in consideration of the said agreement, and also in consideration of the sum of twenty shillings to the said John Randolph by the said Capel & Ozgood Hanbury in hand paid, &c." It was re-acknowledged in October, 1768, and again in November, 1768. In May, 1768, it was recorded in the General Court.

The last account spoken of in the answer, is in these words:

[544] "Dr. The estate of Col. Richard Randolph on account of John Randolph. Cr.

1751, May,	To balance of John Randolph's account then sent him,	£493 10 8
	To interest from said date till paid.	

(E. E.) J. HANBURY & CO.

February 20th, 1752."

In March, 1799, the Court of Chancery, upon a hearing, dismissed the bill with costs. From which decree, the plaintiff appealed to this Court.

RANDOLPH, for the appellant.

It does not appear that there ever was a settlement of the executors and guardians' accounts; which ought to have been done, as there was a large body of land, and a considerable residuary estate appropriated to the purpose of paying the testator's debts; which must not only have been sufficient for that purpose, but probably left a surplus. Added to which, the profits of John Randolph's own estate, must have been very great, during his long minority; and it ought to be shewn how they were disposed of. Besides, the great payment made to the Hanburys, on account of the estate, several years after the bond was given, entitled the plaintiff to a discount for that sum; and ought to have been so applied. At least a further opportunity of enquiring into the matter, ought to have been afforded the plaintiff, by sending the cause to account, before a commissioner. The antiquity of the bond, moreover, affords a strong presumption of its being satisfied. Otherwise, it is not easy to conceive why it was suffered to remain so long without payment having been enforced or even demanded. The account in the record related to another John Randolph, and not to this John Randolph; who, by reason of his tender years, could have had no account against him.

CALL and WICKHAM, contra. [545]

An account would have been improper, after so great a distance of time, when the circumstances must all have been forgotten, and the evidences lost. For, as on the one hand the payments cannot be known, so on the other, the property, debts, and transactions, must have escaped all recollection: Insomuch, that perhaps the delivery of a single slave, or any other article, could not now be shewn. The Court, therefore, will not, at this day, indulge an enquiry into such stale matters. [*Hercy* v. *Dinwoody*,] 4 Bro. C. C. 258. Which case expressly applies. For, here the testator has lain by, and suffered the estate to be distributed, and then the appellant, in the language of the Judge there, comes forward to demand an account, after the right has been so long *slept* on, of transactions originating above half a century ago. The granting of which request would expose the appellees to every possible inconvenience. But, the bond is a presumption of a settle-

ment, until the contrary is shewn: and the long acquiescence afterwards confirms the presumption; especially as the mortgage itself would have been an incitement to demand it. Added to which, Richard Randolph, whose character is not impeached, assigned this bond to his own son, as a security; and it is not probable that he would have done so, if he had not considered it as actually due. The mortgage was a transaction between John Randolph and the Hanburys, and therefore, strictly speaking, is no evidence against Richard Randolph: But, allowing it the fullest force, yet it was probably no more than John Randolph's own share of the debt due from the estate; and, although the mortgage states it as money *borrowed*, that was merely the mistake of the writer; and proves nothing. Besides, the bond is due to Richard Randolph, in his own right; and the sum mentioned in the mortgage was a debt due from the estate. So that the mortgage could not form a proper discount against the bond. The uncertainty, [546] in all these matters, is alone sufficient to repel the application for an account; because, it proves how unsatisfactory the enquiry must be, and to what difficulties it would expose the parties against whom it is prayed. The antiquity of the bond was a proper subject for the consideration of the jury; and they have decided it in favor of the creditor. Besides, the delay to sue upon the bond is accounted for by the answer; and was owing to the family connexion, and the friendship between the brothers.

RANDOLPH, in reply.

If the appellees would be under any difficulties in taking the account, it is the fault of their own testator; who ought to have come to a settlement at an earlier period. But, as it is not stated that any vouchers are lost, it does not appear that there would be any inconvenience in taking the account. If it were true, that the bond was given for transactions between John Randolph and Richard Randolph, yet the debt taken up by the mortgage was more than sufficient to pay it, and ought so to be applied. The case from 4 Bro. instead of repelling the application for an account, contains principles expressly proving our right to it.

HAY, on the same side, insisted, that it was plainly to be inferred, from the whole complexion of the case, that the bond was given on account of transactions relating to the estate; and, if so, then, that the mortgage was a clear satisfaction of it.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the Court. That there was no error in the decree; and, therefore, that it was to be affirmed.

Decree affirmed.*

[*After this decree, the appellants filed a *Bill of Review*, in the Chancery Court, grounded on the discovery of new evidence; and obtained relief; from which decree the appellees appealed to this Court.

Saturday, Nov. 22. The President delivered the opinion of the Court—"That the bill filed in this cause for reviewing the decree, and proceedings therein mentioned, 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 reversed; nor does the new evidence taken and produced in this cause, in any manner prove or warrant the same." 1 H. & M. 180.]

FIELD *v.* CULBREATH. [547]

Friday, May 8th, 1801.

In 1788, C. located a Land-Office Treasury Warrant, issued 29th November, 1783, on lands on the Eastern waters; F. (who, upon the trial, did not prove any title in himself, to the lands located,) entered a *caveat*, in the Land Office, against a patent to C. The District Court gave judgment in favor of C., and this Court affirmed it.*

What is a good entry?

Field filed a *caveat* in the Land Office, against any patent issuing to Culbreath; which caveat is in these words: "Let no patent issue to Thomas Culbreath, for thirty-eight and a quarter acres of land, surveyed for him the thirtieth day of October, one thousand seven hundred and eighty-eight, by John Holloway, assistant to Samuel Dedman, surveyor of Mecklenburg county, and bounded, according to the said survey, as follows: Beginning at a white-oak on Grassy Creek, from thence, north, thirty-nine degrees, east, sixty-six poles,

*The statute under which F.'s counsel resisted the claim of C. was ch. 42, 12 Hen. Stat. at L. p. 100 (Oct. 1785) providing that any one might acquire title to waste land on the eastern waters, on paying £25 for every 100 acres to the treasurer, whose receipt should be carried to the Auditor, on whose certificate the register should grant a warrant, authorizing the surveyor of the proper county to lay off the right quantity. But the act was to affect no legal entry made previously, nor any pre-emption right to marshes, or sunken grounds. It seems to have been the want of title in F., and not any sufficiency of C.'s proceeding, that occasioned the judgment in C.'s favor. Accordant, *Currie* v. *Martin*, 3 Call, 28.