

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.

VOLUME III.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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1810.

DISTRICT OF VIRGINIA, TO WIT :

BE IT REMEMBERED, That on the twenty-second day of January, in the thirty-fourth 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. Volume III. by William W. Hening and William Munford.”

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

WILLIAM MARSHALL,

(L. S.)

Clerk of the District of Virginia.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

At the Term commencing in April, 1809.

IN THE THIRTY-THIRD YEAR OF THE COMMONWEALTH

JUDGES, PETER LYONS,(1) ESQUIRE, *President*;
WILLIAM FLEMING, ESQUIRE.
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE.

Tabb and others *against* Archer and others,
And
Randolph and others *against* Randolph and others.

THESE causes (which were appeals from decrees of the Superior Court of Chancery for the *Richmond* District, pronounced the 14th of *March*, 1804, dismissing the appellants' bills) originated in marriage-contracts, entered into by Doctor *Archer* and Doctor *Randolph*, on their respective marriages with the daughters of Mrs. *Tabb*. After marriage,

Marriage-articles are considered at the heads or minutes, only, of an agreement entered into between the parties, upon a valuable consideration, (the marriage,) and being in

(1) Judge Lyons was absent the whole of this term, having been prevented from attending, by indisposition.

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the wives joined their husbands (respectively) in conveyances of the several estates, (intended by the articles to be settled,) and transferred their whole interests to third persons, in order to have them reconveyed to their husbands. A bill was brought, in each case, by those entitled in remain-

their nature *executory*, ought to be construed and moulded, in equity, according to the intention of the parties at the time of concluding them.

The children born of the marriage, are *purchasers*, under both father and mother, by virtue of marriage-articles; yet upon the death of father and mother, they take (where the limitation is to the *issue* generally) as *coparceners per stirpes*, and not *per capita*. Marriage-articles are not to be rescinded, after the marriage, even by consent of the husband and wife, or by any conveyance which they, or either of them can make; but may be enforced in equity, at the suit of the *issue*, (whether *in esse*, or in *ventre sa mere*), or of any other persons for whose benefit such articles were intended: the Court will either compel performance, (by appointing trustees where none were inserted in the articles, and decreeing a settlement,) or set aside any conveyance made with intent to defeat the rights of the issue, or of those in remainder, expectant on the estate for life of the husband and wife.

The intention of the parties to marriage-articles is to be collected from the nature of the agreement; the *language* and *context* thereof; the usage in similar cases; and the legal rights of the parties, as they existed before, and would have existed after the marriage, if no such articles had been made: but *parol* or other evidence, *dehors* the articles, to explain, or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained, or unless something agreed on by the parties at the time, has been omitted, through fraud or accident.

An indorsement made on articles by the husband and wife subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof.

The husband, on the marriage, being a *purchaser* for a valuable consideration, cannot be deprived of any of his *legal* rights, accruing by the marriage; except such as (according to a just and liberal construction of the articles) he must be understood and intended to have *given up*: if then there be any chasm in the articles, whereby the *legal* rights of the husband may, in certain events, interpose between the uses declared by them, a court of equity, in directing the settlement, ought to have regard to those legal rights, so as to preserve to the husband the enjoyment thereof, on the happening of such events. And the same construction ought to be made, in relation to the wife's *legal* rights, either accruing on the marriage, or existing antecedent thereto, and independent of it.

It having been agreed, by marriage-articles, that all the estate, real and personal, of the wife should remain in her right and possession during the marriage, and that the profits only should be applied to the support of the husband and wife, and their issue, if any; and it having been further agreed, that the husband would never sell or dispose of any part of the said estate, but that the same should *always* be held as an inviolable fund for the support of the said husband and wife and their issue, if any there should be; the first clause was construed as containing a declaration of the *uses* of the estate *during the coverture*, only; and the second clause as declaring the uses afterwards. The husband, therefore, as well as the wife, was adjudged to be entitled to the benefit of these uses *for life*.

Infants may contract by marriage-articles or settlements, and such contracts will bind them when of full age.

The law has entrusted the father or guardian with the marriage of infant children, or wards; and, consequently, settlements made by infants through the father or guardian are binding.

A *recital* in marriage-articles stating it to be the intention of the parties to settle all the real and personal estate of the wife, except as therein after excepted; and a part of such estate being omitted in a subsequent specification thereof, recourse may be had to the *excepting clause* to prevent the *universality* of the *recital* from being *restricted* (as it otherwise might be) by the *specification*.

In the construction of agreements the whole must be taken together.

der, under the articles, to set aside such conveyances, and for a strict settlement.

Few cases have occurred in which mere judicial proceedings have been clothed in such eloquent language as was displayed in the bills and answers in these causes. Much property was involved in the contest; met. of great talents were interested; and it was one of those family dissensions which was well calculated to excite the passions and enlist the feelings of those concerned.

Previously to the marriage of Doctor *John Randolph Archer* with Miss *Frances Cook Tabb*, WHO WAS OF FULL AGE, and of Dr. *Bathurst Randolph* with Miss *Mary Tabb*, WHO WAS UNDER AGE, the mother of the young ladies insisted on a settlement of their estates, as the *ultimatum* upon which her consent to the marriage depended. Articles were accordingly entered into between the *intended* husbands and wives respectively, *without the intervention of trustees*. That between Doctor *Archer* and Miss *Frances Cook Tabb*, commenced with an agreement between the parties *reciting* that a marriage was intended to be shortly had and solemnized between them, and that they had mutually agreed that *all the estate* both real and personal, to which the said *Frances* was entitled should be secured to and settled upon her and her heirs, except certain property therein after excepted: in consideration of the said intended marriage, and for the intent and purpose aforesaid, the said *J. R. Archer* covenanted and agreed to and with the said *Frances* that all the aforesaid estate, both real and personal, *consisting of*, &c. [here several tracts of land and houses and lots are *particularly named*, which had been lately assigned to her, as one of the distributees of her late father's estate; *and *sundry stocks of horses, cattle, sheep and hogs, and other personal property, to which she is entitled as such distributee, but which had not then been assigned*;* are GENERALLY enumerated; also thirty-seven slaves for whose names reference is made to a schedule thereto annexed; *but out of that agreement are ex-*

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cepted two negroes by name, (though not included in the schedule) and a tract of land of 400 acres;] should remain in the right and possession of the said *Frances*, during the continuance of the said intended marriage: and the annual proceeds thereof *only* should be applied to the support and maintenance of the said *J.* and *F.* and their issue, if any there should be: and the said *J.* further covenanted and agreed with the said *F.* that he never would sell or dispose of any part of the said real or personal estate, except as therein before excepted; but that the same should always be held as an inviolable fund for the support and maintenance of the said *J.* and *F.* and their issue, if any there should be, of the said intended marriage; applying only the proceeds or profits thereof, without resorting to, or applying any of, the original stock for that purpose, but the whole of the said original stock, except as before excepted, should be inviolably held for the use and benefit of the said *F.* and her heirs, in the same manner as if the said intended marriage should never take effect: “by which expressions it is meant and understood, between the parties, that if the said *J.* should depart this life, leaving issue of the said marriage, and the said *F.* should again intermarry, and leave issue, that such issue should be equally entitled to the benefit of this settlement as the issue of the said intended marriage would be; and in the event of the death of the said *F.* without issue, then the whole of the aforesaid estate both real and personal, except as before excepted, should go to her next legal representatives.” Signed and sealed by *John R. Archer* and *Frances C. Tabb*, in presence of three witnesses.

The articles between *Dr. Randolph*, and *Miss Mary Tabb* were substantially the same as the preceding, except that they did not mention any property which had not been assigned to *Mrs. Randolph*, nor did they contain the latter clause (marked by inverted commas) which provides for the issue of the intended wife, by any *future marriage*, and also disposes of the estate in the event of the wife dying without issue.

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In the case of Dr. Archer, the articles were executed on the 17th of February, 1801; those of Dr. Randolph had been previously executed, on the 19th of November, 1800. The respective marriages having taken effect, the following endorsement was made on both the articles: "Memorandum, that at the time of executing the foregoing contract, it was understood between the parties thereto, that in the event of issue, by the said intended marriage, the said John [and Bathurst respectively] was to enjoy a life-estate in all the property herein mentioned to be settled and secured." Witness our hands and seals the 26th of February, 1801. Signed and sealed by John R. Archer and Frances C. Archer, in the one case, and by Bathurst Randolph and Mary Randolph in the other; and both dated on the same day.

On the 20th of April, 1802, John Randolph Archer and Frances Cook his wife, by deed of bargain and sale, in consideration of twenty thousand dollars, conveyed the whole estate, real and personal, which had been allotted to Mrs. Archer, as one of the distributees of her deceased father's estate, to Needler Robinson; to which deed the said Robinson also affixed his hand and seal. And on the 21st of May, 1802, Bathurst Randolph and Mary his wife, in consideration of five shillings, by a similar deed, conveyed the whole of her estate derived from her father, to Richard E. Meade; who, on the next day, for a like consideration, reconveyed it to Bathurst Randolph. To set aside these conveyances, was the object of the present bills; which were brought, in the first mentioned case, by Frances Tabb, suing in her own right, and as next friend to the infant issue in ventre sa mere of Archer and wife, and also as next friend to five of her own children, infants, against the said Archer and wife, Randolph and wife, William B. Giles, (who intermarried with one of the daughters of Mrs. Tabb,) and his wife, and the person to whom Archer and wife had made a conveyance of the estate: in the other case, by — Randolph, (the child of Randolph and wife,) an infant of very tender age, by Frances Tabb, his next

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friend, and the said *Frances Tabb* suing as before, against *Randolph and wife*, and the same parties defendants, as in the first suit, substituting the purchaser in one case for that in the other.

William B. Giles, and *Martha* his wife, having released all their interest to *Mrs. Tabb*, and the infant children, their answers and depositions were relied on as evidence. Much parol testimony was introduced by the complainants in the Court of Chancery, tending to shew, (from all the circumstances, and the acts of the parties,) that the true construction of the *articles*, required a *settlement* of the estate upon the wives and their issue as *purchasers*, and in default of such issue, remainder to their blood relations, excluding the husbands even from a life-estate, in the event of their surviving their wives; and also that the articles were entered into with due deliberation, and without any kind of constraint. On the part of the defendants, *Archer* and *Randolph*, it was insisted that they were executed through the undue influence of *Mrs. Tabb*; and that her daughters reluctantly yielded to the terms of a proposed settlement as dictated by her. *Dr. Randolph* declares that "a few minutes before the marriage ceremony was performed, he was summoned to *Mrs. Tabb's* chamber, not to receive the hand of his bride, but to sign the marriage-contract, about the terms of which he had never been consulted." But the testimony going to prove the construction of the articles was disregarded by this Court: and it was thought to have been sufficiently established that the contracts were entered into freely.

The Chancellor dismissed the complainants' bills, and they appealed to this Court.

At the *October* term, 1808, these causes were very elaborately argued by *Call*, for the appellants, and by *Hay*, *Wickham* and *Randolph* for the appellees. In the course of the argument all the doctrine relating to marriage-articles and settlements, the interest which the issue and those in remainder acquired, the capacity of an infant to contract by marriage-articles, the effect of imposing restraints upon

marriage, and the power of a *feme covert* to dispose of her whole estate by giving her husband a conveyance, were fully discussed : but the Judges, in delivering their opinions, *seriatim*, as well as in the decree of the Court, having reviewed all the leading arguments and authorities, it would be productive of needless repetitions to insert the arguments at the bar.

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Thursday, April 20, 1809. The Judges pronounced their opinions, *seriatim*.

Judge TUCKER. This is an appeal from a decree of the *Richmond* Chancery Court, dismissing the bill of the appellants, who are, first, the issue of the marriage between the defendants, *Archer* and wife, formerly *Miss Tabb*; the mother of that lady; and her brothers and sisters, or a part of them; praying that the estate of the defendant, *Mrs. Archer*, may be settled pursuant to certain marriage-articles, entered into between herself and husband, previous to their marriage, under which the appellants claim an interest as *purchasers*, and for general relief.

These articles executed under the hand and seal of the parties, both of full age at the time, in contemplation of their intended marriage, having been proved by three witnesses, and admitted to record in the County Court of *Amelia*, where the parties, or one of them, resided; no question can be made as to that fact. But as a great deal was said in the argument, as to an undue influence exercised by *Mrs. Tabb*, over her daughter, to prevail upon her not to marry *Dr. Archer*, unless he consented to execute such articles; I shall only observe, that *Mrs. Tabb's* conduct, from the evidence, not only seems to me to stand above every possible imputation of impropriety, but to have been highly laudable and proper, and such as every prudent and affectionate parent, whether father or mother, would have done well to have pursued in such a case. *Mrs. Tabb* was guardian of her daughter by nature, and as such, the marriage of her daughter belonged to her, unless a testamentary guardian

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(a) 2 P.Wms.
117. Eyre v.
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had been appointed by the father, or the guardianship of the daughter had been duly committed to some other guardian. (a) But it appears from the record, that she was actually her daughter's guardian, whether by appointment by the father, or the Court, does not appear, and is perfectly immaterial. She was therefore in the strict line of her duty, when she was endeavouring to secure to her daughter, and her children the fortune committed to her care. That she refused her consent to the marriage after her daughter came of age, is perfectly immaterial; it could not impede, or prevent the marriage. And the only penalty which it is alleged she proposed for disobedience, (though that is not proved, or rather is disproved,) was, that her daughter should not be married at her house, or that she would not speak to her again. Even if these things were proved, I hold them of no consequence. A mother has a right to withhold her consent to any connection with her daughter which she does not approve of; and, whatever reasons or arguments she might use, if there were no improper motives or inducements held out on her part, they are not impeachable here. With respect to Dr. Archer, whatever were his motives for first objecting to, and then consenting to, and executing the articles, there can be no doubt of his *free agency*; unless this Court should agree to set a precedent, for which I can find none, in any other place. The validity of the articles, therefore, I conceive, cannot be impeached; the endorsement by Dr. Archer puts this matter out of all doubt as to *him*, being made *after* the marriage. That endorsement could not, however, operate any thing as to Mrs. Archer, who was no longer *sui juris*.

Articles made in consideration of, and previous to, marriage, are considered as heads of agreement entered into between the parties for a valuable consideration; a provision for the issue of the marriage is one of the great and immediate objects of this agreement; and consequently a principal intention of such agreement must be to secure such a settlement, as shall contain an effectual provision for that issue; which end it is clear cannot be answered by a settle-

ment so framed, as to leave it in the power of the parents to bar their issue by fine and recovery, or any other conveyance whatsoever. And the reason is, that the children of the marriage are considered as *purchasers*.^(a) And therefore in articles on a marriage, to settle lands to *A.* for life, remainder to the heirs male of his body, by his wife, the articles being executory, and but as minutes, it has been decreed that the settlement should be made according to the intention, and consequently to the first son, &c. And the reason given is, that, if this construction upon marriage articles were not made, it would give way to fraud, and overreaching, and to the defeating of the manifest intention of the parties in settlements in which the *issue* of the marriage are considered as *purchasers*.^(b) And marriage agreements are said to differ from all others in this ; that the principal consideration is the marriage. Settlements are prudential acts done chiefly for this consideration : and the estate settled may be greater or less, according to the discretion of the parties : as soon as the marriage is had, the principal contract is *executed*, and *cannot be set aside or rescinded* ; the *estate* and *capacities* of the parties are altered ; the children born of the marriage are equally *purchasers*, under both *father and mother* : and therefore it has been truly said that marriage-contracts ought not to be rescinded, because it would affect the interest of *third* persons, the *ISSUE*. It seems also agreed that there is this further difference between agreements, on marriage being carried into execution, and other agreements, that all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement *in part*, it cannot be decreed against the other in *specie*, but must be left to an action at *law* ; but in marriage agreements it is otherwise : for though either the relations of the husband or wife, should fail in performance of their part, yet the *children* may *compel* a performance ; they being considered as purchasers and entitled to all benefit of the uses under the settlement,

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(a) 1 *Eq. Cas.*
390. *Trevor v.*
Trevor. 1 *P.*
Wms. 633. *S.*
C. 1 *Fearne,*
78, 79. 1
Fonb. 202,
203. n. (p). 2
Powell on Con-
tracts, 27. 3
Atk. 610, 611.
Harvey v.
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(b) 1 *P. Wms.*
633, 634. 3
Atk. 611.

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(a) 3 Atk.
187. 610, 611.

(b) 3 Atk.
613.

(c) *Legg v. Gohwine*, Cas. temp. Talbot, 20. 2 P. Wms. 349. *West v. Erissey*, 5 Ves. jun. 273-276. *Randal v. Willis*.
(d) *Trevor v. Trevor*, 1 P. Wms. 631. *Kentish v. Newman*, 1 P. Wms. 234. *Osgood v. Stode*, 2 P. Wms. 257. *Griffith v. Buckle*, 2 Vernon, 13. *Shelburne v. Inchiquin*, 1 Bro. Ch. 358.
(e) 2 P. Wms. 244.

notwithstanding there has been a failure on one side.(a) And, although the rights of an infant, party to such an agreement, to *real* estate, may not, perhaps, be bound by any agreement in relation to it, *unless there be issue* of the marriage, (as there has been in this case,) yet, as to *personals*, her interest may be bound by agreement on the marriage; and if the parent or guardian cannot contract for the infant, so as to bind that property, the husband as to the personal estate, would be entitled to the absolute property in it, immediately on the marriage.(b) And Lord Ch. *Hardwicke* said, he knew of no precedent where a marriage agreement had been called in *question*, where it had been made (as in that case) with consent of parents and guardians: an observation which I make to save a repetition of what I have here said, in the cause which was heard at the same time with this. The force, obligation, and effect of marriage-articles is thus described by the Lord Chancellor in the case of *Randal v. Willis*, 5 Ves. jun. 273. "The marriage taking place upon these articles, and *no other written document* of the agreement between them, and the articles formally executed *under seal*, whatever the rights of the parties are by the *articles*, it is *totally impossible* that any parties thereto could be discharged from *any one obligation* imposed by the articles." Settlements varying from the articles have therefore been reformed or set aside.(c) And *articles* being in their nature *executory*, ought to be construed and moulded in equity, according to the intention of the parties.(d) And, in the case of agreements in consideration of marriage, a Court of Equity will totally disregard the *form*, if the *substance* of the agreement and intention of the parties in making it can be got at; as in *Cannel v. Buckle*,(e) where a woman gave a bond in 200*l.* penalty to her intended husband, in which the intended marriage was recited, and the condition was, that, if it took effect, she would convey all her lands to her husband and his heirs; and though it was objected that this bond became void on the intermarriage, the Lord Chancellor said it is sufficient that the bond is a *written evidence* of the agreement of the

parties, and being^o upon a valuable consideration, (the marriage,) it shall be executed in equity; and that it would be unreasonable that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond. And the same point was before decided in the case of *Acton v. Acton.*(a)

The intent of the parties to an agreement may be evinced, either from the nature of the covenant compared with the substance of the agreement, or from the nature of the contract on which the covenant or agreement arises, considering who are the parties to it, and the object of their stipulating.(b) “The most apt instances of this sort, that occur, are in the cases of marriage-articles, wherein, although lands are expressly covenanted to be conveyed to one for life, with remainder to his heirs male of his body, which, on a contract executed, would give to the party an estate tail; yet, on a bill brought for the execution of articles, the lands will be directed to be settled upon A. for life, with remainder in strict settlement, upon his first, and other sons in tail male, &c. because, from the nature of the contract it is clear, that the issue of the marriage are principally in the consideration of the parties, and that the contract is made with a view to secure to THEM the estates stipulated about, and of which they are PURCHASERS, in CONSIDERATION of the MARRIAGE. It is considered, therefore, that it would be a strange and a vain construction of such contracts, if the PRINCIPAL contracting, and who is evidently the person meant to be RESTRAINED thereby, should be intended to have such an estate by them, as would enable him THE very next day after their execution to DEFEAT, by a fine, the limitations to his ISSUE, with a view to secure which limitations the contract was entered into, and a valuable consideration paid for it.”

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(a) *Proc. in
Chancery,*
257. 2 *Vern.*
480. S. C.
1 *Eq. Ca. 63.*

(b) *Prinell on
Cont. 40.*

622. 1 *Eq. Cas. Abr.* 387. S. C. *Bale v. Coleman.* 1. *P. Wms.* 142. *Seale*
290. *Griffith v. Buckley.* 2 *Vern.* 13. *Osgood v. Strode.* 2 *P. Wms.* 257. *Jones*
1 *Eq. Cas.* 392. *Burton v. Hastings.* *Ibid.* 393.

Ibid. 41. *Trevor v. Trevor.*
1 *P. Wms.*
v. *Seale. Ibid.*
v. *Laughton.*

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(a) 1 Lev.
150. *Ibid.* 237.

(b) 1 Atk.
265.

(c) 3 Atk.
186.

Nor are the *issue* of the *intended* marriage the only persons to whom the consideration of the marriage extends. In the case of *Jenkins v. Remys*,^(a) it was held that the marriage and marriage portion of the *first wife*, for whose issue by the intended marriage a provision was expressly made by a settlement, with remainder to the heirs of the body of the husband, did extend to the issue of the *husband* by a *second wife*. So in the case of *Newstead and others v. Searles and others*,^(b) a widow on her marriage, with the participation and consent of her intended husband, made a settlement of her own estate, in favour of the issue of her former marriage, in fee, with a proviso, that, if there should be any issue of her intended marriage, they should have an equal share of her estate. There was no issue of the second marriage; and Lord *Hardwicke* declares that the issue of the *first* marriage stood in the very same plight and condition, as against a mortgagee having notice of this settlement, as the issue of the *second* marriage, if there had been any, would have done. So, in *Goring v. Nash* and others,^(c) marriage-articles were entered into between a father and his son, on the son's marriage, wherein, after several limitations, there was a limitation in favour of one of the daughters of the father, (not the eldest,) whereupon it was objected that she was a mere volunteer, as not being the issue of the intended marriage, but only a daughter of the father. Lord *Hardwicke* said, all the decrees for the specific performance of marriage-articles, on limitations to *younger* children, were authorities in favour of the daughter of the father; and *where such articles* have been decreed *at all*, they have been carried into execution even as to COLLATERALS, and not carried into execution in PART ONLY. "Suppose," said he, "in the present case a bill had been brought by *R. F. jun.* (the son,) or the widow, *must not this particular limitation have been decreed to the plaintiff* (the daughter of the father) *at the same time?*" And he said nearly the same thing in the case of *Newstead v.*

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(a) 1 Atk.
268.

(b) 2 P.Wms.
594.

(c) 3 P.Wms.
211.

(d) 3 P.Wms.
228. Cas.
temp. Talbot,
80.

Searles.(a) In the case of *Vernon v. Vernon*, which was a bill for the specific performance of marriage-articles, whereby lands of a certain value were agreed to be settled on the husband and wife, and the issue male of the marriage; remainder to the *brothers* of the husband, who were the plaintiffs, in which it was objected that the articles as to them were merely voluntary, and notwithstanding any of the *considerations* therein expressed, yet the Lord Chancellor decreed in their favour, and, upon an appeal to the House of Lords, that decree was affirmed.(b) The case of *Lechmere v. Carlisle*,(c) was, where a bill was brought by the *nephew* and heir of Lord *Lechmere*, deceased, to compel a specific performance of marriage-articles, whereby a certain sum of money was agreed to be laid out in lands, to be settled to the use of Lord *Lechmere* for life, without waste, with divers limitations over; remainder to Lord *Lechmere* in fee. The defendants, by their answer, insisted that Lord *Lechmere* intended only a provision for the *lady* and the *issue of the marriage*; and that the limitation of the remainder in fee to the right heirs of Lord *Lechmere*, ought not to be carried into execution in his nephew's favour, the articles as to him being merely *voluntary*. Sir *Joseph Jekyll*, Master of the Rolls, after taking a full view of all the various cases upon the subject, decreed in favour of the nephew;* and his decree was, upon that point affirmed by Lord Ch. *Talbot*.(d) And the Lord Chancellor in delivering his opinion in that case observed, that "it was then a settled point, that where the " securities are appropriated, money agreed to be laid out " as land shall go as land, not only to the issue of the marriage, but likewise to a *collateral* heir, or *general remainderman*, unless there appears some variation in the par-

* Note by Judge TUCKER. The following cases were mentioned and remarked upon by the Master of the Rolls in giving his opinion. 1 *Salk.* 154. 1 *Vern.* 298. *Kettleby v. Atwood*, *Ibid.* 471. S. C. 2 *Vern.* 101. *Lancy v. Fairchild*. *Ibid.* 20. *Knights v. Atkins*. *Ibid.* 227. *Symons v. Rutter*, *Ibid.* 295. *Chichester v. Bickerstaff*. 1 *P. Wms.* 172. *Lingen v. Sowray*. 2 *P. Wms.* 171. *Edwards v. Countess Warwick*. 2 *Vern.* 322. *Holt v. Holt*. 2 *P. Wms.* 594. *Vernon v. Vernon*.

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(a) 2 P.Wms.
175.

(b) *Hurdres*,
395.

(c) Cited 2
P. Wms. 252.
(d) 2 P.Wms.
255.

(e) 2 P.Wms.
257, 258.

(f) 3 Crui.
Digest, 363.
3 Atk. 646.
S. C.

“ties’ intent.” *A fortiori* the land itself. For, as was said by Lord Ch. *Macclesfield*, in *Edwards v. the Countess of Warwick*,(a) the objection that the plaintiff claimed under a *voluntary* limitation did not hold, inasmuch as it had been held, that the CONSIDERATION for the PRECEDENT limitations in a marriage settlement, had been applied even to the SUBSEQUENT ones; as where, in consideration of a marriage and portion, land had been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a *brother*; these considerations have extended to the *brother*, as was in fact afterwards done in the case of *Vernon v. Vernon*, before mentioned; so that, if that case required the support of a precedent, one might probably have been found. And this is agreeable to what Lord *Hale* is reported to have said in the case of *Jenkins v. Keamish*,(b) that the consideration of the marriage, and the marriage portion, will run through all the estates raised by the settlement, though the marriage be not concerned in them, so as to make them good against purchasers, and to AVOID A VOLUNTARY CONVEYANCE;(c) and though Lord *Macclesfield*, in the case of *Osgood v. Strode*,(d) said, “the marriage and marriage portion supported only the limitation to the husband and wife, and their issue, which was all that could be presumed to have been stipulated for by the wife or her friends;” yet, it must be observed, that in that case, neither the wife, nor her issue, nor any of her friends were parties; but the contest was between a nephew, in whose favour there was a limitation in the articles, and the heirs at law of the father and son, by whom these articles were entered into on the son’s marriage; and there was a decree in favour of the nephew, against the heirs at law. And the settlement was directed to be moulded in such manner as to provide for all the branches of the father’s family, (from whom the estate settled moved,) according to the apparent intention of the father.(e)

In the case of *Le Neve v. Le Neve*, as taken from Mr. *Forrester’s MS*,(f) where, by marriage-articles, the issue of that marriage were to have the estate in such manner as

Edward Le Neve, the father, should, by deed or will appoint; and no direction how the estate should go for want of appointment; but only, in default of issue, to *Edward* and his heirs; so that, if the plaintiff should die without issue in their father's life, their representatives would be entitled to nothing. Lord *H.* said, notwithstanding this, he thought the plaintiffs entitled to some relief, as the other part of that contingency might happen, and decreed a conveyance accordingly. This has satisfied the doubt in my mind, whether the collateral relations and mother of *Mrs. Archer* were entitled to ask for a settlement pursuant to the articles.

And where it appears by the marriage-articles, that, in the settlement proposed to be made, the parties to the marriage are to take an estate for life, instead of an estate-tail, a FINE levied by the husband, (who was absolute owner of the premises in fee-simple, at the time of the marriage and entering into the articles, but was to have been tenant for life only, with remainder to the issue male of the marriage, and the heirs male of such issue male, lawfully begotten, with remainder to his own right heirs,) was considered as no bar to the eldest son of the marriage, although the uses of the fine were declared to be for the second and other sons of that marriage, and although the eldest son, as heir to his father, inherited other very large estates. (a)

Length of time also appears to be no bar. In the last mentioned case, near fifty years had elapsed from the date of the articles, and upwards of twenty-five years from the date of the fine. It appeared that the articles had been thrown by for several years as useless, being found in the bottom of an old trunk after Sir *John Trevor's* death. But Lord Ch. *Parker* disregarded these circumstance, saying that if, within two years, (the time mentioned in the articles within which Sir *John Trevor* agreed to make the proposed settlement,) the wife's trustees had called for the settlement, or had brought a bill to compel the performance of the marriage-articles, there would be no question that the Court would have decided the settlement upon Sir *John Trevor*

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(a) *Trevor v. Trevor*, 1 P. Wms. 622.

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(a) 1 P.Wms.
622. 1 Eq.
Cus. 387.
(b) 3 P.Wms.
213, 214.

(c) Per Lord
Ch. *Hordw.*
3 Atk. 187.
Goring v.
Nash. Ibid.
611. *Harvey*
v. Ashley,
same doctrine.

(d) 1 P.Wms.
632.

for life, &c. according to the intention of the parties. (a) The same doctrine as that last mentioned, was held by the Master of the Rolls, in *Lechmere v. Lord Carlisle*, (b) viz. that Lord *Lechmere* was compelled in equity to fulfil the articles, and, having lived *after* the year within which time the lands were to have been purchased and settled, without doing it, he had *broken* his covenant; and the trustees might thereupon have brought their bill *immediately* to compel him to make such purchase and settlement. And although in common cases of a breach of covenant, the parties may be left to their action at law for damages, yet the power of a Court of Equity to carry marriage-articles into execution, notwithstanding a breach on either side, seems not to be doubted, for the specific execution of articles, being the most adequate justice in general, shall not be left to an action at law. (c)

Marriage-articles being in their nature *executory* only, it has been determined that a covenant therein contained to stand and be seised of the premises, until such time as a further assurance should be thereof made to the uses of the said articles, could not be taken as a final settlement. (d)

This view of the principles by which Courts of Equity are governed, in respect to marriage-articles, may furnish us with a guide to the decision of the case before us.

The marriage-articles, to which *Dr. Archer* and his present wife are the only parties, recite “that, whereas a marriage is intended to be shortly had and solemnized between the parties thereto, and they have mutually agreed that ALL the estate, both real and personal, to which the said *Frances* is entitled, SHALL be secured to, and settled upon her and her heirs, except as therein after excepted. Now, in consideration of the said intended marriage, and for the intent and purpose aforesaid, the said *ƒ.* doth thereby covenant and agree to and with the said *Frances*, that ALL the aforesaid estate, both real and personal, (consisting of sundry plantations, slaves, stocks of horses, cattle, &c. except as therein excepted,) shall remain in the right and possession of the said *Frances*, during the

“ *continuance* of the said intended marriage ; and the annual proceeds thereof, ONLY, shall be applied to the support and maintenance of the said *J.* and *F.* and their *issue*, if any there should be. 2dly. The said *John* doth thereby FURTHER covenant and agree to and with the said *Frances*, that he never will sell or dispose of any part of the said *real* or *personal* estate, (except as before excepted,) in any manner whatsoever : But the same shall always be held as an INVIOABLE FUND for the support and maintenance of the said *John* and *Frances*, and their *issue*, if any there should be, of the said intended marriage, applying only the proceeds, or profits, without renting or applying any of the original stock for that purpose : But the whole of the said *original stock* (except as therein excepted) shall be INVIOABLY HELD, for the use and benefit of the said *Frances* and her heirs, in the same manner as if the said intended marriage should never take effect. By which expression it is MEANT and UNDERSTOOD between the parties, that if the said *John* should depart this life, leaving *issue* of the said marriage, and the said *Frances* should again intermarry and leave *issue*, SUCH ISSUE shall be equally entitled to the benefit of this settlement, as the *issue* of the said intended marriage would be ; and, in the event of the death of the said *Frances*, without *issue*, then the whole of the aforesaid estate, both real and personal, (except as before excepted,) shall go to her next legal representatives.” On the back there is an endorsement, of which I shall take notice presently.

It was objected to this instrument, that, if it were any thing, it was a marriage SETTLEMENT, and not merely articles ; that it was therefore an agreement already EXECUTED between the parties, and not merely *executory*, as articles are ; that being already *executed*, it must be left to its legal operation and construction ; that the Court could not interfere to direct any other settlement, since that would, in effect, be to change the agreement between the parties. To these objections an answer perfectly satisfactory was given

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by the counsel for the appellants; that there is no covenant, or *grant*, or any words capable of *passing* an interest, or of declaring that she will stand seised to the uses in the instrument mentioned, or of creating a use, or trust, *on the part of Mrs. Archer*. The covenants are entirely on the part of the husband; and whether the object of these covenants be *executory* or not, yet, as it appears that the husband has *actually broken* his covenant, by executing a *voluntary* conveyance for the land, and taking back a conveyance to himself, in exclusion of the *wife* and her issue, (to provide for whom, whether of that or any future marriage, was manifestly the object and intention of the articles,) that objection ought not to prevail. And the case of *Lechmere v. Carlisle*^(a) is a strong authority to shew, that, whenever there is a *breach* of any covenant contained in marriage-articles, a Court of Equity will interpose its aid, to enforce a settlement to be made pursuant to the intention of the parties, as it may appear from the articles; provided the application for the aid of the Court be made in behalf of such persons, whose interest, whether immediate or remote, was within the consideration of the marriage, as in the case of the issue of Doctor *Archer* and his wife, now before us, who, in my opinion, are well entitled to have such a settlement made, as was manifestly the intent and meaning of the parties, as expressed in, or as may be collected from, the articles themselves.

(a) 3 P. Wms.
211.

The counsel for both parties have contended, on their respective parts, for an exposition and interpretation of the articles, by evidence *dehors* the articles themselves. The counsel for the appellants rely on Mr. *Giles's* deposition, and some further evidence, altogether parol; their adversaries claim the benefit of the endorsement, made by Dr. *Archer* and his lady, upon the articles, some time after the marriage. I am of opinion, that *both* ought to be rejected, in the present case. The only effect of that endorsement, I conceive, is to prove, (if such proof were wanting,) that there was no fraud or surprise upon Dr. *Archer* in the original execution of these articles. With respect to Mrs.

Archer, they could have no effect ; she was no longer *sui juris* ; no longer capable of *contracting with*, or of *explaining* a contract *made with*, her husband ; being equally incapable of being a *witness* for or against her husband, as of *contracting* with him. The endorsement, to have any operation with regard to her, must operate in one or other of these modes. With respect to parol testimony, I can discover no such ambiguity in these articles as to require or permit a resort to it. I have, on a former occasion, expressed my reasons pretty much at large for rejecting parol testimony to explain the meaning and intention of parties in a solemn covenant, or even in written agreements. (a) I will not repeat them, though I still feel their full force ; and conceiving that the articles themselves are sufficiently intelligible, as containing words which have, in themselves, a positive, precise sense, I have no idea of its being possible to change them : and shall add, upon the authority of Lord *Thurlow*, that I take it to be an established rule, that words cannot be changed in that manner. (b)

From the various cases upon the subject of marriage-articles, I think one general rule may be collected, which I do not recollect to have found precisely laid down, in any one. It is this : that, whenever in marriage-articles a settlement is proposed to be made, if there be any *casus omissus* or chasm in the uses, or estate intended to be settled, such *casus omissus* or chasm shall be supplied by the Court according to the intention of the parties, if possible to be collected from the instrument ; if not, then from the *rules of law*, or the usages customary in such settlements. Thus, where the uses expressed in the articles have gone *no further* than to limit an estate-tail to the issue of the owner of the estate, it was held that the equitable reversion in fee descended upon the heirs general of the grantor ; and it would seem that a settlement was directed accordingly. (c) So where money, part of which was the husband's, and part the wife's, was on the marriage agreed to be laid out in land, and settled on the husband for life, remainder to the wife for life,

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(a) *Long v. Colston*, 1 *Hen. & Munf.* 121.

(b) 1 *Bro. Gh. Rep.* 350, 351. See also 4 *Bro. Ch.* 244, 245. &c.

(c) *Goring v. Nash*, 3 *Atk.* 186.

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(a) 2 Vern. 20,
21. *Knights v.*
Atkins.
(b) 3 P.Wms.
217, 218.

(c) 1 P.Wms.
633. *Trevor v.*
Trevor.

remainder to the heirs of their two bodies; and the uses went no further; it was decreed that the heir of the husband should have the whole (notwithstanding the wife survived him) after the wife's death, upon the presumption that it was so intended. (a) And this decree was cited and approved by the Master of the Rolls, in *Lechmere v. Carlisle*. (b) So, where articles on a marriage were to settle lands to A. for life, remainder to the heirs male of his body by his wife, the articles being *executory*, and but as *minutes*, the settlement should be according to the intention and usual course in such cases, and consequently to the first son, &c. in strict settlement. (c)

Now the husband upon the marriage is a purchaser for a *valuable consideration*, and shall not be deprived of any of his *legal rights*, accruing upon the marriage, except such as he shall have expressly covenanted, or consented, to give up, by the articles concluded between him and his intended wife. In decreeing a settlement, therefore, to be made pursuant to these articles, the Court ought to inquire how far he has given his consent to this deprivation; beyond which this Court cannot go. Therefore if there be in the articles any contingency unprovided for, in the happening of which his *legal rights*, *jure mariti*, may take place without prejudice to the general scope and intention of the articles, and to the interests of those who are within the consideration of them, the settlement to be made, in case of such contingency happening, ought, I conceive, to pursue the rules of law, so as to let him into the perception and enjoyment of those legal rights. And the same construction ought to be made in favour of the wife's rights, accruing on the marriage: each party retaining in their fullest extent their respective rights accruing upon the marriage, which they have not, on a fair and liberal interpretation of the articles, according to the established rules of construing them in Courts of Equity, surrendered for the mutual benefit of themselves, and their issue, or of such other persons as are evidently within the consideration of the agreement. I wish to be understood as confining my observations to the con-

struction of marriage-articles, not as meaning to extend them to settlements, or any other agreements executed.

The articles contain two distinct covenants. The first relates, exclusively, to the *continuance of the marriage*; during which period the rents and profits *only*, are to be applied to the support and maintenance of the husband and wife, and their issue, if any. By the second, Dr. Archer covenants that he *never* will sell any part of the estate; (except as in the articles mentioned;) thereby divesting himself, completely, of all power of disposing of the same; (as in violation of that covenant he has done;) but that the same shall *always be held* as an INVIOABLE FUND for the support and maintenance of the said JOHN and Frances, and their issue, if any; only applying the proceeds or profits thereof, without resorting to, or applying, the original stock, &c.

Now the first covenant applying to the *continuance of the marriage*; this part of the articles may fairly be interpreted to relate to some *future* period, so far as relates to the application of the proceeds or profits of the estate; the support and maintenance of the husband is evidently contemplated therein, as well as that of the wife and their issue: and the original fund is to be *held INVIOABLY* for ALL those purposes. The provision for the husband is not limited to the continuance of the marriage, any more than the provision for the wife, or the children; it must therefore be for life at least; subject, however, to the claims of the issue for a proper support and maintenance, if it should be withheld. The meaning then is, that Dr. Archer, in consideration of the marriage, and of the property left at his disposal by the articles, renounces his matrimonial rights to the rest of the estate of his intended wife; and, in lieu thereof, covenants and agrees to accept of the proceeds and profits thereof, *only*, for the support and maintenance of himself and family during the continuance of the marriage, and for the like support and maintenance of himself and the issue of that marriage in the event of his surviving his wife.

But if I am mistaken in this construction of the second covenant, and it should be that it relates only to a support

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and maintenance for Dr. Archer, during the continuance of the marriage, then, I must observe that there is no provision made for the event of Dr. Archer's surviving his wife, and therefore as there is issue of the marriage, Dr. Archer will at all events be entitled to be tenant by the *curtesy* of the lands, there being no covenant or agreement to surrender that *legal* right. But, under the fairest construction of the articles, I think he has agreed to accept the profits for life, of the *whole* estate, in lieu of the chance, only, of being a tenant by *curtesy* in the *real* estate.

The latter part of the second covenant, "that the original stock shall be inviolably held for the use and benefit of the said *Frances* and her heirs, in the same manner as if the said intended marriage should never take effect," may seem to give room for a different interpretation of the preceding member of the covenant, were it not that the meaning of that expression is immediately explained, so as to leave ample room for the construction I conceive it ought to have; or if not, to leave room for the interpretation of the tenancy by the *curtesy* in the lands, which is nowhere covenanted to be surrendered, or given up, although it may be merged in the life-estate, which, according to my interpretation of the articles, Dr. Archer is entitled to.^(a)

(a) *Wide Hodsdon v. Lloyd*, 2 Bro. Ch. 543. where articles somewhat like these were entered into.

My opinion therefore is, that the Chancellor's decree dismissing the bill of the plaintiffs ought to be reversed; that the defendants, Dr. Archer and his lady, ought to be decreed to execute a settlement of her estate (except as excepted in the articles) to trustees, to be named by the Court, in fee-simple, in trust to permit Dr. Archer, during the continuance of the marriage, to take and receive the rents, issues, and profits thereof, for the support and maintenance of himself, and his wife, and their issue, if any, and, from and after the determination of the marriage union, to permit the survivor of the said *John* and *Frances* to take and receive the rents and profits, in like manner, during his or her life, for the like purposes; and, from and after the death of the survivor, to hold the same to the use of the issue of the said *Frances*, and the descendants of such

issue, if any there be, in equal portions, *per stirpes*, and not *per capita*: and, in case of the death of the said *Frances*, without issue of her body, and without any descendants, then and in that case, to the use of the heirs of the said *Frances*, who shall be then living, generally, in such portions as the law directs; subject, nevertheless, to the right of *Dr. Archer* to take and receive the rents, issues, and profits thereof, in case he shall survive his wife: that the several deeds and conveyances executed by *Dr. Archer* and wife, for the lands and slaves, &c. and the several deeds and conveyances executed by the persons to whom those deeds and conveyances first mentioned were made, be brought into the Court of Chancery, and there cancelled; and that the Court of Chancery take such further order, as to the records made of the proof of the said deeds and the recording thereof in the District Court of *Petersburg*, and in the County Court of —, as in the opinion of that Court will best answer the purposes of preventing fraud and imposition in consequence of the proving and recording those deeds.

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Judge ROANE. As the case of *Randolph v. Randolph* and others, not only embraces, perhaps, all the important topics on which the case of *Tabb v. Archer* and others turns, but also involves some important points *ultra*, I will first give my opinion on it: a few words will then suffice to declare my opinion on the other case.

I shall throw out of this case all the parol testimony going to explain the contract in question. Where there is a written agreement, the whole sense of the contracting parties is supposed to be comprised therein; and it would be dangerous to make any addition thereto, unless there was fraud in leaving out something at the time; a) or unless there be a latent ambiguity which is impossible to be explained without the aid of parol testimony. The last is not pretended to exist in this case; and as to the first, it is not shewn that any *other* terms than those comprised in the written contract were stated to, or assented to, by *Dr. Randolph*: if any thing intended by *Mrs. Tabb* has not

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been inserted in this agreement, it is exclusively her own act, or that of her agent; and cannot affect the interest of Dr. *Randolph*. The construction of the *contract* must therefore depend exclusively upon the terms of the instrument itself.

Before I come particularly to the construction of the contract, I will dispatch some preliminary objections.

In the first place, it is objected that Mrs. *Randolph* was an infant at the time of executing the agreement, which, therefore, shall not bind her. The answer is, that infants may marry, and as essential thereto, may contract by means of marriage settlements. In the case of *Harvey v. Aston*,^(a) this position is established; and a settlement by an infant *feme* of 15, was held to be irrevocable in favour of the issue, and that the infant had not her election to waive the agreement at the age of 21. The same doctrine is expressly held in the case of *Seamer v. Bingham*.^(b)

Again, it is objected that the agreement in question was no act of the infant, Mrs. *Randolph*, but exclusively the act of her mother. The answer is, that the law has entrusted the father, or guardian, with the marriage of infant children, or wards, who ought not to do it to their disparagement; and, consequently, that settlements made by infants through them are binding; and it is further held that, even where the father or guardian acts *corruptly or fraudulently*, the agreement is not therefore to be set aside, and the children stript of the provision intended.^(c) In the case before us there is, on the contrary, no pretence to say that the motives of the mother were interested, (however unusual such a course of conduct may be in this country,) or that she made any gain to herself by the contract in question. The settlement before us has no limitation in favour of herself or others of the *Tabb* family; as is the case in the cause of *Tabb v. Archer*.

As to the consent to this instrument on the part of Dr. *Randolph* and his wife, it is proved that they executed it freely; and it is probable, upon the testimony, that they

(a) 3 Atk. 575.

(b) 3 Atk. 54.

(c) 3 Atk. 611.

Rnew from an early stage of the courtship, that a settlement would be insisted on by Mrs. *Tabb*.

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With respect to the settlement itself ; it is held that in the case of articles before marriage, the provision for the issue being the immediate object of the agreement, Courts of Equity will execute them in strict settlement, so as to bar the power of the parents to defeat them by fine and recovery ; (a) and that, although the articles, by *legal construction*, would give an estate of inheritance to the husband or wife, yet they will be executed in strict settlement in favour of the issue on the ground assigned. (b) To these positions I will add this ; that the support of the husband and wife being equally objects of the marriage, to which the property belonging to each is naturally contributory, the rights of either thereto, accruing by the marriage, will only be lost by an express renunciation thereof, or by a renunciation arising from a plain and necessary implication ; and that, as such a renunciation without consideration is unreasonable, we ought to lean in favour of a construction giving an equivalent. I have not found nor looked for any authorities on this point ; but I hold it to be self-evident.

(a) *Fearne*,
78.

(b) 2 *Bridg.*
Dig. 9.

The case before us is a strong one for the application of this principle ; for, unless the husband gets a life-interest in the property, he gets almost nothing, although he married a lady with a large fortune. Let us see whether there be any thing in the agreement which imports an absolute renunciation ; or rather, whether the renunciation of his marital rights is not in consideration of a life-interest in the whole estate, exclusively of the excepted property. It is of no avail to say that this construction, letting in the life-interest of the husband, postpones the vesting, or, rather, the enjoyment, of the limitation, in favour of the issue ; that is but the common case, and such a provision for the husband, in general very just, is found in almost every settlement of the kind.

The agreement before us states its object, intent and purpose to be, to “ secure and settle” upon the wife and her “ heirs ;” (construed to mean “ issue” in order to further the intention of the agreement,) all her estate, except a

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pittance particularly specified and excepted. The first remark I make on this part of the agreement is that this declared object is answered, although the husband is also let in to the enjoyment of a life-interest: for the covenant not to aliene, &c. *secures* the estate to the wife for her life, and the articles also settle the property upon, and vest it in, the issue, although the husband is construed also to have a life-interest: by this construction the estate is "secured" to the wife and "settled" on the issue in the language of the articles, although in the last case it may not be so soon enjoyed by them as if the life-estate of the husband should not intervene and had been expressly given up and excluded.

In furtherance of this declared object and intention, it is covenanted that the property aforesaid shall "remain in the right and possession of said *Mary* during *the continuance of said intended marriage*," and the proceeds only be annually applied to the support of the said *Bathurst* and *Mary*, and their *issue*, if any be. The covenant thus far relates only to the continuance of the coverture. Dr. *Randolph* then goes on further to stipulate, that "HE NEVER WILL sell or dispose of any part" of the estate in question in any manner whatever, but that the whole thereof, shall be ALWAYS held as an inviolable fund for the maintenance of said *Bathurst* and *Mary*, and their issue, if any there should be, applying only the profits or proceeds thereof to *that purpose*, without resorting to or selling any of the original stock, for that purpose, which shall be held for the use and benefit of the said *Mary* and her heirs, "in the same manner as if said intended marriage should never take effect."

The first stipulation above mentioned relates only to the rights of the parties *during the continuance* of the intended marriage. Every purpose in relation thereto would seem to be answered by the stipulation that the property should remain in the RIGHT AND POSSESSION of the wife, *during the marriage*, and the *proceeds* only be applied to support the issue: after this it would perhaps be supererogation to stipulate that the husband would not sell the same *during*

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the coverture. We must therefore to satisfy this last stipulation, apply it to events posterior to the coverture ; to the rights of the husband in the event of his surviving his wife. In this relation it is, that Dr. *Randolph* stipulates that he will “NEVER” sell or dispose of the property in question ; (not that he will not do it during the coverture ;) he also stipulates that it shall ALWAYS be held as an inviolable fund for the support of himself and wife, (not that it shall be so held only during the coverture,) and their issue, if any ; applying the profits only as aforesaid. While these words are fully extensive enough to confer on Dr. *Randolph* the use of the property for his life, for the covenant is not restricted to the duration of the coverture ; they also guaranty to the issue of the marriage a support therefrom even after the death of his wife, and thus answer every equitable purpose in their favour. The concluding stipulation that the original stock shall be inviolably held for the “ use “ and benefit of *Mary* and her heirs in the same manner as “ if said intended marriage should never take effect,” while it cannot be taken LITERALLY, for then the object of the settlement in favour of the issue of the marriage would be *defeated*, must be satisfied by a construction giving to the husband the use of the property for life in the event of his surviving, while his power of alienation being given up, the estate will *ultimately* remain to the wife and to her issue after his death. We must restrain the meaning of these last mentioned words in this manner, in order to effectuate the clear intention of the parties, to settle the estate in favour of the issue of the marriage, and reconcile it to the life-estate given to the husband in consideration of his marital rights as aforesaid.

I am thus inclined to think that, upon a fair view of the whole instrument, and especially, when we take into consideration the general principle before mentioned, that the enjoyment of the property of a husband or wife by the other, as the case may be, for life at least, is always intend-

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ed in settlements of this kind ; the right of Dr. *Randolph* in the case before us to the use of the property for his life is recognised and admitted by the articles.

Such is my construction of the agreement in question. I therefore think the decree ought to be reversed ; and one rendered calculated to settle the estate in controversy pursuant to the uses embraced by that construction.

Most of the grounds of my opinion in the case of *Randolph v. Randolph* and others, apply also to the case of *Tabb v. Archer*. The circumstances of this case are stronger against the claim of the appellees than those in *Randolph's* case. For example ; Mrs. *Archer* was of full age at the time of the contract ; and therefore Mrs. *Tabb's* consent was not essential to the marriage. The marriage might have been had without it : but indeed, Mrs. *Archer* herself required a settlement as a *sine qua non* of the marriage. Dr. *Archer* was also duly notified of this requisition, and on deliberation, acceded thereto.

As to the construction of the agreement there is no difference between this case and the other, except that it provides for the issue of any FUTURE marriage of Mrs. *Archer*, and in default of any issue by her, provides also for the next legal representatives of Mrs. *Archer* ; whereas, in *Randolph's* case, the issue of the contemplated marriage only was provided for. This general limitation in favour of the *Tabb* family might by possibility extend to Mrs. *Tabb* herself : but this possibility is too remote to fix on her any selfish or interested conduct which can in any degree affect the validity of the transaction. I should be of this opinion even if the contract had been negotiated by her : but this is not the case ; it was the act of Mrs. *Archer* ; and if any benefit results to Mrs. *Tabb* thereby, it is conferred by her daughter, and not by her own act. My opinion is, that the decree in this case is to be similar to that in the case of *Randolph v. Randolph* and others, except that it is to take in all the issue, by any marriage, of the appellee, Mrs. *Archer*.

Judge FLEMING. The case has been so fully and ably discussed by the Judges who have preceded me, that I shall only add that I concur with them in opinion, and unite in the decree which has been agreed upon in conference.

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The following were the decrees entered, in both cases, changing only the names of the parties. Those parts included within crotchets, thus, [] were inserted in the case of *Tabb* and others v. *Archer* and others, and omitted in that of *Randolph* and others v. *Randolph* and others. The additional matter to be found in the decree in the last mentioned case, is noted at the bottom of the page.

“ The Court is of opinion that the issue of the said *Frances Cook Archer*, [either] born of her marriage with the said “ *John Randolph Archer*, [or any future marriage,] when- “ ever they may come *in esse*, are in equity to be consider- “ ed as *purchasers*, and within the consideration of the “ articles agreed upon and executed between the said [“ *John Randolph Archer* and *Frances*] his wife, then [“ *Frances Tabb*,] previous to their intermarriage; to which articles,* “ [both parties being of full age at the time of the execution “ thereof,] no objection is perceived either on the ground of “ fraud or surprise; nor are the same liable to be impeach- “ ed for any other reason. Marriage-articles are consider- “ ed as the heads or minutes, only, of an agreement entered “ into between the parties, upon a valuable consideration, “ the marriage; and, being in their nature executory, ought “ to be construed and moulded in equity according to the “ intention of the parties at the time of concluding the same. “ As soon as the marriage takes place, the *principal* contract “ is *executed*, and cannot be set aside, or rescinded, the

* Additional matter in the decree of *Randolph* and others v. *Randolph* and others.

Instead of the words, included within crotchets, at this mark * insert, “ although the said *Mary Randolph*, then *Mary Tabb*, one of the parties “ thereto, was an infant at the time, yet being made by her with the privity, “ approbation and procurement of her mother and guardian, and being, “ moreover, beneficial to the said infant and her issue.”

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“ *estate and capacities* of the parties being altered, and the
 “ children born of the marriage equally purchasers under
 “ both father and mother : wherefore it has been truly said,
 “ that marriage-contracts ought not to be rescinded, be-
 “ cause it is impossible to reinstate the parties in their original
 “ condition, and because it would affect the interest of *third*
 “ persons, the *ISSUE* ; who, whenever they come *in esse*, or
 “ are even in *ventre sa mere*, are entitled to the aid of a
 “ Court of Equity to compel a performance, or to set aside
 “ an act done with intent to defeat their rights, which it was
 “ the object and intention of the articles to secure : which
 “ intention can never be answered if the parents are at liber-
 “ ty to dispose of the property agreed to be settled, on
 “ the marriage, so as to bar their issue by fine and recovery,
 “ or any other conveyance whatsoever. Whatever effect a
 “ conveyance by husband and wife may have upon the in-
 “ terest of the wife alone, as intended to be secured by
 “ marriage-articles, (concerning which it is now unnecessary
 “ to decide,) the interest of the *issue*, when intended to be
 “ provided for by the articles, cannot be affected thereby ;
 “ it being impossible for the parties to the contract to be
 “ discharged from any one obligation imposed by the arti-
 “ cles. For it would be a strange and vain construction of
 “ marriage-articles, if the principal party contracting, and
 “ who is evidently the person meant to be restrained there-
 “ by, should be intended to have such an estate by them, as
 “ would enable him the very next day to defeat the limita-
 “ tions to his issue, with a view to secure which the con-
 “ tract was entered into, and a valuable consideration paid
 “ for it. And, although this, perhaps, might have been
 “ one of those cases, where the articles alone, if the parties
 “ thereto had not attempted to defeat them, might have
 “ been sufficient to answer the purposes intended, without
 “ any settlement to be made pursuant thereto ; yet the de-
 “ fendants in the present case, having done all that lay in
 “ their power to defeat the articles, the *issue* of the mar-
 “ riage and all others within the contemplation of the
 “ articles, are entitled to the aid of a Court of Equity, to

“ prevent that design from taking effect, by setting aside all
“ the conveyances made *by*, or *to*, the defendants for that
“ purpose ; and by appointing trustees, and decreeing a
“ settlement to be made, pursuant to the articles, and to
“ the intention of the parties, at the time of the contract ;
“ as the same may be collected from the nature of the agree-
“ ment ; the language and context thereof ; the ordinary
“ usage in similar cases ; and the legal rights of the
“ parties as they existed before, and would have existed
“ after, the marriage, if no contract or agreement had
“ been made between them, without resorting to *parol*, or
“ other evidence *dehors* the articles to explain, or vary the
“ meaning thereof, unless there be some latent ambiguity
“ therein, which is otherwise impossible to be solved or ex-
“ plained, or unless something agreed on by the parties at
“ the time, has been omitted to be inserted therein,
“ through fraud or accident, as in the case of *Flemings v.*
“ *Willis.* 2 *Call*, 5. The endorsement made on the arti-
“ cles by the parties thereto, subsequent to the marriage,
“ can neither be regarded as a part of the original contract,
“ nor as an explanation thereof. The wife, *after* the mar-
“ riage took effect, being no longer *sui juris*, or capable of
“ making any contract with her husband, (but through the
“ intervention of the trustees, which is not the case at pre-
“ sent,) nor capable of giving evidence in his behalf. The
“ evidence of Mr. *Giles*, who drew the articles, is consi-
“ dered as inadmissible for the purpose of explaining them,
“ because it is conceived that the words of the articles, if
“ the preceding rules for construing them be adopted, are
“ too strong to admit of his construction, without contra-
“ dicting, rather than explaining, them. The husband on
“ the marriage being a *purchaser* for a valuable considera-
“ tion, cannot be deprived of any of his *legal* rights accru-
“ ing *by* the marriage, except such as (according to a just
“ and liberal construction of the articles) he must be under-
“ stood, and intended, to have *given up*, for the purpose of
“ securing that provision for the wife and her *issue*, or other
“ persons manifestly within the consideration of the articles,

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“ who are intended to take as *purchasers under them*, which
 “ was the sole object of such an agreement; if, then, there
 “ be any chasm in the articles, whereby the legal rights of
 “ the husband, may, in certain events, INTERPOSE *between*
 “ the uses declared by the articles, a Court of Equity, in
 “ directing the settlement which is to be made; ought to
 “ have regard to those *legal rights*, so far as to preserve to
 “ the husband the enjoyment of them, in case of such
 “ events. And the same construction ought to be made
 “ in behalf of the wife’s *legal rights*, accruing also on the
 “ marriage, or existing antecedent thereto, and independent
 “ of it. For these reasons, this Court is of opinion, that the
 “ Court of Chancery erred in dismissing the bill with costs;
 “ therefore the said decree is reversed, &c. And this Court
 “ proceeding to pronounce such decree, as the said Supe-
 “ rior Court ought to have made, is further of opinion,
 “ that the covenant contained in the articles, (whereby it is
 “ agreed, that all the estate, real and personal, of the said
 “ *Frances*, shall *remain* in the right and possession of the
 “ said *Frances*, *during the continuance of the marriage*, and
 “ the proceeds thereof, only, shall be applied to the sup-
 “ port and maintenance of the said [*John and Frances*,]
 “ and their *issue*, if any there be,) contains the decla-
 “ tion of the *uses* thereof, *for that period only*; and
 “ that the subsequent covenant (whereby the said [*John*]
 “ doth FURTHER *covenant* and agree with the said [*Frances*]
 “ that he *never will sell or dispose* of any part of the said
 “ real or *personal estate*, (except as therein particularly ex-
 “ cepted,) in any manner whatsoever; but that the same shall
 “ ALWAYS be held as an INVIOLEABLE FUND, for the support
 “ and maintenance *of the said JOHN and FRANCES*, and their
 “ ISSUE, if any there should be, applying only the proceeds or
 “ profits, without resorting to, or applying any of, the *original*
 “ *stock* for that purpose) must be understood and intended as
 “ a declaration of OTHER USES, than those before described
 “ and limited; and the said [JOHN] being equally within
 “ the declaration of those other uses, as the said [*Frances*]

“ or their *issue*, if any ; he must, according to a just
 “ and proper construction of that clause, be intended to be
 “ equally entitled to the benefit of those uses, as the others,
 “ for the full period of his natural life ; during which, in
 “ the event of *issue* born of the marriage, he would have
 “ had a *legal* estate, in the lands, and real estate, as tenant
 “ by the curtesy, if he had not covenanted to have the
 “ rents and profits, *certainly*, in lieu of the personal estate,
 “ to which he must be understood as renouncing all his
 “ rights, and also in lieu of the chance of being tenant by
 “ the curtesy of the real estate, in case he should have
 “ issue and survive his wife : that in decreeing a settle-
 “ ment to be made pursuant to those articles, it is neces-
 “ sary and proper that the said articles should be carried
 “ into execution, fully, and not in part only. Therefore in
 “ the settlement to be directed, every limitation contained
 “ *in*, or necessarily implied *by*, the articles, ought to be in-
 “ serted ; and the articles so framed, as to preserve the
 “ contingent remainders thereby proposed to be limited.
 “ That this can be done in no way so properly and effec-
 “ tually as by ordering and decreeing that the defendants
 “ [*John R. Archer and Frances Cook*, his wife] do, within
 “ a certain time to be limited by the said Superior Court
 “ of Chancery, by deed of bargain and sale, or other suffi-
 “ cient conveyance, convey to such person or persons as
 “ the said Superior Court of Chancery shall name as trus-
 “ tees for that purpose, all the estate, real and personal,
 “ which was of the said [*Frances Cook*] on the [*17th day of
 “ *February*, 1801,] (except as in the said articles is excepted,)
 “ together with the progeny of the slaves, and the increase
 “ of the stocks of horses, cattle, sheep, and hogs, if any,
 “ which have come to the hands and possession of the said
 “ [*John R. Archer*, or *Frances Cook*] or either of them, or
 “ of any other person or persons, to the use of them or
 “ either of them ; the lands and other real estate, in fee-sim-

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* In the case of *Randolph and others v. Randolph and others*, “ 19th day
 “ of *November*, 1800.”

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“ ple, and the slaves, and other personal estate, in absolute
 “ property ; in trust, to permit the said [*John R. Archer*]
 “ to take and receive the rents, issues, and profits of the
 “ same during the joint lives of the said [*John R. Archer,*
 “ and *Frances*] his wife, and their issue, if any, without re-
 “ sorting to, or applying any of the original stock for that
 “ purpose ; and, from and after the death of either of them
 “ the said [*John and Frances*] to permit the survivor to take
 “ and receive the rents, issues and profits thereof, in like
 “ manner, and for the like purpose, under the like restric-
 “ tion ; and from and after the death of such survivor, to
 “ hold the said estate, real and personal, so to be conveyed
 “ to them, to the use of all and every child or children of
 “ the said [*Frances Cook*] born or to be born of her present
 “ [*or any future*] marriage, which shall be living at the time
 “ of the decease of the said [*Frances Cook*] and the descend-
 “ ants of such of the children of the said [*Frances*] as may
 “ die before her, (if any such there be,) as parceners, in
 “ parcenary, agreeably to the sixteenth section of the act di-
 “ recting the course of descents ; and, in default of such
 “ issue of the said [*Frances*] living at the time of her
 “ death,* [*then and in that case to hold the whole of the*
 “ *estate so to be conveyed to them, in trust, for the use of the*
 “ *heirs of the said [Frances Cook] as parceners, in parcena-*
 “ *ry, agreeably to the directions of the beforementioned act*
 “ *of assembly ; with remainders to trustees to preserve con-*
 “ *tigent remainders.*] With liberty to the said trustees to
 “ apply to the said Superior Court of Chancery, from time to
 “ time for an injunction, or injunctions to stay waste, or to pre-
 “ serve the said estate, real and personal, by such restraints
 “ against alienation thereof, as may be necessary and pro-
 “ per ; and that the several deeds and conveyances executed

* In the case of *Randolph and others v. Randolph and others*, omit the words included thus, [] and insert, “ then from and after the death of the survivor of the said *Bathurst* and *Mary*, the trusts so to be created, to cease and determine, and the estate, embraced by the said marriage-articles, and settlement so to be made, to descend and pass to such persons, and in such proportions, as if such articles and settlement had never been made.”

“by the said [*J. R. A. and Frances Cook*] or by any other person or persons to them, or either of them, for the purpose of defeating the said marriage-articles, be brought into the said Superior Court of Chancery, and there cancelled; and that the said Superior Court of Chancery do take such further order respecting the proof of the said deeds, and recording thereof in the District Court of *Petersburgh*, or the County Court of *Amelia*, or elsewhere, as in the opinion of that Court will best answer the purposes of preventing fraud and imposition in consequence of the proof of such conveyances, and admitting the same to record. And that the cause be remanded to the said Superior Court of Chancery, with directions to make and enter a decree pursuant to the principles herein stated, which is decreed and ordered accordingly.”

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After the foregoing decree was pronounced, it was suggested by *Hay* and *Wickham*, that the decree was more extensive in its operation than was contemplated by the parties; inasmuch as it would require a settlement to be made of all the estate and interest of the wives, including as well that which had been allotted, as that held by Mrs. *Tabb*, in right of dower, and existing in outstanding debts. They contended, that, although the preliminary part of the articles mentioned all the estate, yet the specification “consisting” of such particular property, restricted their operation to that part which was specially enumerated. On the construction of deeds, they cited 3 *Com. Dig.* 330. *Sheppard’s Touchstone*, 74, 75. 85. *Cowp.* 819. *Cooke v. Boosh*(a)

(a) *Sed vide*
5 *Term Rep.*
564. *Clifton v.*
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Call, contra, said it was unnecessary to refer to books, on this subject, as it was a mere question of intention, to be gathered from the words of the articles; which, he contended, passed the whole estate.

May 17th, 1809. Judge TUCKER delivered the following opinion on the construction of the articles:

Mr. Hay for the appellees in these two causes, moved the Court to revise and correct the decrees therein made on the

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20th and 21st of *April*, upon this ground ; that the Court had directed the *whole* of the estates which belonged to the appellees, Mrs. *Randolph* and Mrs. *Archer*, previous to their marriage, to be settled pursuant to the directions of those decrees, whereas the reversionary right of those ladies to a proportion of the estate held by their mother, Mrs. *Tabb*, for her life, was not included in the marriage-articles.

This Court having unanimously established the principle that marriage-articles are to be considered only as the minutes, or heads of an agreement, which is to be carried into effect according to the true intent and meaning of the parties ; and that for attaining that end, greater liberality is to be observed in the construction of them, than of deeds or other contracts, *executed*, we have only to consult the articles, in the present case, to know what was the real intention of the parties.

Those between Doctor *Randolph* and his lady recite, that, whereas a marriage is intended to be solemnized between the parties, “ and the said *Bathurst* is *willing* and *desirous*. “ of securing and settling upon the said *Mary* and her heirs “ ALL HER ESTATE BOTH REAL AND PERSONAL, to which “ she is ENTITLED, as one DISTRIBUTEE of the estate of her “ late father deceased, EXCEPT AS THEREIN AFTER EX- “ CEPTED ; in consideration of the said intended marriage, “ and for the *intent and purpose aforesaid* ; the said *Ba- “ thurst* thereby covenants,” &c. Words more comprehensive cannot in my opinion be used ; they shew that it was the intention of the parties to settle the *WHOLE* estate of the lady, *real* and *personal*, whether in *possession*, or *reversion*, or remainder, (EXCEPT as in the *articles excepted*,) to the uses thereby declared. If any part of the estate was omitted in the enumeration of the particulars thereof, it was a *mistake* in the drawer, which ought to be corrected, according to the precedent established in the case of *Flemings v. Willes*, 2 *Call*, 5. recognised by this Court in the preamble to these decrees.

It was conceded by Mr. *Hay*, that the articles between Dr. *Archer* and his lady, were stronger than those which

I have just noticed. I am therefore of opinion that the decrees were perfectly correct, and that no change ought to be made therein.

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Judge ROANE observed, that the words of the recital were very broad, and he should have been of opinion that they would have been abridged by the specification, if nothing else had followed. But afterwards the parties say, *except* certain property, naming it; by which the specification seems to have been given up; and then we can only resort to the recital, to explain the exception; in doing which *all* the estate will be comprehended, except that particularly excepted.

Judge FLEMING. In the construction of agreements, the whole must be taken together; and in viewing these it is my opinion, and the unanimous opinion of the Court, that the whole estate passes.