REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

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DISTRICT OF NEW-YORK, ss.

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

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

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

At the term commencing the first of October, 1810,

IN THE THIRTY-FIFTH YEAR OF THE COMMONWEALTH.

JUDGES, WILLIAM FLEMING, ESQUIRE, *President.*
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,
PHILIP NORBORNE NICHOLAS, ESQUIRE.

Templeman, Executor of Steptoe, *against* Steptoe and others.

Monday, October 8.

THIS was a suit originally brought in the late High Court of Chancery by *James Steptoe* and others, relations

1. A decree, dismissing so much of a bill as claims one of two separate subjects in controversy, and as to the *other*, determining also the rights of the parties, *but directing an account to be taken*, is not *final* in *any* respect, between the parties *retained in Court*, and their legal representatives; but subject to revision and alteration in *every* part, at any time before a final decree; without the necessity of a bill of review.

2. *Quære*, in such case, whether any subsequent decree could affect the rights of *bona fide purchasers* of property as to which the bill was dismissed?

3. Construction of the 5th, 6th, and 7th sections of the act "to reduce into one the several acts directing the course of descents." Where an *infant*, having title to a *real* estate of inheritance derived by purchase or descent *immediately* from the *father*, dies without issue, and with no brother or sister, or descendant of either; the father being dead, but the *mother living;* the right of inheritance is not in *abeyance*, but goes in parcenary to the brothers and sisters of the *father*, or their lineal descendants: and, *vice versa*, such estate being derived *immediately* from the *mother;* and *she* being dead, but the *father living;* it goes in parcenary to *her* brothers and sisters, or their lineal descendants.

4. The law was the same as to *personal* estate, between the 1st of *October*, 1793, and the 22d of *January*, 1802.

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(on the part of the father) of *Edward Steptoe*, an *infant*, (who died intestate, unmarried, and without issue, on the 24th of *May*, 1794,) against *Elizabeth Steptoe*, his mother, and *William Steptoe*, his paternal uncle; executrix and executor of *George Steptoe*, his father, for an account and division of certain property, *real* and *personal*, of which he the said *Edward Steptoe* died seised and possessed, as his absolute estate, *derived immediately from his father*. The great questions in dispute were, 1st. The same with that decided in *Tomlinson* v. *Dilliard*, 3 *Call*, 120. and *ante*, p. 183. viz. whether *Elizabeth Steptoe*, the *mother*, was excluded from succeeding to *such personal* as well as *real* estate; and, 2dly. If she was excluded, whether the plaintiffs and the defendant *William Steptoe* were entitled to take the said real and personal estate; there being no brother or sister of the *infant*, nor any descendant of either. The defendant, *Elizabeth Steptoe*, in her answer, observed, that "if she had a right to her son's estate, *some of her near connections* might be benefited by it;" but did not mention who they were; and nothing farther appears in the record to shew the names or degrees of consanguinity of *her* relations.

The plaintiffs were *James Steptoe*, (a brother, of the *whole blood*, to *George Steptoe*, the *father*,) and the *descendants* of four sisters, of the *half blood*, to the said *George Steptoe*. The defendant, *William Steptoe*, was also a brother of the *whole blood*.

The facts in the case were generally agreed by the parties; and, on the 17th of *March*, 1797, the cause came on to be heard; when the Court, "being of opinion that the plaintiffs were not entitled to any part of the *slaves* and *personal* estate" in question, "adjudged, ordered, and decreed, that the bill, as to the part thereof which claimed the said *slaves* and *personal* estate, and demanded an account of the administration thereof, be *dismissed;* but the Court was of opinion that, by the 5th, 6th, 7th, and 14th sections of the act to reduce into one the several acts directing the course of descents, the defendant *Elizabeth* was excluded from succession to the *real* estate;" and that the same descended

to the plaintiffs and the defendant, *William Steptoe*, in certain proportions specified in the decree. Commissioners were therefore appointed to state accounts of the said *real estate*, and of the profits thereof since the death of the said *Edward Steptoe;* to allot the same, according to the said proportions, (subject to the defendant *Elizabeth's* right of dower,) and to report the said accounts and allotments to the Court.

After this, (the late High Court of Chancery having been divided by the act of *January* 23, 1802)(*a*) a bill was exhibited to the Superior Court of Chancery for the *Williamsburg* District, on behalf of the same plaintiffs and others omitted in the former bill, and of the widow and children of the former *defendant. William Steptoe*, (who now were *plaintiffs*,) setting forth the former proceedings in the original suit, "which by this bill was sought to be *revived*," and stating that "before any further proceedings were had in the said cause, or upon the said *interlocutory* decree, the said *Elizabeth Steptoe* and *William Steptoe* had both died, (the said *Elizabeth* between the 16th of *April* and 13th of *February*, in the year 1802, and the said *William* in *April*, 1803,) whereby the said suit and all proceedings thereon became abated;" that *Samuel Templeman* was executor of *Elizabeth Steptoe*, and, as such, had possessed himself of all the real and personal estate of which *Edward Steptoe* died seised and possessed; and that *William Steptoe* had died intestate. The plaintiffs had been advised that, "so long as a decree remains *interlocutory* it is amendable by the judge who pronounced it; and that the decree above mentioned was amendable by the present judge, to whom all the powers respecting it, which that judge had, were transferred by legislative authority. They had also been advised that, according to the true exposition of the acts of Assembly severally entitled, "An act to reduce into one the several acts directing the course of descents," and "An act reducing into one the several acts concerning wills, the distribution of intestates' estates, and the duty of executors and administrators,"(*b*) "the same were in opposition to that part of the said decree which tended to

(*a*) 1 *Rev. Code*, p. 426.

(*b*) 1 *Rev. Code*, p. 164. s. 27.

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deprive them of the surplus of the *slaves* and *personal* estate late of *Edward Steptoe* aforesaid, deceased, which exceeded the funeral expenses, the debts and all other just expenses chargeable on the said estate." They therefore prayed "the benefit of all the proceedings in the original suit, except the said *interlocutory decree*, which ought to be set aside, partly for *error apparent on the face of it*, and *partly because the execution of certain parts of it had become impossible;*" that the said *Samuel Templeman*, "being in possession of all the books of accounts of the said *Elizabeth Steptoe*, should render an account of her administration of the estate of *George Steptoe*, and of her receipts and expenditures out of the estate of her infant son *Edward Steptoe*, derived to him from the said *George*, together with the receipts and expenditures of the said *Samuel* out of the said estates, since they came into his hands; and the amount and particulars of which they severally consist; and that a writ of *subpœna*, *to revive and answer*, be directed to the said *Samuel Templeman*, executor as aforesaid," &c.

To so much of this bill as claimed the *slaves* and other *personal* estate, the defendant *pleaded*, *in bar*, *the decree of March 17th*, 1797, which, as to those subjects, he contended was *final;* alleging that he "was proceeding to execute the provisions contained in the will of his testatrix, when he was arrested by a notice of the complainants' claim, very unexpectedly; for, from the *length of time* which had elapsed since the said *final* decree, he had thought that the complainants, perceiving the weakness of their title, had *acquiesced in the decision*, and no longer insisted on their right to the said slaves and personal estate: since that period this defendant had hired out the slaves whereof his testatrix was seised at the time of her death, and was ready to give an account of the same, and of their hires, if the Court should so decree." As to the other matters, he *answered*, and said that the Commissioners had assigned "to the said *Elizabeth Steptoe* her *dower* in the real estate of inheritance whereof *Edward Steptoe*, her infant son, was seised at the

time of his death, and to which she became entitled at the death of her husband *George Steptoe*, but had not proceeded to state an account of all the said real estate, or to allot the same to the parties mentioned in the decree, agreeably to the proportions therein established; because the parties entitled to the said real estate of inheritance were most of them infants, and had no representatives known to the Commissioners; and because other difficulties afterwards occurred, (such as the death of some of the Commissioners,) neither did the said Commissioners settle and adjust an account (as they were directed in the said decree) of the profits of the real estate since the death of the said *Edward Steptoe*, because, upon investigation, they found that *no profits* accrued therefrom; that, *after the allotment of her dower*, the said *Elizabeth Steptoe had nothing to do with the residue of the said real estate, but it remained subject to the disposal of the parties entitled thereto;* and that the defendant had never interfered with, nor received any profits of, the *real estate* of which *Edward Steptoe* died seised."

The plaintiffs filed a special replication to the *plea* of the defendant; in which they deny that the decree of *March*, 1797, was *final* in any respect; especially because "it could not have been signed and enrolled agreeably to the language formerly spoken in Courts of Equity, and did not authorize the clerk of that Court to enter all the pleadings in the suit and other matters relating thereto, together, in a book to be kept for that purpose, according to the act of Assembly, in that case made and provided, entitled "An act reducing into one the several acts concerning the High Court of Chancery."(*a*)

(*a*) 1 *Rev. Code*, p. 67. s. 49.

On the 8th of *November*, 1805, "the cause came on to be heard on the bill, *supplementary* bill, the answer of *Elizabeth Steptoe and William Steptoe*, in their life-times, the plea and answer of the present defendant, the replication thereto, the exhibits, and was argued by counsel; on consideration whereof, the Court overruled the said plea, and was of opinion that all the real and personal estates of *Edward*

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Steptoe, which came to him from, or through his father *George Steptoe*, became divisible *among his relations on the part of his father;* his *mother*, though then alive, *and her relations on her part, being entitled to no share or proportion thereof.* It further appearing that the said infant, *Edward Steptoe*, at the time of his death, left two uncles of the full blood, and the descendants of four aunts of the half blood, on the part of his father *George Steptoe*, deceased," (plaintiffs in this suit,) the Court was of opinion, and decreed, "that the real estate, the slaves and all the other personal estate whereof the said *Edward Steptoe* died seised or possessed, in possession, reversion or remainder, whereunto he derived title from or through his father *George Steptoe* aforesaid, as well as the rents, issues, and profits thereof since his death, be divided, by Commissioners, into eight equal parts; that two such parts, or one fourth of the whole, be by them allotted to the said *James Steptoe;* other two eighths, or one fourth, to the family of *William Steptoe*, deceased;" and one eighth to the descendants of each of the four aunts aforesaid; according to certain proportions, specified in the decree. It was also ordered, that the defendant settle an account, before the said Commissioners, of the said *Elizabeth Steptoe's* administration of *George Steptoe's* estate, and of her receipts and expenditures of the estate of her infant son *Edward*, derived to him from his father; and also an account of his own receipts and expenditures of the said *Edward Steptoe's* said estate." And, on the prayer of the defendant, an appeal was granted him from the said decree.*

Wickham, for the appellant. The case of *Tomlinson* v. *Dilliard*, precludes my making a point I intended; that the Chancellor's decree of *March*, 1797, was right, so far as it

*Note. This appeal (being from an *interlocutory* decree) was granted by virtue of the discretionary power vested in the Chancellor by the act "enlarging the right of appeal in certain cases," passed the 23d of *January*, 1798. See 1 *Rev. Code*, p. 375.

respected the *personal* estate. I will substitute another; that, during the life of *Edward Steptoe's* mother, the right of inheritance was in *abeyance.*(a)

But, whether right or wrong, that decree was *final* as to the *personal* estate. The claim of partition of the *real* estate was entirely distinct from that for division of the *personal.* The widow, as *executrix*, had nothing to do with the land. I do not deny that several *distinct* claims may be included in one bill; but, where such is the case, if the Court dismiss the bill as to *one* of those claims, the parties are out of Court as to *that.* The decree was therefore *final;* and, of course, the bill now in question is a bill of *review.*

(a) 2 *Tuck. Bl. App.* 28—42.

But, being a bill of *review*, it was not filed within the *time* the law requires. Though *when* it was filed is not *precisely* stated in the record, it sufficiently appears to have been more than *five* years after the date of the decree; and this length of time, by analogy to the law relating to writs of *supersedeas*,(b) is a bar to a *bill of review.* The rules in Courts of Equity concerning limitations of suits are framed by analogy to those which govern the Courts of common law. In *England* the time within which a *writ of error* may be brought is, by an act of parliament, *twenty* years. The Court of Chancery, therefore, will not permit a *bill of review* to be brought after *twenty* years;(c) which are to be computed not from the time of the enrolment, but from the time of pronouncing the decree. Applying the same principle to this country, the limitation here, on bills of review, should be *five* years; that being the limitation upon writs of error or *supersedeas*, by our act of Assembly. If, in this case, there were *infant* plaintiffs, not barred by the limitation, *others* had certainly no excuse: and, if their rights are *joint*, (which, in my opinion, they are not,) the disability of those who are of full age, to prosecute the bill, might subject the infants to the same disability.

(b) 1 *Rev. Code*, p. 82. s. 52.

(c) *Coop. Eq.* 92, 93. and the cases there cited, particularly *Edwards* v. *Carroll*, 5 *Bro. Parl. Cas.* 466. and *Smith* v *Clay*, 3 *Bro Ch. Cas.* 639. in note, and *Ambl.* 645. S. C.

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Warden, contra, relied on the cases of *Grymes* v. *Pendleton*,(a) *M'Call* v. *Peachy*,(b) *Fairfax* v. *Muse's Ex'rs*, and *The President and Professors of William and Mary College* v. *Hodgson and others*,(c) as cases in which it was repeatedly decided, that a decree is not final when any thing remains to be done. In this case the Chancellor might, on the *final argument*, (even without any supplemental bill,) have set the decree aside as to the personal estate. The bill could therefore be considered only as a bill of *revivor*, rendered necessary by Mrs. *Steptoe's* death. But, if it was a bill of *review*, there is no law of limitation upon that subject in this country. The 52d section of the District Court law relates only to writs of *supersedeas* or error to judgments of inferior Courts; between which, and bills of *review*, granted by a superior Court to its own decrees, there is no analogy.

(a) 1 *Call*, 54.
(b) *Ib.* 55.
(c) 2 *H. & M.* 557.

Judge ROANE referred to *Gaskins* v. *The Commonwealth*,(d) as having established a contrary doctrine.

(d) 1 *Call*, 194.

Warden. I do not recollect that case. But, at any rate, the rights of *infants* are saved. It appears that many of the plaintiffs were infants when this bill was filed; and, I believe, a considerable part are infants *now*. How could those of age (where the parties were so numerous, and some of them *infants*) have brought their bill of review without making them all parties? The whole must be considered as bringing their suit together; because all persons interested must be parties.

As to the question of *abeyance*, Judge TUCKER, in his note to 2 *Bl.* p. 107. has referred us to *Fearne*, 513. and 526. which shew that, in a case of this kind, the estate could never have been in *abeyance;* for that cannot happen unless there be *no heir known.* Is there any resemblance between *this* case, and either of those stated by *Blackstone?*

Williams, on the same side, quoted the 49th section of the Chancery law,(a) to shew what the legislature considered a final decree. If the decree of *March*, 1797, was *final*, the Clerk ought to have recorded all the papers. Yet the cause remained on the docket. There might be twenty records of the same case, if dismission as to *part* should be considered as *final*. In *Grymes* v. *Pendleton*,* there was such a decree as this, though not inserted in the report of the case: yet it was decided to be *interlocutory* only. But if this point be against me, the decree was nevertheless correct. It is not at all important that Courts of Equity have, by analogy, adopted the rules of limitation at law; for, if so, the analogy must hold throughout. The act of limitations must be *pleaded;* which is not the case here. So in *Hite's Heirs* v. *Wilson* and *Dunlap*,(b) this Court decided that a *release of errors* must be *pleaded*.

(a) *Relied on in the replication, ante.* 1 *Rev. Code*, p. 67.

(b) 2 *H. & M.* 268.

As to the right of inheritance being said to be in *abeyance*, the question is raised on the 7th section of the act of descents.(c) But the case of *Brown* v. *Turberville*,(d) settled that question as to an *adult:* and, from the opinions of the Judges there pronounced, it appears that the 5th and 6th sections ought to be construed as disposing of the estate in the case of an *infant*, so that, where the *mother* is excluded from inheriting, it shall go to the brothers and sisters, or their descendants, of such infant, on the part of the *father;* or, if there be none, then to the brothers and sisters of the *father*, or their descendants. But I do not consider this

(c) 1 *Rev. Code*, p. 169.

(d) 2 *Call*, 390.

**Note.* It appears from the record in the case of *Grymes and others* v. *Pendleton and Lyons, Administrators of John Robinson*, deceased, that the Chancellor's decree, (pronounced the 26th of *September*, 1793,) after ascertaining the sum to which the plaintiffs were entitled, subjecting the unadministered *personal* estates of *Philip Grymes* and *Presley Thornton* to satisfy the same, and directing an *account* of the said *personal* estates to be taken by a Commissioner, "dismissed so much of the bill of the plaintiffs as sought to subject to their demand the *real estates* of the defendants derived from their ancestors and testators." From this decree the *defendants* prayed an appeal, which was granted by the Court of Chancery, but dismissed by the Court of Appeals at *October* term, 1797, and the cause remanded for farther proceedings.

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question important *in this case;* there being no proof in the record that there are any *maternal kindred.* By the 14th section, then, if there be no kindred on one side, the whole must go to the other.

Call, on the same side, to shew that the appellant could not avail himself of the act of limitations, since it had not been *pleaded*, cited *Coop. Eq.* 304. and 2 *Vez* sen. 109. *Gregor* v. *Molesworth.* In 1 *Bro. Parl. Cas.* 96. *Sherrington* v. *Smith*, a *demurrer* was allowed on the ground of length of time: but it appears, from the report of the case, that the *equitable bar was set up in the demurrer;* and, according to *Pryor* v. *Adams*,(*a*) the *form* is unimportant, whether by *plea* or *demurrer;* provided the fact be *stated*, and *relied upon as a bar.* But, here, it was neither pleaded nor relied upon. Mr. *Wickham's* argument, that *adults* may be barred while *infants* are not, is not applicable to this case; the decree being *entire* and *joint*, though the respective *proportions* of the plaintiffs are several. The only case where (an *adult* and *infant* being joined in a *judgment*) one is bound, and the other not, is that of a *fine*, or common *recovery;* but those are considered as *conveyances;* and the *adult* is bound by his *conveyance.* A *joint* judgment, *naught in part is naught in all.*(*b*)

(*a*) 1 *Call*, 391.

(*b*) *Styles*, 400. 406.

The decree here is joint to every intent and purpose. A reversal, then, as to the *infants*, must enure to the benefit of the *adults.* But, *in equity*, as the bar by the act of limitations arises only from *analogy*, it is regulated by the sound discretion of the Court, according to the circumstances of each case.(*c*) For example, the rule *at law* that, where the act begins to run, it does not stop, though descents to *infants* or *femes covert* intervene, is not permitted to operate, *in equity*, to their *injury*, though it may to their *benefit.* But

(*c*) *Wyatt's Pr. Reg.* 307. 3 *P. Wms.* 8. *Mills* v. *Banks*, 1 *Vez.* sen. 206. *Kemp* v. *Squire.* 1 *Sch. & Lef.* 413. *Bond* v. *Hopkins.*

2. The decree of *March*, 1797, was *not final;* for a final decree is that only which puts an end to the cause, and puts it off the docket. The reasoning of the Court in *Metcalf's*

case,(*a*) shews what is a final *judgment* at common law; and may, by analogy, be applied to the question concerning what constitutes a final *decree*. It is there said, that "a writ of error shall rehear all which be parties to the original writ;" which shews that a writ of error brings up the *whole* case, though there may have been judgments as to *part* from time to time. The same doctrine is recognised in Courts of Equity. In *Ormston* v. *Hamilton*,(*b*) a decree, in *Scotland*, for part, was considered *there* as a final decree, but reversed in the House of Lords on that ground. What is the difference between a decree *for part in favour of the plaintiff*, (which is ever considered *not final*,) and a decree *dismissing his bill as to part?* Surely if in one case it be not final, neither is it so in the other. In *Grymes* v. *Pendleton* (before cited) there was a decree as to *part:* yet the *whole decree* was decided to be *not final*, and the *whole cause* was sent back for farther proceedings; on the ground that the appeal was premature. If the Court considered *any part* of that decree final, why did they not *affirm that part?*

(*a*) 11 *Co.* 39.

(*b*) 8 *Bro. Parl. Cas.* 364.

The decree then not being final, a bill of review was unnecessary and improper. In *Triplett* v. *Dunlop*, (MS.) this Court have decided that there cannot be a bill of review to an interlocutory decree.* In *England*, there may be a *rehearing* at any time before enrolment; and *there* the practice is to obtain it by *petition*. Until the cause is matured, so as that the Clerk should *record the papers*, the rule *here* is the same as *in England before enrolment:* but the practice is by *motion*.

3. On the merits of the last decree. The difficulties suggested have arisen from the fallacy of considering the 5th and 6th sections of the act of descents as *disposing* or *donative* clauses, when, in fact, they are only *excepting* clauses; *excepting*, in a certain event, a certain description

* *Note.* See also *Ellzey* v. *Lane's Executrix*, 2 *H. & M.* 589.

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of persons. Every *other* person is left to take precisely as if those exceptions did not exist. The 7th section is predicated upon the *non-existence* of the *mother*, *brothers*, &c.; but the effect is the same as if there were *no mother;* there being *none capable of taking*. The act of 1785 destroyed the common law rule of resorting to the blood of the first purchaser: that of 1790, c. 13. restored it *sub modo*. The question then is, always, whether there be a person of that blood which is heritable.

Let us suppose that a citizen dies leaving an *alien* brother. The words of the section are, "if there be no mother, nor *brother*," &c.: but, in fact, there *is a brother*, though not entitled to inherit. What then is to become of the estate? The answer should be, "the case is precisely the same as if there were *no brother*." The case of a *half* brother before the act of 1785 was similar to this. Monstrous consequences would follow from a contrary doctrine: a multitude of cases would exist in which there would be no canon of descents.

The right of inheritance can never be in *abeyance* in a case like this. The rule is universal that there must be a tenant to the *præcipe:* otherwise, there can be no *abeyance*. While the freehold is in *abeyance*, some person must hold. But here no person can hold, but as *heir* under the act of Assembly: and, if there be no heir, it must go to the Commonwealth.

But the doctrines laid down by the Judges in their several opinions pronounced in the case of *Brown* v. *Turberville*, 2 *Call*, 390. are amply sufficient to remove all these difficulties; either by considering the act of 1785 as still in force, where not repealed by the act of 1792;(*a*) or by construing the last-mentioned act according to its evident spirit and meaning;(*b*) or by taking the whole of that act, and all other acts made on the same subject, into one view, and moulding them so as to effectuate the *intention* of the legislature.(*c*) And this decree is right, if either of those modes of construction be adopted.

(*a*) See Judge *Fleming's* opinion, 2 *Call*, 397—400.

(*b*) See Judge *Carrington's* opinion, *ib.* 401, 402.

(*c*) See Judge *Lyons'* opinion, *ib.* 403., and Judge *Pendleton's*, *ib.* 404—408.

Wirt, in reply. 1. The decree of *March*, 1797, was final *as to the personal estate;* being a decree which absolutely decided the right, and left nothing farther to be done.(*a*) There was no condition to *shew cause* against it; no fact left open for a *Jury* to try; and no reference to a *Commissioner*. On the contrary the bill was *dismissed* on a hearing, and the cause, *as to this subject, out of Court*. We admit it is still *in Court as to the real estate;* and, *so far*, the decree is merely interlocutory. But there is no weight in that circumstance, unless our adversaries establish the proposition that a decree cannot be final as to any party or any branch of a subject, as long as there shall be a party or any remnant of a subject in Court.

(*a*) 2 *Fowler's Exc. Pr.* 195.

The constant practice of this country disproves the proposition. Whenever a cause comes on, regularly matured for a final hearing, our Courts dismiss *any defendant* who, they may be convinced, ought not to be before the Court, or any *subject* of the controversy which they are satisfied ought not to be detained and suspended in Court. The inconvenience and absurdity of a contrary practice is evident; since it would occasion, 1. The detention of a multitude of parties for the default of *one;* in which they are in no wise implicated, and for which, from the nature of the case, they cannot be responsible; and, 2. The unnecessary detention of a distinct estate in Court, which, the Court shall be satisfied, can in no event be changed by a suit.

Let us suppose the case of a suit brought against several persons as distributees of an estate, and claiming, of each of them, specific negroes by name. The suit comes on for final hearing; and the Court are satisfied that one of the persons charged as a *distributee* is in fact *not one*, and in no wise liable to the claim; but that the other defendants are liable, and that multifarious accounts are to be settled, which threaten a long, troublesome, and vexatious contest. Must the innocent defendant be kept in Court? or may the Court dismiss the bill as to him? They may: they do: and, as to him, such dismission is final: and, if so, it follows that

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a decree in part may be final, and yet another part of the cause remain in Court.

Again suppose, in the case put, the Court should be of opinion that, as to certain *slaves* charged by the bill to have been received by one of the defendants as a distributee, they were acquired by purchase from a different quarter, and never had any connection with the estate? Must those slaves be kept in Court for twenty years, and their owner's hands tied, till the other branches of the cause are decided? Reason, right, and practice are otherwise. The bill may be dismissed *as to them;* and, from that day, they are out of Court, and their owner's hands untied.

Suppose, again, a debt attempted to be charged in Chancery upon the *heirs* and *executors* of a man; being different persons; and the Court should be of opinion that the *heirs* were not liable, (from the nature of the debt, or because they had received no portion of the estate,) but the *executors* were: must the *heirs* be still kept in Court? Or, if it should appear that the personal estate was fairly exhausted, or demanded for payment of simple contract debts, but that the land was liable to the claim; might they not discharge the *executors*, and detain the *heirs?*

So, here, the plaintiffs demand the real and personal estate: the cause is matured for a hearing, and comes on for that purpose fully before the Court: and the Judge is of opinion that the plaintiffs have no right to the personal estate; and, as to that subject, dismisses the bill. The decree is final.

If, in *March*, 1797, when the decree was pronounced, *Elizabeth Steptoe* had held *only the personal estate*, as *administratrix* to her son; and *other persons* calling themselves *heirs* had held the *real estate;* and the Chancellor had given this opinion, dismissing the cause *as to her* and the subject in her hands; would she not have been out of Court? Would the pendency of a different and distinct claim against others have operated to keep her in Court, after she had been dismissed? Might she not, in such case, consider herself as discharged, and act accordingly; selling and adminis-

tering the estate? Would a purchaser under her, after such dismission, be deemed a *lite pendente* purchaser, and forced to refund the property? Could the Court proceed to decree any thing against the party so dismissed, without the notice of new process? Those who hold the affirmative of these propositions, must find a new dictionary of the *English* language, and shew, by it, that an *absolute decision of a right* means the *expression of a doubt*, and to *dismiss* a party *out of Court* means *to keep him in it.*

If, then, the decree would be final, where the heirs and administratrix are *different* persons, does it make any odds that the two rights concur in the *same* person? The *subjects* are in their nature *distinct*, *real* and *personal*, capable of being the subject of distinct suits, and held by different persons. The *characters* in which they are held are distinct; as *heir* and *administratrix;* their functions distinct; their responsibilities distinct. And the maxim is, that, when two distinct rights concur in the same person, they are regarded by the law in the same light as if they were in different persons. The opinion of the Judge treats the subjects and characters as distinct; the expression of opinion as to the right is just as absolute, and the terms of dismission as strong, as if the persons were different; and those expressions and terms of dismission must mean the same thing as if the persons were different. The effect of the decree of dismission is the same as to the rights of the administratrix and of purchasers.

But the decisions of this Court are relied upon as establishing the doctrine that a decree is not final, until all the parts of a cause are disposed of, and all the parties out of Court.

The cases of *M'Call* v. *Peachy*,(*a*) *Fairfax* v. *Muse*,(*b*) and the *President and Professors of William and Mary College* v. *Hodgson*,(*c*) were all cases where the subjects in controversy and the decrees were of a totally different character from that now in question. In each of those cases, the subject was *one;* not only incapable of being held by different persons, but incapable of division; much more of distinct

(*a*) 1 *Call*, 55.
(*b*) 2 *H & M.* 557.
(*c*) *Ibid.*

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suits. The decrees were not, as here, decrees of *dismission*, but of satisfaction of debts in part. We defy the counsel on the other side to produce a case where, in a suit claiming two subjects in their nature distinct, a decree, absolutely deciding the right as to one of them against the plaintiff, and dismissing the bill as to that, has been held interlocutory *quoad hoc*.

(a) 1 *Call*, 54.

The appeal in the case of *Grymes* v. *Pendleton*,(a) (as will be seen by reference to the original record,) did not present the question whether that part of the decree which dismissed the bill as to one of its objects was or was not final. The *defendants* (who were the appellants) could not complain of that part of the decree which made *in their favour;* as has been frequently settled in this Court. The other part, therefore, which was *against them*, could alone be drawn in question upon *their* appeal; and that part was clearly interlocutory. If the *plaintiffs* had appealed from the decree dismissing the bill as to the land, *they* might have raised the question whether this branch of the decree was or was not final: and if, *on their appeal*, it had been adjudged interlocutory, there might have been some colour for the argument on the other side.

Mr. *Call*, aware of this obvious answer to the argument drawn from that case, has asked, "if the Court considered any part of that decree final, why did they not *affirm that part?*" Because there was no party before them authorized to ask it. The *appellants* had no right to ask an affirmance; nor had the appellees, who represented the *personal estates* of *Grymes* and *Thornton*, any interest in, or right to, the *real* estates. The question then was not raised. By the mere appeal of the *defendants*, they were not called on to consider any part of the decree in their favour. Why then should the Court have *affirmed* it

(b) 1 *Rev. Code*, p. 67.

The 49th section of the Chancery law,(b) furnishes no argument to shew that this was not a final decree. The object of that section is only, "for the more entire and better preservation of the records of the Court," to impose a

certain duty on the Clerk when a cause is *finally determined in all its parts*. But it does not declare *what is a final* DECREE; for no such phrase occurs in the section. Indeed the "*final determination*," there intended, is always understood as not taking place till after the decision of this Court upon the *appeal from the final decree;* for not until then does the Clerk of the Court of Chancery record the papers. The Clerk's recording the papers gives *no new* authority to the decree: the pleadings thus made out are never *signed by the Judge*. The decree is perfect before: this book being merely for safe keeping. Nor is the enrolment, in *England*, an act which at all changes the nature of the decree, as to its being final or interlocutory: for, if it did, as the bill of review lies only after the final decree, the time which runs against it would run from the *enrolment;* whereas it is counted from the *time of pronouncing* the decree.(*a*) Indeed enrolment "is now much disused."(*b*) So that the final nature of the decree, in *England*, is decided by its terms, its intrinsic character, and not any *formality* used in relation to it. And in this country the rule is the same: or if any act, equivalent to the enrolment in *England*, were requisite to complete the final character of a decree, it is found in this, that the record of each day's proceedings is regularly drawn up by the Clerk and signed by the Judge. In *Metcalf's* case(*c*) there was a judgment *quod computet;* which clearly was not final; and no writ of error lay till after judgment on the account; as was evident from the very form of the writ:(*d*) but that case has no resemblance to this. *Ormston* v. *Hamilton*(*e*) is a short note in the index, in these words: "Decree, in *Scotland*, taken for part of a demand, with reservation of the other part not determined. Decreed *there* that it was *lis finita; but reversed.*" The case itself is not reported in the book: but this little shews clearly that it has nothing to do with this argument. It was determined in *Scotland*, not that such a decree was final *pro tanto;* but that it finished the whole controversy; and the lords very rightly determined that it did not. So that the position re-

(*a*) *Coop. Eq.* 92.
(*b*) *Ibid.* 73.
(*c*) 11 *Co.* 39.
(*d*) *Ibid.* 38.b.
(*e*) 8 *Bro. Parl. Cas.* 364.

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mains untouched, that this decree, deciding against the right of the plaintiffs to the personal property, and dismissing the bill as to that subject, was *so far final.* If so, the controversy is at an end as to *Templeman*, the only defendant now before the Court, who, as *executor* of *Elizabeth Steptoe*, is interested in maintaining no other part of the decree of 1797: for he is protected by a final decree, unreversed, and unappealed from, and which, in fact, no proceeding has ever been instituted to affect. Mr. *Wickham*, willing to place this case on the most liberal ground for the plaintiffs, considered their last bill as a bill of *review.* They disclaim it, and call it a bill of *revivor;* and rightfully, I incline to think: and, if a bill of *revivor*, it cannot reach this part of the decree; but only those proceedings which *were alive* but *abated* by the deaths of the defendants. The plea and replication do not consider this as a bill of *review.* The parties join issue upon the point whether the decree of 1797 was final as to the personal estate; and the Chancellor on this issue overrules the plea; thereby deciding that it was not final but interlocutory. This we say is an error; and, if so, the case is with us.

2. But if the bill against *Templeman* is to be considered as a bill of *review*, it is too late, according to the authorities heretofore cited; to which add *Cook* v. *Arnham.*(*a*) But it is said that we ought to have *pleaded* the limitation; and the authority of *Hite's Heirs* v. *Wilson and Dunlap*(*b*) is relied upon. But that case goes no farther than to settle the doctrine that every thing, *out of the record*, that is, every defence which is matter *in pais*, must be *pleaded.* But here the objection did appear by the record: the intervening time was shewn on the face of the last bill and its exhibits. *Coop. Eq.* p. 304. is admitted to say expressly that this matter must be pleaded; and this on the authority of 2 *Vezey*, 109. The same author had before asserted this doctrine, (p. 216.) on the same authority; expressly laying it down that it will not do by demurrer. Yet in the note he refers to 1 *Bro. Parl. Cas.* 95.(*c*) as *contra.*

(*a*) 3 *P. Wms.* 287.

(*b*) 2 *H. & M.* 268.

(*c*) *Sherrington* v. *Smith.*

The case of *Edwards* v. *Carrol*, in 1760,(*a*) a still stronger and later case, and on higher authority than that of *Vezey*, settles the principle that the Court will notice it *ex officio:* for *there* was a general demurrer: and this upon very good reason; for the party who files a bill of review must take it out of all exceptions *appearing by the record.* The defendant needs no plea to introduce his objections: the *record* operates as a plea.

(*a*) 5 *Bro. Parl. Cas.* 466.

It is said too that the *infancy* of some of the plaintiffs shall save the rest; because the decree of dismission, being *joint*, if void as to any, is void as to all; and *Styles*, p. 400. is quoted. But it is not proper to deduce conclusions from the *common law forms* of entry, as governing cases *in equity.* The case in *Styles*, is one of a *joint judgment at common law:* and cases are reported which shake this rule as applicable to all cases of joint judgments in which an *infant* is a party.(*b*) But the decree now in question is not joint but several in every thing. Was it not competent for the *adults* to proceed to review it, whether the *infants* would join, or not, as *plaintiffs?* There is nothing, therefore, in the infancy of some of the parties to take the *adults* out of the operation of time: and as to *them, at least*, the decree of 1797 cannot be set aside.

(*b*) 1 *Salk.* 203 *Cone v. Bowles;* and *Carthew*, 122. S. C.

3. The plaintiffs have not made a case which justifies the decree of *November*, 1805. Under the act of 1785, the mother would have taken the whole estate in this case. How far does the 5th section of the act of 1792 repeal that provision? Mr. *Call* says *totally:* it destroys her heritable blood altogether; it annihilates her existence.

Be it, then, that the mother is excluded from the inheritance. Who takes next? Do the *paternal uncles and aunts?* Certainly not under the act of 1785: because, by that act, where there were neither children, father, mother, brothers or sisters, or their descendants, the paternal uncles and aunts did not come in; but the estate was divided into *two moieties*, *one* of which was to go to the *paternal*, the *other* to the *maternal* line. If, then, the act of 1785

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would not give the *whole* estate to these plaintiffs, does the 5th section itself, of the act of 1792, give it to them? No: for Mr. *Call* says, and says truly, *that section is not donative*, but only *excepts* a particular case out of the canon of 1785. On what then do they found their title?

It is clear that Mr. *Call* thought that, on his removing the *mother*, these plaintiffs would stand next under the general law. In pursuit of this idea, he advanced the position that, if the person who stands next to the *propositus* have no heritable blood, the estate passes on to the next, as if such intermediate person had no existence. This is not believed to be true: certainly *not universally*: for, at common law, where the blood of the *eldest* son was *attainted*, the *next*, though free from attainder, could not take. So, in the case of the *eldest* being an *alien*, the *next* son a *citizen*; it is a *moot* point whether the *latter* could take: our law of descents considered it so, and therefore provided for it.(*a*) So the statute of 1 *Jac.* I. c. 4. s. 6. having pretermitted popish recusants, but not prescribing who should take the inheritance, another statute was necessary.(*b*)

(*a*) 1 *Rev. Code*, p. 169. c. 93. s. 18.

(*b*) 2 *Tuck. Bl. App.* p. 33. *note.*

But, admitting the principle correct, and that the mother is to be considered dead, the 5th section merely excludes from the inheritance the *mother*, and "any *issue* which she may have by any person other than the father of such infant;" but leaves the *ascending and collateral relations of the mother* where they stood under the act of 1785.

What decree then is right? and where shall the rule be found? *Brown* v. *Turberville*(*a*) was on a different case; the only question there being, whether the words interpolated in the 7th section covered the case of an adult: and, except an *obiter dictum* of Judge PENDLETON, there is nothing in that case touching this.

(*c*) 2 *Call*, 390.

Upon the whole, then, the plaintiffs have not made a case to justify the decree; which, therefore, should be reversed.

Wickham requested leave to make a few additional observations. If the plaintiffs had brought *separate suits* for the real and personal estates, the decree as to the personal would have been final. If their coupling both in *one bill* makes it otherwise, it follows that the plaintiff has it in his power to *oust* the Court of Appeals of jurisdiction, at his own discretion, by the manner of bringing the suit: a conclusion too monstrous to be tolerated.

As to the inheritance, the case of *Dilliard* v. *Tomlinson*(*a*) shews that the *words* of the act, when plain, are binding, and *construction* is not admissible against them. Therefore, *here*, as the words only *exclude* the mother, and do not say *to whom* the estate is to go, the Court cannot supply a disposal of the estate. As to the *personal* property, (*the law not providing*,) the mother, as *administratrix*, is in *possession*, and the plaintiffs have no claim upon her; like the case of a husband administering on his wife's estate, who is not to be called upon for distribution.(*b*)

(*a*) *Ante*, p. 183.

(*b*) 1 *Rev. Code*, p. 164. c. 92. s. 27.

Wednesday, *October* 24. The Judges pronounced their opinions.

Judge TUCKER. This is a case arising upon the construction of our law of descents, and of distribution of personal estate; where an infant of the age of thirteen years died possessed of real and personal estate derived from his father; leaving a mother, (and other relations on the mother's side, as it would seem,) but no brother, or sister, whatever, nor any descendant from them.

A preliminary question, however, arises from the following circumstances. The infant, *Edward Steptoe*, died in *May*, 1794. His mother administered upon his estate, and entered into possession of the whole, both real and personal. A part of the present plaintiffs, uncles and aunts on the part of the father, or descendants from them, brought their bill against the mother for a division of the estate, *claiming the* WHOLE. In her answer she states, that she had been ad-

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vised she had a right to her son's personal estate; nda, if so, some of *her near connections* may be benefited by it: which seems to shew she had near relations who were no parties to the suit. On the 17th of *March*, 1797, Mr. *Wythe*, then Judge of the High Court of Chancery, pronounced his decree, whereby he decided that the complainants had no right to the slaves, or personal estate, and dismissed the bill as to the part thereof which claimed the same, and demanded an account of the administration thereof. But, being of opinion that the complainants were entitled to the lands, he directed partition thereof to be made among them in certain proportions, and appointed Commissioners to state an account thereof, and to settle and adjust an account of the profits, since the death of the infant *Edward Steptoe*, to be reported to the Court. But, before any farther proceedings were had, *Elizabeth Steptoe*, the mother, died, having made a will, and appointed the appellant, *Templeman*, her executor; and *William Steptoe*, another defendant, having also died, the suit abated as to both those original parties.

After the division of the High Court of Chancery into Districts, (the act for which passed in *January*, 1802,) the present complainants filed a bill (the date of filing which does not appear) in the *Williamsburg* Chancery District Court; in which they speak of the former decree as *interlocutory*, and still *amendable* by the Court, and therefore pray that they may have the benefit of all the proceedings in the original suit, except the said interlocutory decree, which, as they are advised, *ought to be set aside*, partly for *error apparent on the face of it*, and partly because the execution of certain parts of it has become impossible; and pray process of *subpœna* to *revive and answer* against the appellant *Templeman*, as executor of *Elizabeth Steptoe*. One of the suggestions in this bill, which states that *William Steptoe* died in *April*, 1803, shews that the filing of the bill was after that period, so that more than six years elapsed

between the time of pronouncing the first decree, and the preferring the present bill.

To this bill *Templeman*, the executor of the mother, after disclaiming any connection with the real estate, pleads the decree of *March*, 1797, as a *final* decree in bar of the claim to the slaves and personal estate, and account of their hires, since the death of his testatrix, or of the administration of his testatrix on the personal estate of her husband, *George Steptoe*, deceased, &c.; and insists on the length of time, and acquiescence of the plaintiffs under that decree.

The replication to that plea denies that the decree of *March*, 1797, was *final*, in any respect, but says nothing of the lapse of time or acquiescence under the decree.

In *November*, 1805, the cause was heard before the Chancellor of the *Williamsburg* District, who pronounced a decree overruling the defendant's plea, and declaring that, neither the mother, though alive at the death of her son, nor *any relations on her part*, were entitled to any share or proportion of the infant's estate, real or personal, and directing that the *whole* should be distributed among the complainants, as heirs on the part of the father, in the several proportions therein mentioned, together with an account, &c. in order to a *final* decree.

From this decree the defendant *Templeman* prayed, and obtained an appeal to this Court, by virtue of the act of 1797, c. 5. authorizing the High Court of Chancery, in its discretion, to grant appeals from interlocutory decrees. Before which period no appeal could be granted until a *final decree*.

The counsel for the appellees contend, that the original bill having been *dismissed*, as to the *personal* estate, by the decree of *March*, 1797, that decree was *final* as to that matter; and that the plaintiffs were barred by length of time from filing a bill of *review*.

If the premises be correct, I think the conclusion must be so too. For the utmost period within which an appeal from

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a Superior Court of Chancery to this Court lies, seems to be *three* years, as was fully discussed in the cases of *Tomlinson* v. *Dilliard*, and *Mackey* v. *Bell.*(*a*) By analogy, then, I should suppose that a bill of review would not lie after that period. For that would be granting more power to the Judge of the same Court to reverse the decrees (pronounced by his predecessor perhaps) than the law vests in this Court. Instead of resorting to the period assigned to writs of error at common law, I think it far more reasonable that the period which the law has assigned to appeals from the Courts of Chancery be adopted as that which bars a bill of review. In *England* the statutory law is silent as to appeals from the High Court of Chancery. Therefore, the analogy to writs of error at common law was adopted. But our law having assigned a period within which appeals in Chancery must be brought, that period appears to me the proper standard by which the granting of bills of review should be governed. It is unnecessary, I conceive, to consider how far the saving in favour of infants might operate: the analogy must be observed throughout; and, if any of the parties were infants, their case is provided for.

(*a*) 3 *H & M.* 190—217.

But the counsel for the appellants insist that the decree was not final, but merely interlocutory, and therefore still in the breast of the Court. The inconveniences of such a construction were most ably commented upon, and illustrated by the opposite counsel. They are such as, in my opinion, to deserve not only the attention of the Courts, but of the Legislature. That a decree of *dismission*, which in its nature seems conclusively to determine every question of right, after being acquiesced in for *six* years, should be liable to be set aside by the successor of the Judge who pronounced it, and thereby affect, perhaps, the rights of *bona fide* purchasers for a valuable consideration, actually paid, upon the principle that they were purchasers *pendente lite*, seems so far repugnant to every idea that I have of justice, or equity, that I cannot well imagine a case that would call more loudly for legislative aid and protection, if the offended

dignity of Courts should pronounce against the claim of such *bona fide* purchaser. But that case is not before us, and I hope never will be, though not unlikely to happen very frequently, if the practice be permitted to prevail; which it certainly ought not, so as to affect *others*, now that the law allows appeals from interlocutory decrees. In the present case, however, as the law stood at the time the decree was pronounced, no appeal lay; for, however cogent the arguments to the contrary appear in my eyes, I am constrained by former *precedents* to say that the decree of *March*, 1797, was not a *final* decree between the parties, all of whom were still retained in court, although the bill, as to a part of the subject claimed, was dismissed.(*a*) The succeeding bill is, therefore, to be taken as a bill of *revivor* and *supplement*, by which the cause was brought regularly before the Judge who pronounced the second decree.

(*a*) *Grymes* v. *Pendleton*, 1 *Call*, 54.

By that decree, as I have already noticed, the Chancellor decided that, neither the mother of the infant, nor any relations of the infant, on the part of the mother, were entitled to any portion of his estate, real or personal.

That decision, so far as it respects the mother herself, or any of her descendants, other than children by the father of the infant, or their descendants, appears to me to be perfectly correct. But I differ with the Chancellor so far as respects the father or mother of the mother, or any of her collateral relations, all of whom, in the events which have happened, appear to me (if in being at the time of the infant's death) to be entitled to a portion of his estate, real and personal.

The following principles appear to me not to require any argument, or authority, in support of them.

1. That the laws of descent, or rules of succession *ab intestato*, to property real or personal are merely creatures *juris positivi*.

2. That, by the act of 1785, c. 60. all former rules and canons of inheritance and succession to estates real and personal within this Commonwealth, whether established by

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the common law or by statute, were entirely rescinded, abrogated and annulled: and that they cannot be revived in any manner, but by some express legislative provision for that purpose.(*a*)

(*a*) See *Acts of* 1789, c. 9.

3. That, if, by any subsequent act, any case provided for by the act of 1785 shall now happen *not* to be provided for, the *Legislature only* is competent to provide for such omitted case.(*b*)

(*b*) See 1 *T. R.* p. 52.

4. That the case of an infant having lands by descent or purchase from his father, already deceased, dying in the life-time of the mother, and leaving no child, nor brother, nor sister, nor any descendant from either of them, was fully provided for by the fourth section of the act of 1785, c. 60.

5. That the same happens now *not* to be provided for, by the operation of the act of 1792, c. 93. s. 5. The law declaring only that, in such case, the *mother* shall *not* succeed to the same: without designating any *other* person or persons to whom the succession shall belong *during the life of the* MOTHER: neither the seventh section of that act, nor any subsequent part thereof, providing for the succession in any such case.

From these principles, as premises, it appears to me that, in the case above supposed, (which is the same with that before the Court,) the succession to the inheritance *during the life of the* MOTHER was in ABEYANCE; and that, at *her death*, the whole estate, real and personal, ought to go to the same persons, and in the same proportions, as the same would have descended, if there had been *no mother*, nor brother, nor sister of the infant, nor any descendant from either of them, at the time of the death of the infant. And, consequently, that, *after the death of the mother*, the estate, both real and personal, ought first to be divided into two moieties, *one* of which *moieties* ought to be allotted to the plaintiffs in the several proportions, by which the Chancellor in his decree has directed that the *whole* shall be allotted; and that the *other moiety* be reserved for the benefit

of those relations on the part of the mother (of which by her answer to the original bill it appears probable there were some living at the time of the infant's death) who may within a reasonable time assert and prove their claims thereto. But if no such relations on the part of the mother shall assert their claim within a reasonable time, to be limited by the Court of Chancery, that the *other moiety* be then divided among the plaintiffs in the same proportions as the former.

It also appears to me, that, as no person was capable of succeeding to the inheritance as HEIR, *during the life of the mother*, the account of rents and profits, subsequent to the death of the infant, ought not to be decreed to be taken for that period which elapsed between the death of the infant and the death of his mother. The inheritance, *during that period*, being, as I have already said, *in abeyance*, the *first occupant*, who might enter and possess himself thereof during that period, might, as I conceive, lawfully hold the same, and take the rents, issues, and profits thereof to his *own* use, so long as the mother lived, without being in any manner chargeable or accountable for the same to the persons to whom the succession may belong, *after the mother's death.*(*a*)

My opinion, therefore, is, that so much of the Chancellor's decree as is in opposition to these principles be reversed, and that a decree conformable thereto be now made: and that the remainder of the decree be affirmed.

To prevent any misconception of this opinion, I beg leave to add that, if there had been any brother or sister of the infant on the part of his father living at the time of his death, or any descendant from them, such brother, sister, or their descendants, would have been entitled to take the estate *immediately*, notwithstanding the mother was then also living; as, in such a case, the inheritance would not have been in *abeyance* for a moment.

(*a*) See *Tucker's Blackstone*, vol. 2. *App.* p 28—42. for the reasons at large upon which this opinion is founded.

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Judge ROANE. With respect to the first question made in this case, I consider it as the established doctrine of the Court that a decree of the inferior Court is not to be considered as final, until the cause is completely dismissed therefrom. Until that is the case, the Court below has, itself, the power to correct any errors it may have committed, and any decree it may have rendered is, therefore, not to be considered as *final.* Most of the arguments now used on this topic have been used and overruled on former occasions.

As to the question now made upon the act of descents, I believe it will be admitted that I have borne my testimony* against the policy which gave rise to the act of 1790, restoring, in a measure, the feudal principle of the blood of the first purchaser. But, while I shall never be in favour of extending that principle in doubtful cases, by construction, I do not deny the power of the Legislature to make the innovation. The question before us is then purely a question of construction upon the intention of the Legislature as manifested in the act itself.

No man can be more sensible than I am, of the impropriety of extending the construction of an act by mere implication; especially to further an odious or unjust principle; but I apprehend that an implication may be so *strong* and *necessary* as to be equivalent to an express declaration by the Legislature. This I take to be the case in the present instance. The exclusion of the *mother* in the event that there is a brother or sister on the part of the father, or a brother or sister of the father, is substantially equivalent to an express declaration that the persons last mentioned shall themselves succeed; and this the rather, as the first section of the act of descents purports to provide a rule of inheritance as to all cases, and which idea is entirely supported by the opinion of this Court in the case of *Brown* v. *Turberville.* I consider that decision as a complete au-

* In the two decisions in the case of *Tomlinson* v. *Dillard,* &c.

thority to overrule the idea that the inheritance is in *abeyance* in the case before us. The succession in this case, therefore, does not rest upon a mere naked implication, but upon an implication so strong and necessary, (all the circumstances considered,) as to be equivalent to an express declaration by the Legislature. In this last respect this case differs from the one put in a note to 2 *Tuck. Bl. App.* p. 33. where an elder child being disabled from inheriting by receiving a popish education, and the statute which disabled him (1 *Jac.* I.) *containing no declaration* who should have the land, a subsequent statute was deemed necessary to be made in favour of the next of kin.

It is a sound rule of construction that, if it can be prevented, no clause, sentence, or word, shall be rendered superfluous, void, or insignificant.(*a*) In the case before us it is difficult to say wherefore the brothers and sisters on the part of the father, and *è converso*, were *mentioned* in the act, but for the purpose of *following up the principle* on which the change of the rule was founded, and giving the estate to them, instead of the excluded parent.

(*a*) 6 *Bac.* 380.

Upon the whole, my construction of the act of 1792 is, that it is entirely similar to that of 1785, with the single exception of the amendment made by the act of 1790; (which is kept up and *extended* by the 5th and 6th sections of the act of 1792;) and that those sections operate by way of exception from the general law in the cases put therein, as well by substituting one heir, as excluding another. The error on this point seems to be in considering the canons of the act of 1785 as *still in force*, (for example, in favour of the paternal grandfather and maternal grandmother,) while *at the same time* the succession is changed, in a particular case, in favour of the maternal uncles and aunts, &c. As to the justice of this alteration, the *power* of the Legislature being admitted, we are compelled to say "*stet pro ratione voluntas.*"

I therefore concur with the Chancellor in his construction

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in the present instance, which is also that of the public at large, and thereby avoid the great evil (as almost all *infants* derive their property either on the part of the father or the mother) which would result from deciding that, in cases like the present, no rule of descent is provided by law, and that the estates are, consequently, in every instance, to be considered as in *abeyance.*

Judge FLEMING. The counsel for the appellant, in their statement, rested the cause on two points only:

1st. That the original decree was right; and,

2d. That the bill having been dismissed as to the personal estate, the decree was final as to that matter; and the plaintiffs were barred by length of time from filing a bill of review.

The cause was argued with great ability on both sides, but much the greater part of the arguments of the appellant's counsel seemed predicated on the assumption of facts which, in my apprehension, did not exist; to wit, that the decree of *March*, 1797, was final; and that the bill against *Templeman*, as executor of *Elizabeth Steptoe*, was a bill of *review.* In order to prove that the decree of 1797 was final, it was strenuously argued that there ought to have been two separate and distinct suits; one for the real, and the other for the personal estate: but, for what *good* purpose there should have been more than one suit, I am at a loss to discover. The counsel proceeded to argue that, as the Chancellor decided the *right*, respecting the personal estate, and dismissed the bill, *as to that subject*, the decree was *final:* but this Court has never considered a decree to be final, so long as the parties remained in Court; but every order and decree made during that space, has been considered as interlocutory, and subject to revision; as in the cases of *Young* v. *Skipwith*,(a) *Grymes* v. *Pendleton*,(b) and *M'Call* v. *Peachy*.(c) In the former case, *Skipwith* brought his bill against *Young* for the moiety of a tract of land, according to contract. The Chancellor decreed for the plaintiff a moiety

(a) 2 *Wash.* 300.
(b) 1 *Call*, 54.
(c) *Ibid.* 55.

of the land, (which completely decided the rights of the parties,) and appointed a Commissioner to make a partition accordingly. *Young* appealed to this Court, which, after a long and solemn argument on the merits of the cause, decided unanimously that the decree was interlocutory, dismissed the appeal, and remanded the cause to the High Court of Chancery; as was likewise done in the cases of *Grymes* v. *Pendleton*, and *M'Call* v. *Peachy*, noticed above: and in several subsequent cases, after the act of *January*, 1798, allowing appeals (by the *Court* of Chancery) from interlocutory decrees; particularly, in the cases of the *President and Professors of William and Mary College* v. *Lee's Executors*, and of *Fairfax* v. *Muse's Executors*.(a) In the latter case, there was a decree to foreclose the equity of redemption of mortgaged lands, and the premises ordered to be sold: yet this Court unanimously dismissed the appeal, as having been improvidently allowed, in *vacation*, from an *interlocutory* decree; which was not authorized by law. And, had an appeal been allowed, in the case before us, from the decree of *March*, 1797, there is not a doubt on my mind but it would have been dismissed, as having been prematurely granted. Considering *that* decree then as interlocutory, and not final, the argument, that a bill of *review* was barred by length of time, falls to the ground. But, in my apprehension, it is not a bill of *review*, but a bill of *revivor* and supplemental bill, which the several deaths of *Elizabeth* and *William Steptoe*, who were the executrix and executor of *George Steptoe*, deceased, made necessary, in order to bring the whole subject in controversy properly before the Court; and in which the widow, and the children of *William Steptoe*, (eight in number,) were made parties, plaintiffs; and who, by the last decree, are made distributees of one fourth part of the estate of the said *Edward Steptoe*, deceased, the widow's dower therein being first allotted to her; all which appears to me to have been correct and proper.

(a) 2 *H. & M.* 557. *and note* (2), 558.

As to the length of time that the appellees acquiesced in, and left undisturbed, the decree of *March*, 1797, it may be

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well accounted for. The Commissioners appointed, by that decree, to state an account of the real estates whereof the said *Edward Steptoe* died seised, and to settle and adjust the profits of the said estate, since his death, had made no report of their proceedings, before the deaths of the said *Elizabeth* and *William Steptoe*, when the bill of revivor, and supplemental bill, became necessary for the purposes aforesaid. I come now to consider the cause on its merits, and to decide, according to the best of my judgment, the rights of the parties to the estate of *Edward Steptoe*, deceased, under our several acts of Assembly. And here a difficulty seems to arise, and a difference of opinion among the Judges, respecting the exposition of those acts; which circumstance, and the very ingenious arguments of the counsel, induced me to consider the subject with more than ordinary attention; and, after the most mature deliberation, the difficulty to me appears easily solved, by giving to those acts such a construction as I conceive to have been the sense and intention of the Legislature, at the several periods when they were passed; and, as I believe, agreeably to the *general* sense and understanding of the community at large.

It was objected by the appellees' counsel, though not much relied on, that the fifth clause of the act of 1792, under which the appellees claim, is only a *proviso*, or an exception, to the general principles, words, and meaning of the preceding clauses; and ought not to have the same force and effect as if it had been declaratory, and an enacting clause.

Our first act of Assembly, altering the course of descents from that of the common law, was passed in the year 1785; in which the sense of the Legislature was expressed in general terms; as it was likewise in the 24th section of the act of distribution, passed the same session, and referring to the act of descents, for the distribution of goods and chattels: but, in the year 1790, an important change was made, in cases of *infants* dying without issue; and, by an act passed the 24th of *December*, in that year, entitled "An act to amend the act entitled an act directing the course of descents," it is

enacted (section 3.) that, "where an *infant* shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the *father*, the *mother* of such infant shall not succeed to, or enjoy the same, or any part thereof, by virtue of the said recited act, *if there be living any brother or sister of such infant*, OR ANY BROTHER OR SISTER OF THE FATHER, OR ANY LINEAL DESCENDANT OF EITHER OF THEM:" in which act there is another clause, *vice versa*, excluding the *father*, &c. where the estate is derived from the *mother*. In the same act there is a repealing clause in the emphatic words following: "So much of all acts as comes within the purview of this act, and PARTICULARLY *of the act entitled an act directing the course of descents*," (viz. the act of 1785,) "shall be, and the same is hereby repealed." The above clauses, respecting cases of infants dying without issue, are declaratory and explicit, and not *exceptions* to clauses of general import. It is true that, when they are incorporated into the act of 1792, "to reduce into one the several acts directing the course of descents," they are there inserted as provisoes to the *general* course of descents in the preceding clauses; *with the exclusion of any* ISSUE *which the mother may have by any person, other than the father of such infant;* which latter exclusion was not in the act of 1790: and so in the clause excluding the father, &c. from inheriting any estate derived from the mother.

But it is contended, in the present case, that the 5th clause of the act of 1792, which excludes the mother from the inheritance, is in negative words, and no express declaration who shall inherit the estate; and therefore it is a *casus omissus;* and, during the life of the mother, the estate was *in abeyance*, there being no person in existence capable of inheriting; as the infant died, leaving neither brother nor sister; and that, on the death of the mother, (there being no provision for the case in the act of 1792.) so much of the act of 1785 as directs that the inheritance shall be divided into moieties, one of which shall go to the paternal, and the other to the maternal kindred, is revived, and in force; (the course of descents by the common law being

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done away by the statutes; and it being a rule, that a statute cannot be repealed by implication.) But we have already seen that the act of 1785, so far as it was within the purview of the act of 1790, which completely embraced, and, in my conception, provided for, the case before us, was repealed in as express terms as language could devise.

And, further, in the act of 1792, directing the course of descents, there is a clause declaring that all and every act and acts, clause and clauses of acts heretofore made, containing any thing within the purview of this act, shall be, and the same are hereby repealed. The act, then, of 1785, or so much thereof as was within the purview of either the act of 1790, or the act of 1792, was clearly repealed. And it is a rule of equal force with the one mentioned above, that a statute *once repealed* shall not be *revived* by implication. There is also another important rule of construction that well applies to the case before us; which is, that *force* and *efficacy* is to be given to every sentence, and *significant word*, in a statute, which does not contradict or obscure some other part of the same statute; and that, where words or expressions are ambiguous, and of doubtful meaning or effect, such interpretation and application shall be given them, as to fulfil the object and intention of the Legislature, if the will of the Legislature can be fairly deduced from such words or expressions. And here let me premise that, in my conception, the Legislature intended to provide, and hath provided, for every possible case that could happen, (and such was the sense of *all* the Judges in giving their opinions in the case of *Brown* v. *Turberville*,) and, particularly, is there provision made for the one now under consideration; and others of a similar nature; and that, as *Edward Steptoe* died under age, and without issue, having an estate of inheritance derived by purchase from his *father*, neither his *mother*, nor *any issue* which she might have had by any person, *other than his father*, could succeed to, or inherit, any part thereof: and, as there was no brother nor sister of the said *Edward Steptoe*, nor descendants of such, living at the time of his death, the bro-

thers and sisters of his father *George Steptoe*, deceased, and their descend ants, (the present appellees,) have a right to the inheritance; which I conceive to have been clearly the will and intention of the Legislature; or why was the mother, and any issue which she might have by any person other than the father, excluded from the inheritance, "*so long as there should be living any brother, or sister of the father, or any lineal descendant of either of them?*" To give the latter words any other construction would, to my mind, render them nugatory, and so many dead letters: and they are certainly of too important signification to be thus considered. And I construe them on the principle that a devise of lands to a son, *after the death of his mother*, gives to the mother an estate for life by *implication*.

I am therefore of opinion, that the decree is correct, and ought to be affirmed; and (the decree being interlocutory) the cause remanded to the Superior Court of Chancery of the District of *Williamsburg*, for farther proceedings to be had therein.

By the *majority* of the Court, decree AFFIRMED, and cause remanded for farther proceedings.

Paynes *against* Coles and others.

Thursday, October 11.

JOHN PAYNE and *Mary Payne*, infants, by *Mary Payne*, their mother and next friend, filed their bill in the

1. A record of one suit cannot be read as evidence in another, unless *both* the parties, or those under whom they claim, were parties to *both* suits; it being a rule that a document cannot be used *against* a party who could not *avail himself of it*, in case it made in his favour.

2. An answer in Chancery (though, *in form*, *responsive* to a question put in the bill) is not evidence, where it asserts a right, *affirmatively*, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill.

3. An issue out of Chancery ought not to be directed to try a claim altogether *unsupported by testimony*, or a title *not alleged in the bill, but suggested in the answer, without proof*. Neither is this rule to be varied by the circumstance that *infants* are interested.

4. The aid of a Court of Equity ought not to be afforded to set up a marriage promise when the effect would be to disinherit (against the intention of the parties) the only issue of the marriage.

5. *Quære*, whether a Court of *Equity* ought, under *any* circumstances, to *assist*, to the prejudice of a *posthumous* child, the claim of devisees under a will (made before the 1st of *January*, 1787) by a testator who had *no child* living, and was ignorant that his wife was in a state of pregnancy?