REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

NEW-YORK:
Printed and published by Isaac Riley.
1812.

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."

IN CONFORMITY to the act of 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."

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

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?

October, 1810.

Paynes v. Coles.

late High Court of Chancery, on the 1st of *March*, 1796, against *Walter Coles*, *Isaac Winston*, and *Lucy* his wife, *Garland Anderson*, and *Mary* his wife, *Thomas Price*, executor of *William Darracott*, deceased, and *John Syme*, and *Sarah* his wife; setting forth that *Williams Coles*, late of *Coleshill*, in the County of *Hanover*, (being the father of three children, to wit, a son named *Walter*, and two daughters, *Mary*, the mother of the plaintiffs, and *Lucy*, the wife of *Isaac Winston*,) on the 4th of *September*, 1768, wrote a letter to Mrs. *Darracott*, the mother of *Mary Darracott*, to whom his son was then paying his addresses, informing her that the match would be very pleasing to his wife and himself; that he intended to give his son, immediately, to the value of 3,000*l.* current money, in land, slaves, and other things; and, at his own and his wife's death, he would leave him the land he then lived on, "with his possession in *Ireland*, and some more slaves," &c.

The bill farther stated that (whether before or after the said letter was written, the plaintiffs knew not) the said *Williams Coles* told *William Darracott*, brother of *Mary Darracott*, that "if the match should take place, he would give his son at the time of the marriage his plantation in *Goochland* County, and sixteen or eighteen negroes, seventy or eighty head of cattle, and other stock upon the said plantation, and that at his death he would give his said son the plantation whereon he then lived, and other negroes, and some other estate; that the marriage took effect, but the agreement was not executed; that, some time in the year 1769, *Walter Coles*, the son, departed this life, having made a will, in which, after bequeathing to his wife *Mary* all the slaves, horses, and all other things that he had with her as a marriage portion, and ten pounds current money, and to each of his sisters a mourning ring, he "gave and bequeathed to his *father and mother* all and singular the remaining part of his estate of any nature or kind soever, to them and their heirs for ever;" that the *defendant Walter* was his *posthumous* son; he having had no child living at

the date of the said will; which, as the plaintiffs were advised, passed his rights under the marriage agreement from his infant child to his father and mother. They were farther advised, that the father and mother took under the will as *joint-tenants;* that *Williams Coles*, the father, dying about the year 1781, intestate, his moiety survived to *Lucy Coles*, the mother; and that, upon her death in the year 1784, the whole right to the benefit of the said marriage agreement devolved (by virtue of the residuary clause in *her last* will) on the plaintiffs. The bill moreover set forth that *William Darracott* administered on the estate of *Williams Coles*, and *Walter Payne* qualified as executor of *Lucy Coles;* but that *Darracott*, as administrator of her husband, had previously taken possession of her whole estate, (alleging that her lands had descended on the defendant *Walter Coles*, his nephew, as heir at law of the said *Williams Coles*, and that the slaves and personal property belonged to the estate of his intestate,) *and made such distribution of the estate as to him seemed meet;* leaving the defendant *Walter Coles* in possession of the *land*, and far greater part of the other estate; and allowing no part of it to the plaintiffs; thereby preventing *Walter Payne*, the executor, from performing the duties of his office; that the said *Walter Payne*, having gone beyond sea, had not been heard of for seven years; and thus, the plaintiffs had been deprived of all benefit from the devise aforesaid in their grandmother's testament; notwithstanding she therein appointed *Sarah Syme*, wife of Col. *John Syme*, trustee and manager for them; the said *Sarah* having never interfered, under the trust, to have justice done them; that the defendant *Walter Coles* had held the estate, allotted him, ever since the distribution; that *William Darracott* is dead, and *Thomas Price*, his executor, is the only person who can account for his acts in relation to these estates.

The prayer of the bill was for an *account* of so much of each of the *estates* of *Williams* and *Lucy Coles*, as was received by the defendants, *Walter Coles*, *Isaac Winston*,

October, 1810.

Paynes v. Coles.

and *Lucy* his wife, and *Garland Anderson*, and *Mary* his wife; for an *account* of the *administration* by *William Darracott*, to be rendered by the defendant *Thomas Price*, his executor; "that the said *Walter Coles* be decreed to convey to the plaintiffs all lands, whether in this country or in *Ireland*, to which they are equitably entitled under the above devise of the testament of their grandmother, and which (independently of the above recited *letter* and *conversations*, the *testament of his father*, and the *testament of his grandmother*) would have descended to him by right of inheritance, or any other title; and that the defendant, *Sarah Syme*, be compelled either to accept of or relinquish her trust aforesaid, and, in the former case, to execute the same agreeably to the principles of equity in like cases."

The defendant *Walter Coles* answered, saying that "it *may* be true that *Williams Coles* his grandfather did, on the 4th of *September*, 1768, write such letter as is set forth in the bill, but for greater certainty refers to such *proof* as the complainants can bring concerning the same: he has *understood* that the said letter was written at the instance of Mrs. *Darracott*, grandmother of this defendant; and that the said *Williams* was induced to write it by information received of her, or from some other relation of his mother, that her fortune was much more considerable than it was afterwards found to be. He admits that the marriage took effect, but denies that the said *Walter Coles*, this defendant's father, became *possessed* of the property mentioned in the said letter. He further saith, that his said father, when he made his last will, had no knowledge of the pregnancy of his wife: and this defendant submits it to this honourable Court whether, as the said will was made when his father had no child, the subsequent birth of this defendant did not operate as a revocation thereof; but, if it shall be thought otherwise, he insists that, as his said father was not possessed of the estates mentioned in the said letter, the same did not pass by his will; more especially, as it evidently appears, from the will itself, and the then situation of the

parties, *that the said estates were not in the contemplation of the testator when the will was made.* This defendant does not admit the *parol* agreement between his grandfather and his uncle, stated in the bill; and supposes that, if any such conversation took place, it ought to be considered as having no effect, so far as the same is different from the letter referred to by the complainants."

The same answer farther states that "*Williams Coles*, the grandfather, proved the will of the said *Walter*, whereof he was appointed executor, but never held any of the *property, mentioned in his letter*, under the devise from his son, but as his own several property; in like manner as if the said will had never been made; that *Lucy Coles* never held any part of it, except as widow of the intestate; and, if she made such will, (which, however, the defendant *contested*, having instituted a suit in Chancery to set it aside,) *she* never *meant* that *this* property should pass by it; that *Darracott*, the administrator, made distribution of the property of his intestate (as he had a right to do) between *Mary Payne*, the mother of the plaintiffs, *Isaac Winston* and *Lucy* his wife, and this defendant; they being the persons entitled thereto; that this defendant never has had possession of any property which he conceives to have belonged to his grandmother, Mrs. *Coles*, and only received his share as heir and distributee of his *grandfather;* that the plaintiffs cannot set up any *legal* claim under the marriage contract alleged by them to have been made by this defendant's grandfather, and he submits it to the Court, whether the same ought to be carried into effect, *in equity, to the prejudice of the issue of the marriage, for whose benefit it must have been intended;* insisting that, if the same ought to be performed, he, *being the sole issue of the marriage, ought to receive the benefit thereof.* He further saith, that, *as no claim was ever set up under the said letter, either by his grandfather or his widow;* and, as the complainants claim under the letter; he conceives himself entitled to, and prays the benefit of the *act of limitations.*"

OCTOBER, 1810.

Paynes v. Coles.

Garland Anderson and *Mary* his wife answered separately; the former alleging total ignorance as to Mrs. *Coles*, or any of her affairs; the latter stating that she did not remember ever to have seen Mrs. *Coles's* will; had heard that a legacy was left her; but had never received it.

Only one deposition was taken in the cause; and that went to prove the execution of Mrs. *Coles's will.*

The exhibits were the wills of *Walter Coles* and *Lucy Coles.*

The plaintiffs also exhibited the proceedings in the suit in *Hanover* County Court, on behalf of the defendant *Walter*, (when an *infant* about two years old,) against *Williams Coles*, his grandfather; claiming the benefit of the marriage agreement. The bill in that suit relied upon the letter above mentioned as the foundation of the plaintiffs' claim; and the answer admitted the said letter to have been *written;* but contended that it ought not to be *binding;* having been produced by a deception as to the amount of *Mary Darracott's* fortune; and being unreasonable in itself; and that the will of *Walter Coles* operated as a *release* from the said agreement.

Sundry depositions were taken, but no decision appears to have taken place.

To the admission of the bill, and proceedings thereon *in that suit*, as evidence in *this*, the defendant *Walter Coles*, by his counsel, filed a written exception.

The suit was dismissed, by order of the plaintiffs' counsel, as to the defendants *Isaac Winston* and *Lucy* his wife; and, on the 4th of *October*, 1803, the cause coming on to be heard as to the other defendants, the Court dismissed the bill with costs; from which decree the plaintiffs appealed.

The record also contains a copy of the proceedings in a suit brought in *Hanover* County Court by the defendant, *Walter Coles*, against the present plaintiffs and others, for the purpose of setting aside the will of his grandmother *Lucy Coles;* which suit was removed by a writ of *certiorari* to the High Court of Chancery, and decided on the same

4th of *October*, 1803, by a decree dismissing the bill with costs; from which decree no appeal was taken.

In that suit, *Mary Payne*, one of the defendants, and daughter of *Lucy Coles*, alleged in her answer, (among other things,) that the said *Lucy* was twice married; first to *Cornelius Dabney*, and afterwards to *Williams Coles;* that, by *Cornelius Dabney*, she had issue a son, *William Dabney*, who had issue several sons, of whom *Isaac Dabney* was the eldest, and *he*, dying in the life-time of the said *Lucy*, and after the death of his father, left issue several children, of whom *William Dabney* was his eldest son; and that the said last-mentioned *William Dabney* (who is still alive) was, at the time of the death of the said *Lucy*, and now is, her heir at law; and, "*as the estate came by the said Lucy altogether, or as to the greater part thereof, as her inheritance*, this defendant is advised that, if the said *Lucy* had died intestate, and if the said estate had been left to pass by the rules of inheritance at the time of her death, the complainant never could have claimed it as her heir, so long as any of her descendants of the name of *Dabney* were in existence."

A number of depositions were taken in that suit; proving, on the one hand, that *Lucy Coles's* will was duly executed, and, on the other, that she had no idea that the property now claimed belonged to her, but considered it as belonging to *Walter Coles*, her grandson. No evidence appeared, either to support or contradict the allegation, that "*the estate came by the said Lucy altogether*, or, as to the greater part thereof, *as her inheritance.*"

Warden, *Nicholas* and *Wirt*, for the appellants.

Wickham, for the appellees.

On the part of the appellants, the subjects in controversy were considered in two points of view:

1. As to the *real* estate, which *Lucy Coles* held in her own right; and,

2. As to the estate comprised in the marriage promise.

OCTOBER, 1810.

Paynes v. Coles.

1. It must be clear that, if *Lucy Coles* held any real estate in her own right, it belongs to her devisees under her will. In the bill exhibited by the appellee *Walter Coles* to set aside that will, he called upon the defendants, *Mary Payne* and others, to say, whether the said *Lucy Coles* in her life-time did not at all times declare that she considered the title to the land and other property which he held, derived from his grandfather, to be completely vested in him, independent of her, and that she could not dispose of the same by will or otherwise. To this question *Mary Payne* answered that *Lucy Coles had said*, (*and this defendant moreover asserted that the fact was so.*) that the greater part of the *Virginia* estate in question did not belong to *him* as heir of his grandfather, but was *her own inheritance*. In this particular the answer was *responsive* to the bill, and therefore evidence: at any rate, if not *direct* or *conclusive*, it was *sufficient* evidence to have produced a reference to a Commissioner, or a Jury, to ascertain the fact, for the benefit of the *infants* who were co-defendants. The decree was, therefore, erroneous in not directing such reference.

2. As to the estate comprised in the marriage promise of *Williams Coles* to *Walter*, the appellants say that this promise gave to *Walter Coles* an interest which he had a right to dispose of either by will or contract; that he did dispose of it by his will to his father and mother *jointly;* that *Lucy Coles* took it by *survivorship*, and devised it to them. They do not claim, as being *originally the objects* of the marriage promise, nor by virtue of *consanguinity*, but as *purchasers* under him for whom the promise was made, and who exercised his lawful right in devising it.

On the other side, it was contended, 1. That, since the appellants had no right to sue at law for the property in question, a bill will not lie *in their behalf*, for the specific execution of the supposed marriage agreement; their claim being highly *inequitable:* for a Court of Equity has a *discretionary* power of withholding relief, and will not compel specific performance in a *hard case*.

2. There is no sufficient proof of the agreement charged in the bill; for the record from *Hanover* is not evidence in this suit. It is true that the *appellee* claims under *Williams Coles*, the defendant in that suit, and was himself the plaintiff; but the *appellants* were not parties; neither was *Lucy Coles* (under *whom they* claim) a party; and the rule must be reciprocal. The record could not be used as evidence *against* her; and, therefore, cannot be *for* her. Besides, a *bill* in Chancery, when not sworn to, is merely suggestion of counsel, and not evidence against the plaintiff.(*a*) But, if it were evidence against an *adult*, it cannot be against an *infant;* for even the *answer* of an infant by his *guardian*, is not evidence against him. And, as to the *answer* of *Williams Coles;* he says he was deceived and imposed upon in writing that letter; and his statement must be taken altogether.(*b*)

(*a*) *Doe, lessee of Bowerman, v. Sybourn, 7 T. Rep. 2, 3. Peake's Ev. 54.*

(*b*) *Peake's Ev. 55.*

3. Admitting the agreement to be proved; the *real* estate agreed to be settled did not pass by the will of *Walter Coles*, as he had *neither an equitable nor legal seisin;* and the *personal* estate being devised jointly to his father and mother, and being in their possession, the whole vested in the father, in his own right, and as *husband*, and no part survived to his wife.

4. The birth of the appellee *Walter Coles* operated as a revocation of his father's will, in *reason*, though not by *authority*. A subsequent marriage and birth of a child are a revocation: but no good reason can be assigned why, at common law,* the birth of a posthumous child, for whom no provision is made in the will, should not be considered a revocation, as to such child; especially since, according to the case of *Brady* v. *Cubitt*,(*c*) an implied revocation may be rebutted by parol evidence of the actual intention of the testator. No authority can be shewn against the right of the posthumous child in such a case. In *Yerby* v. *Yerby*,(*d*) it was decided that, where a man *had* children at the time of

(*c*) *Doug. 39, 40.*

(*d*) *3 Call, 334.*

* *Note.* By our act of 1785, c. 61. (see 1 *Rev. Code*, p. 160, 161.) such is now the law, as to every last will and testament made when the testator had *no child living.*

October, 1810.

Paynes v. Coles.

the will, the subsequent birth of a child was no revocation; but that case was not like this.

5. Supposing a right to have survived to the wife; the property did not pass, and was *not intended* to pass by *her* will.

6. Possession having been delivered to the appellee in her life-time, and retained by him, the appellants are bound by length of time.

7. The appellants as residuary *legatees* of Mrs. *Coles* are not entitled to sue on the death of her executor, but the suit can only be maintained by an *administrator de bonis non* of her estate.

8. If their suit be maintainable, all the legatees of Mrs. *Coles* should have been parties.

9. The suit has not been properly followed up against *Price*, the administrator of *Darracott*, and other defendants.

In reply, to the first of these points, it was said, there was no injustice, or hardship, in the claim of the appellants. The marriage promise was made for the benefit of *Walter Coles*, between whom and Miss *Darracott* the match was about to take place; not for the benefit of the *issue;* about whom nothing was said. Suppose it had been complied with, and a settlement made: *Walter Coles* might surely have sold or devised the property. In like manner, his devise of his *interest* in the promise was equally good *in equity*. The enforcement of marriage articles is uniform in Courts of Equity; the construction there being the same as at law; and this is always done according to the terms *expressed* in the articles. The cases of settlements are very numerous; and it will be found that the *issue* is always expressly provided for, where it is intended; and this is done by a covenant that the estate shall be conveyed to the husband and wife for their joint lives, and afterwards to *trustees* for the benefit of the children of the marriage; to prevent the remainder in their favour from being defeated by *alienation*.(a) But, if this be not done, no case can be found of a refusal

(a) 2 *Bl. Com.* 171.

1

to decree execution of a marriage agreement, on the ground that the *issue* was not provided for, and would, therefore, lose the estate. In *Chichester* v. *Vass*, the suit was brought by *Vass*, in his own name, and he recovered; though that case was not so strong as the present, in favour of the exclusive right of the husband. There are cases, too, which shew that Courts of Equity are not so active on behalf of the rights of *issue*, as it is supposed, even where designated in the settlement.(*a*) Courts do not enter into ideas of abstract justice in enforcing agreements, where parties are explicit. The circumstance, then, that the *issue* was not provided for, is no bar to our suit.

(*a*) *Cann* v. *Cann*, 1 *Vern.* 480 *Clarke* v. *Sampson*, 1 *Vezey*, 100. 2 *Com. Dig.* 125.

It is not true, in all cases, that, where an action cannot be brought at law on an agreement, there a suit will not lie in equity for a specific performance.(*b*) On the contrary, if the contract be good at law, in its origin, and a Court of Law, either from the situation of the parties, or from other causes, can give none or inadequate relief, the discretion of the Court of Equity is at an end, and it must give a decree. But, indeed, the question about specific execution does not occur in this case; the only question being whether *Walter Coles* had a right to devise his own property.

(*b*) *Cannel* v. *Buckle*, 2 *P. Wms.* 244.

2. As to proof of the letter: it is *faintly* denied, or rather admitted, by the answer of the defendant *Walter Coles*. But if that be not sufficient, it appears from the bill filed in *Hanover* Court by his guardian, that the original letter was in his hands. The appellees, then, cannot be expected to produce it. The reason of the rule, which regards a bill as merely suggestion of counsel, cannot apply in this case. Neither ought the rule that *depositions* taken in a suit between different parties are not to be read to prevent our availing ourselves of the *depositions* by which the letter is clearly established. The reason of that rule proves it inapplicable. It is because the party against whom such depositions are offered has had no opportunity to cross-examine: but here the case was otherwise.

OCTOBER, 1810.

Paynes v. Coles.

3. Possession was not necessary to give validity to the devise in the will of *Walter Coles;* for a possibility, if coupled with an interest, is devisable;(*a*) and so also is *any equitable* interest.(*b*) If the devise had been to *Williams Coles* alone, it might, perhaps, have operated as a *release* of his engagement: but, as it is to him and his wife *jointly*, thereby instituting the right of survivorship between them,(*c*) it must be considered as conferring a higher title. If it do not convey this equitable estate, there is nothing for it to operate upon: for it does not appear that he had any thing else to devise by the residuary clause in question. And the circumstance of his ignorance of his wife's pregnancy, though not sufficient to vacate his will, is sufficient to indicate his intention to give all his rights to his *father and mother.*

(*a*) *Jones* v. *Roe, Lessee of Perry.* 3 *T. Rep.* 88.
(*b*) *Perry* v. *Phelips,* 1 *Vezey,* jun. 254.
(*c*) 2 *Bl. Com.* 181.

But it is objected that, with respect to the *chattels* bequeathed, they vested absolutely in *Williams Coles*, and did not survive. To this it may be answered, that *Walter Coles's* claim was not a *legal* but an *equitable* one. *Williams Coles* never complied with, or *executed*, his agreement. The case, therefore, does not stand precisely on the footing of chattels given to husband and wife absolutely. He did no act to sever the jointure; and unless some act of that kind had been done, it subsisted. In 2 *Vern.* 683.(*d*) a case is found where the right of survivorship to the wife took place as to *money* vested, in mortgages and bonds, in the life of the husband. But if this point be against us, it does not preclude our having an account and decree for the *real* estate.

(*d*) *Christ's Hospital* v. *Budgin et ux.*

4. The fourth point is clearly against the appellees: for although marriage *and* birth of a child, concurring, revoke a will,(*e*) *either* of those events *singly does not.*(*f*)

(*e*) *Wilcox* v. *Rootes,* 1 *Wash.* 140.
(*f*) 7 *Bac.* 365. (*Gwill.* edit.) *Shepherd* v. *Shepherd,* *Doug.* 36.

5. It is said that *Lucy Coles* never considered herself as holding under *Walter Coles's* will. But it is immaterial what are the *impressions* of parties of their legal rights: else what would become of the appellee himself, who brought a suit as claiming under the letter which in this suit he disclaims?

6. The 6th objection is founded in an error in fact; for, according to the bill, answer, and evidence, possession was not delivered to the appellee by *William Darracott*, the administrator, until after the death of *Lucy Coles*. In fact, she was in possession of all the estate at the time of her death; in what character it is not for the appellee to say.

7. *Walter Payne*, the executor, having left the Commonwealth; there being *no administrator de bonis non;* all the estate of the testatrix being in the possession of the defendant *Walter Coles;* and the plaintiffs, her legatees, being the only persons entitled to the property in question; they were authorized to sue as legatees.

8. All the necessary parties have been made; for the other legatees claim no title to the property now in question.

9. If the suit has not been properly followed up against *Price*, the administrator of *Darracott*, that is no reason for refusing us a decree against *Walter Coles*. We go against him for the *land* at any rate; and further proceedings may be directed against *Price*.

Monday, November 5. The Judges pronounced their opinions.

Judge TUCKER. The history of this cause in all its branches, as spread upon the record, is complicated, and most of the facts appear very uncertain.

The bill charges that *Williams Coles*, grandfather of the appellee, *Walter Coles*, the elder, being informed that his son *Walter* was paying his addresses to a young lady whom he supposed to be entitled to a considerable fortune, on the 4th of *September*, 1768, wrote the following letter to Mrs. *Darracott*, then a widow, and mother of the young lady.

Coleshill, Sept. 4, 1768.

"Madam,

"My son informs me he is paying his respects to your

OCTOBER, 1810.

Paynes v. Coles.

daughter, which is very pleasing to his mother and me. I intend giving him *now* to the value of 3,000*l.* current money, in lands, slaves, and other things. At mine, and his mother's death, will *leave* him the *land I now live on*, with my *possessions in Ireland*, and some slaves. I am, &c.

"*W. Coles.*"

It may not be improper here to state, that *Coleshill*, the place where the writer then lived, is affirmed in the answer of *Mary Payne*, (the defendant in one of the suits, which were heard together in the Court of Chancery,) to have been the property of *Lucy Coles*, the wife of *Williams Coles*, the writer of the letter: and that she, having been married to a former husband named *Dabney*, had by him a son called *William*, who dying, has left a son of the same name still living, and heir at law to the said *Lucy Coles*, his grandmother.

The marriage between *Walter Coles* and Miss *Darracott* took effect not long after the date of the above letter. On the 28th of *March*, 1769, *Walter Coles*, being ill, made his will, which was proved and admitted to record in *October* following, by which he gave to his wife the property which he had with her as a marriage portion, and ten pounds for mourning; and then "gave and bequeathed to his father and mother all and singular the remaining part of his estate of *any nature or kind soever*, to them and their heirs for ever, and constituted his father his sole executor."

A few months after this, *Walter Coles*, the present appellee, and the only issue of that marriage, was born; not long after which a suit was brought in his name and behalf, by *Isaac Winston*, his guardian, for a specific performance of the *promise contained in the before-mentioned letter*, then in the complainant's possession. *Williams Coles*, the defendant, put in an answer thereto, admitting the letter; which is sworn to the 17th of *September*, 1771. The deposition of *Elizabeth Darracott*, the complainant's grandmother, appears to have been taken the 8th of *February*

preceding; but by what authority does not appear. That of *William Darracott*, her son, appears to have been taken the first of *June*, 1780. The magistrates certify that it was taken in that suit, "*according to law.*" The suit appears to have been no further proceeded in. Mr. *Wickham*, of counsel for the appellee, *Coles*, objected to the admission of that bill as evidence in the cause. This I think brings the case within a narrower compass.

Williams Coles died intestate, leaving the appellee, *Walter Coles*, his heir at law: he left also two daughters, from one of whom the appellants, *John Payne* and *Mary Jackson*, are descended, the latter being the daughter of *Mary Payne*, sister of *John*, the other appellant.

Lucy Coles, the widow of *Williams Coles*, and grandmother of the appellant, *Walter*, being the mother of his father, and one of the objects of his bounty in his will, survived her husband, *Williams Coles*, several years, and died testate, having made a will bearing date *March* 5th, 1784, which was proved and admitted to record, *May* 5th, 1785. By that will, after several inconsiderable legacies, "she gave all the remainder of her *estate*, also her ready money, to her grandchildren *Mary* and *John Payne;* (above named;) also one hogshead of tobacco which was in hand." She also appointed Mrs. *Sarah Syme*, wife to Col. *Syme*, trustee and manager for her daughter, *Mary Payne* (who then resided in *Philadelphia*) and her children, (*John* and *Mary* above named,) and appointed several executors; of whom, as it is said, her grandson *Walter Payne* alone qualified, and soon after removed himself out of the state, and went beyond seas, without ever possessing himself of any part of her estate, and has never since been heard of.

The bill, which was originally brought by *John Payne* and *Mary Payne*, infants, by *Mary Payne*, their mother and next friend, suggests that *William Darracott*, the uncle of the defendant, *Walter Coles*, having obtained letters of administration on the estate of *Williams Coles*, the deceased husband of *Lucy*, previously to the probate of her will, had

OCTOBER, 1810.

Paynes v Coles.

taken possession of her whole estate, alleging that her slaves and personal estate were the estate of his intestate *Williams*, her husband, and that her lands had either descended upon his nephew, *Walter Coles*, as heir at law of the said *Williams*, or was his right in consequence of the before-mentioned letter. That *Darracott*, having made a crop on the land, afterwards made such a distribution of the estate, as to him seemed meet, leaving the defendant, *Walter Coles*, in possession of the land, and far greater part of the other estate. That *Darracott* is since dead, having appointed the defendant *Price* (now also dead) his executor, who took upon himself that office.

The appellants in their bill claim the benefit of the marriage promise contained in *Williams Coles's* letter before mentioned; and also of a *verbal* promise which they allege to have been made by him to *William Darracott*, brother to the lady whom *Walter Coles* the elder married, viz. that, if the marriage should take effect, he would give his son *Walter*, at the time of his marriage, his plantation in *Goochland* County, and sixteen or eighteen negroes, with the stock upon that plantation.

The appellee, *Walter Coles*, in his answer to this bill, says, that it *may be true* that *Williams Coles*, his grandfather, did write such a letter as is set forth in the bill; but, for greater certainty, refers to such proof as the complainants can bring concerning the same. He has understood that the said letter was written at the instance of Mrs. *Darracott*, his grandmother, and that the said *Williams* was induced to write it by information received from her, or from other relations of his mother, that her fortune was much more considerable than it was afterwards found to be. In various other parts of his answer he speaks of that letter, and of its operation and effect, in such a manner as appears to me to manifest no doubt of its having been actually written, as charged in the bill. He positively denies the verbal promise.

1

It will be proper to state, that, about six months after the commencement of this suit in the High Court of Chancery, the defendant, *Walter Coles*, instituted a suit in Chancery in *Hanover* County Court, against *Mary Payne*, then a widow, and the appellants, *John* and *Mary*, her children, then infants, and others, the object of which was to set aside the will of *Lucy Coles*, his grandmother, whose heir at law he states himself to have been. This suit, on the petition of *Mary Payne*, was removed by *certiorari* into the High Court of Chancery. The defendant, *Mary*, there filed her answer, in which, among other things, she denies that *Walter Coles*, the complainant in that suit, is heir at law to her mother, *Lucy Coles; William Dabney*, her great-grandson, then living, being her heir at law: and avers, that the estate which he has possessed himself of, or the greater part of it, was her mother's inheritance. This answer imports to be the joint and separate answer of herself and her children, *John* and *Mary*, above named. Several depositions were taken in that cause, and both causes were set for hearing by the counsel for the appellants. They were heard together, and the Chancellor dismissed both bills. *Coles* did not appeal from the decree against him in the suit in which he was plaintiff.

Although, by the acquiescence of the plaintiff in the decree pronounced in the last-mentioned suit, the decree in that cause cannot be reviewed here, yet as both suits related in fact to the same subject matter, (being in the nature of cross causes,) and were heard *together*, I am of opinion that the record and proceedings in that suit are so far to be regarded as a part of the record in that which is now before the Court, as that the evidence arising out of the record may be applied by the Court in the consideration of the case before us. But, as to the record in the suit brought in *Hanover* County in behalf of the appellee, *Walter Coles*, then an infant of two or three years of age, by *Isaac Winston* his guardian, against *Williams Coles*, his grandfather, it appears to me that Mr. *Wickham's* exception to the admission of it

OCTOBER, 1810.

Paynes v. Coles.

as *evidence* in this suit was very well founded; there being no sort of privity that I can discover between the present appellants and the defendant in that suit. But, although that record, for the reason just mentioned, ought not to be admitted as *evidence* in this cause; yet it furnishes a circumstance which, I conceive, might have led the Chancellor to direct an issue to determine whether *Williams Coles* did, or did not, write the letter charged in the appellant's bill; inasmuch as the object of the bill, thus brought by the guardian of the appellee, was to establish the existence of that very letter, and to obtain a specific performance of the promise therein contained, in behalf of his ward: referring to the said letter as then in the complainant's possession: and the answer of *Williams Coles* to that bill, which answer is on oath, confesses that he did write such a letter.

The letter of Mr. *Williams Coles* to Mrs. *Darracott* (as charged in the bill) contains, in my opinion, a promise founded upon a valuable consideration, the proposed marriage between his son and her daughter, which, although not made either TO his son, or TO the young lady, would, upon their intermarriage, *enure* to the benefit of *both;* and might also enure to the benefit of the *issue* of *their marriage*, if not performed during the continuance of it; which promise a Court of Equity might enforce in such manner as might be most beneficial for the parties claiming and entitled to the benefit thereof:(*a*) for, as the former part of the promise contained no specific description of the things meant to be given as a portion immediately upon the marriage, but merely a promise of giving *lands*, *slaves*, *and other things*, to the *value* of 3,000*l.*; if *Walter Coles* had died intestate, leaving his *wife* and *several* children living, I conceive that, upon a bill brought by these parties against the grandfather for a specific performance of his promise, a Court of Equity would have decreed such a performance thereof (by apportioning the lands, slaves, and money to be conveyed, purchased or paid,) as would enure to the benefit, not only of the *heir* at law, but of the *younger* children, and the *widow:*

(*a*) See *Tabb* v. *Archer*, 3 *H. & M.* 399. *Chichester's Ex'x* v. *Vass's Adm'r*, *ante*, p. 98.

the marriage portion, which she brought, being one of the inducements to the promise; and the younger children entitled to participate, with the heir, in whatever slaves or personal property might have been intended to be given. As to *Coleshill*, if it belonged to the grandfather, that part of the promise would have enured exclusively to the benefit of the heir at law. So, probably, would the promised possessions in *Ireland*. With which we have nothing now to do.

Again; as this was a promise which a Court of Equity would enforce, and execute, so, also, was it capable of being *released*, entirely, by the husband in his life-time; or by his last will and testament wherein he should make such a provision for his widow as she should accept. It might be questionable how far a *release* made by a last will and testament would in this case have barred the widow's claim to a specific execution of a marriage promise, made in consideration of the portion which she brought to her husband, if she had renounced all benefit under the will of her husband, and brought a bill against his father for the performance of his promise: but, as she did not, but has altogether acquiesced under her husband's will, it is unnecessary to consider that question.

It appears that the devise in *Walter Coles's* will of all and singular the remaining part of his estate of any nature or kind soever to his father and mother, and their heirs for ever, operated as a release to the father, of the *obligation* contained in his letter to Mrs. *Darracott*, as far as the same was not executed, in his life-time, by the gift of *lands*, *slaves*, *and other things*, to the *value* of 3,000*l.*: for, *quoad hoc*, the promise was a *chose in action;* and, by a bequest thereof to the husband and wife jointly, if the subject thereof had been in the hands of another, and the husband had received it, or reduced it into possession, the *whole* would have rested in him *jure mariti*. But the husband being the person liable to the action on account of this *chose in action*, and the same being given to him and his wife,

OCTOBER, 1810.

Paynes v. Coles.

the action is thereby extinguished for ever: for he can neither sue himself, nor can his wife sue him: the bequest, therefore, must operate as a release; for if an action be released for an hour only, it is extinct for ever.(*a*)

(*a*) *Co. Litt.* 280. a.

But, with respect to the land at *Coleshill*, if it, in fact, did belong to *Williams Coles*, the promise, on his son's marriage, vested in him an equitable title to the same on his father's death, which was devisable by his will, according to the authority of *Greenhill* v. *Greenhill*, 2 *Vernon*, 679.(*b*) The same, I presume, may be said of the *possessions* in *Ireland*. In this case, then, there being a devise in fee-simple to husband and wife, they were properly neither joint-tenants, nor tenants in common: for, being considered as one person in law, they could not take the estate by moieties, but both were seised of the *entirety*, *per tout et non per my;* the consequence of which was, that neither husband nor wife could dispose of any part thereof without the assent of the other, but the whole remained to the survivor.(*c*) So that, whether the *Coleshill* lands were originally the property of *Williams Coles*, or of his wife *Lucy*, the fee-simple thereof was in the latter at the time of making her will, and passed to the appellants under the residuary clause in her will. But, as to the slaves and personal property of *Walter Coles*, the son, I conceive that, if they were reduced into possession by his father in his life-time, as *legatee*, (and not merely as *executor* of his son,)(*d*) the right of his wife thereto was merged in the marital rights of the husband; and consequently did not survive to her as the right in the lands would.

(*b*) *Prec. in Ch* 350. S C. 1 *Pow. on Devises*, 205.

(*c*) 2 *Bl. Com.* 182.

(*d*) See *Wallace* v. *Talliaferro*, 2 *Call*, 470.

But here we must consider an objection, upon which the decree of the Chancellor, dismissing the appellant's bill, was probably founded, viz. that the existence of the letter from *Williams Coles* to Mrs. *Darracott*, as charged in the bill, is neither admitted by the answer, nor proved by any other evidence whatsoever; and, secondly, that it is not *proved* that the inheritance of *Coleshill* was in Mrs. *Lucy Coles*, instead of her husband.

It is very true that the defendant *Walter Coles* has not in his answer expressly admitted the letter; neither has he directly or indirectly denied it. He refers, for *greater certainty*, to such proof as the complainants can bring concerning the same; and, as I have before observed, speaks of the letter in various parts of his answer in such a manner as manifests no doubt of its existence. The appellants, or their counsel, probably relying that the bill exhibited by the appellants' guardian for the purpose of establishing and enforcing a specific performance of the promise contained in that letter, would be admitted as evidence not only to establish its existence, but the fact that it was in the appellee's possession, have not given themselves the trouble to exhibit any other proof of it. Under these circumstances, I doubt whether the Chancellor ought not to have directed an issue to inquire whether such a letter was ever written by *Williams Coles*, or not. So, also, with respect to the title which *Lucy Coles* had to the estate at *Coleshill*, which her daughter Mrs. *Payne*, one of the defendants in the cross-bill, who answered in behalf of the appellants, her children, as well as of herself, states to have been the original inheritance of her mother. This, as not being responsive to any direct charge in the bill, may not be such evidence as is sufficient to establish that fact; and yet I am inclined to believe it ought to have led the Chancellor to direct an inquiry into the nature of her title to that estate; as also, what other estate real or personal she was seised or possessed of, as of her own property, at the time of making her will; the residuary clause of which appears to me to furnish sufficient reason for such an inquiry, and to be sufficient to pass the same to her residuary legatees.

I am, therefore, of opinion that the decree of dismission ought to be reversed, and the cause sent back, with directions conformable to what I have said.

Judge ROANE. The counsel for the appellants rightly considered this case under two aspects; 1st. As relative to

October, 1810.

Paynes v. Coles.

any right to real property which the appellants, as claiming under old Mrs. *Coles*, may have by virtue of the letter mentioned in the proceedings; and, 2dly. As to such other real property as that lady might have had a right to as of her own separate inheritance.

As to claims to *personal* property, it is not shewn nor pretended that any such existed in her favour which were not reduced by her husband into possession during the coverture.

With respect to both the first-mentioned descriptions of claims, the first question is, whether the proceedings in the suit brought by the appellee against his grandfather during his minority in *Hanover* Court, to which his grandmother was no party, and which is particularly objected to as evidence by the appellee, in the court below, were competent to bind her; and I am of opinion they were not, inasmuch as in respect of *real* property a wife has, as it were, a separate existence, and therefore must be made a party to a suit respecting it before it can bind her. It is also a rule of evidence that no person can take the benefit of the proceedings in any suit, or any verdict, who would not have been prejudiced thereby, if it had gone against him.(*a*) The consequence of this principle applied to the present case is, that the appellants, as claiming under old Mrs. *Coles*, cannot give in evidence any of the proceedings in the before-mentioned suit: there is, consequently, no testimony whatever left remaining in the cause, to establish the existence, or the extent of the marriage promise on which the appellants' pretensions are bottomed: the admission of the appellee (from report) of the possibility, or even probability, of such a letter, cannot have such effect, as he expressly calls on the appellants to prove their case in this particular, and in truth admits *nothing*, as to the purport or extent of that letter. The claim of the appellants, therefore, as arising under the marriage promise, is left without any foundation to rest on.

(*a*) 2 *Bac.* 616 *and* 1 *H & M.* 174. *Baring* v. *Reeder.*

With respect to a claim of land as of the separate inheritance of old Mrs. *Coles*, that seems to be a *new* idea. Such

a claim is not advanced, nor charged, in the bill before us, and is wholly unsupported by any testimony, if we except some *general* expressions, as to this point, of Mrs. *Payne*, the guardian of the appellants, in her answer to the suit brought in *Hanover* Court, to set aside old Mrs. *Coles's* will: but the rule is well settled, that the answer of a defendant in Chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand, but that, in such case, he is as much bound to establish it by independent testimony as the plaintiff is to sustain his bill. On this subject I would refer to the case of *Beckwith* v. *Butler*, 1 *Wash.* 224. as expressly in point. In that case, an executor, when called on to account and to say what were the particulars and amount of the estate of the testator, swore that a part of that estate was his (the executor's) property, by reason of a gift to him by the testator; and there being no other testimony of this gift, it was held by this Court to be *monstrous* to permit an executor to swear himself into a part of the testator's estate.

I must, therefore, also say that there is no evidence in this cause of any separate property having existed in old Mrs. *Coles*, in any of the lands of which her husband was possessed. The *general* calls in the appellee's bill in *Hanover* Court which were relied on to justify the answer in this particular, on the ground of its being responsive to the bill, are perhaps far less competent to have that effect than the call for an account was in the case of *Beckwith* v. *Butler*.

I am of opinion, therefore, to affirm the Chancellor's decree, upon the testimony in this cause: but, were this testimony even supplied, my opinion on the merits would not be different.

Admitting that, in point of sheer law, the interest of this land would have passed (had the land been ascertained and *identified*) both by the wills of *Walter Coles* and old Mrs. *Coles*, I am strongly inclined to believe that in neither case was it *intended*. With respect to the former will, we are now in the dark: but with respect to the latter, while

OCTOBER, 1810

Paynes v. Coles.

there is, on one hand, no *iota* of testimony, to shew that the testatrix ever considered *this* as *her* property, there is on the other hand abundant testimony proving that she considered it as the property of the *appellant*. Under these circumstances, therefore, the aid of a Court of Equity ought not to be afforded to frustrate the *expectations* of the testatrix herself, as well as wholly to disinherit, in favour of strangers, the only *issue of that marriage*, to further and promote *which* the promise in question is supposed to have been made. Besides, independent of all testimony on this point, it is scarcely credible, as *upon the face of the will* itself, that *this* property was contemplated: for, while this good lady was particularly parcelling out her shoebuckles and teaspoons, &c. among her descendants, it is hardly to be believed that she would not have also *particularly* designated this *immense* interest, had it been so designed or intended.

With respect to directing an issue as to the marriage promise in this case, we are told, 2 *Fonb.* 494. that, where the evidence is *full*, the Court will not direct an issue at law at all: and so, *è converso*, I presume, an issue will not be directed, when the claim is altogether unsupported by testimony, which is the case before us.

As to an issue respecting Mrs. *Coles's* separate inheritance, we are told in the same book, p. 495. that an issue ought not to be directed to try a title *not alleged* in the plaintiff's bill: and, although it is added, by way of exception, that if a matter does *appear* to the Court, at the hearing, which goes to the very right, the Court will *sometimes* order an issue to try it; yet, in the case before us, the matter in question does not legally *appear* to the Court, by reason of the objection to the affirmative character of the answer in this particular as aforesaid.

Judge FLEMING. The claim of the appellants to the estate in controversy is founded on a letter, containing a marriage promise, charged in their bill to have been written by *Williams Coles*, grandfather of the appellee, and addressed to *Elizabeth Darracott*, when a marriage was about

to take place between *Walter Coles*, son of the former, and *Mary Darracott*, daughter of the latter, (which marriage took effect,) and the subsequent will of *Walter Coles*, the son, dated the 28th of *March*, 1769. And they come into a Court of *Equity* to assert their right.

The first point made in the cause, by the appellants' counsel in their statement, is of *seeming* importance, to wit, "that *Williams Coles* could dispose of no part of the lands which descended to *Lucy* his wife, by inheritance," or to which she was entitled in her own right "by purchase." But there is neither proof, *nor charge in the bill*, that any of the lands in the seisin of *Williams Coles*, were either the inheritance or purchase of *Lucy* his wife; and all that appears in the record on that subject is in the answer of *Mary Payne*, to the bill of the appellee to set aside his grandmother's will; wherein she uses this expression—"*notwithstanding that the greater part of the Virginia estate, then in question, and now in question in this Court, was the inheritance of the said Lucy:*" which I conceive to be a mere idle suggestion that ought to have no effect on the cause.

It is the unanimous opinion of the Court, that no part of the record in the suit brought in *Hanover* Court, by the guardian of the appellee, in his behalf, in the time of his early infancy, is proper or admissible evidence in this cause: and *that* being altogether rejected, it may, with propriety, be asked, where is the evidence to be found to prove the existence of the letter, or to substantiate the marriage promise charged in the bill? There is none that proves it to my satisfaction. And, as to directing issues to try whether any of the land in question was the inheritance of *Lucy Coles*, the appellee's grandmother; and whether such a letter from *Williams Coles* to Mrs. *Darracott*, as stated in the bill, did exist; I think it improper to direct an issue to try any fact not charged in the bill; and I am not for hunting evidence that may tend to deprive an only child of the estate and inheritance of his father, in whose

OCTOBER, 1810

Paynes v. Coles.

will (it must be obvious to every one) he was pretermitted, solely, for want of knowledge in the father, when he made his will, or at the time of his death, that the mother was in a state of pregnancy. Any other supposition would be against every principle of justice, natural affection, and humanity. Nature has implanted in the *birds* of the air, and in the *beasts* of the field, a strong affection, and tender regard for their own offspring. And, had the marriage promise been sufficiently proved, as stated in the bill, I might, perhaps, have been of opinion that, in *equity*, it ought to operate in favour of any *issue* that might be the fruit of the marriage; for such *issue* must, undoubtedly, have been in the contemplation of the parties to the contract at the time of making it: and I should have made a long pause, before I could have decided in favour of the appellants, to the exclusion of the appellee from any part of the estate, rights and interests of his father. And such have been the impressions of our Legislature on the subject, that, so long ago as the year 1785, in the "*act concerning wills and the distribution of intestates' estates*," ample provision is made for *posthumous* children, and such as are pretermitted in any last will and testament, though in life at the death of the testator.(*a*)

(*a*) 1 *Rev. Code*, c. 92. s. 3.

I am of opinion, upon the whole, that the decree is correct, and ought to be affirmed.

Thursday, November 8.

Chapmans *against* Chapman.

A record of one suit cannot be read as evidence in another, on the ground that the *defendant* and *one of* the *plaintiffs* in the latter suit were parties to the former, and that the same point was in controversy in both; *another plaintiff*, and the person under whom both the said plaintiffs *jointly* claim, not having been parties to such former suit.

UPON an appeal from a decree of the late Judge of the Superior Court of Chancery for the *Richmond* District, in

2. In such case, the circumstance that the "*writings and evidences*" in the former suit *were read* at the hearing of the latter, without any exception taken *at that time* appearing on the record, is no proof that this was done by consent of parties, and does not preclude the objection from being taken in the appellate Court; the defendant in his *answer* having objected to the admission of the *verdict and other proceedings* in the former suit, but *offered* to agree that the *depositions only* might be read; to which offer no assent appeared on the part of the plaintiff.