REPORTS OF CASES

S. H. 1827.

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

AND OF

SOME SPECIAL CASES ADJUDGED

IN THE

Court of King's Bench:

COLLECTED BY

WILLIAM PEERE WILLIAMS,

LATE OF GRAY'S INN, ESQ.

PUBLISHED, WITH NOTES, REFERENCES, AND TABLES OF THE NAMES OF THE CASES, AND OF THE PRINCIPAL MATTERS,

BY HIS SON,

WILLIAM PEERE WILLIAMS,

OF THE INNER TEMPLE, ESQ.

EDITED (IN 1787 *AND* 1793*) WITH ADDITIONAL REFERENCES TO THE PROCEEDINGS IN THE COURT, AND TO LATER CASES,*

BY SAMUEL COMPTON COX,

OF LINCOLN'S INN, ESQ.

NOW ONE OF THE MASTERS OF THE COURT OF CHANCERY.

THE SIXTH EDITION,

WITH REFERENCES TO THE MODERN CASES,

BY JOHN BOSCAWEN MONRO, WILLIAM LOFTUS LOWNDES,

AND

JAMES RANDALL,

OF LINCOLN'S INN, ESQRS. BARRISTERS AT LAW.

IN THREE VOLUMES.

VOL. I.

LONDON:

JOSEPH BUTTERWORTH AND SON, 43, FLEET STREET.

1826.

CASE 152.

METHAM *versus* DUKE OF DEVON.

LORD CHANCELLOR PARKER.

2 Eq. Ca. Ab. 291. pl. 13. 331. pl. 5. One devises 3000*l.* to all the natural children of his son by Jane Stile, the bastards born after making the will shall not take; nay the child in ventre sa mere shall not take. (*z*)

THE late Earl of *Devonshire* devised three thousand pounds *to all the natural children of his son the late Duke of* Devonshire *by Mrs.* Heneage; and the question was, whether the natural children by Mrs. *Heneage* born after the will should take a share of the three thousand pounds?

Lord Chancellor: They shall not; the Earl of *Devonshire* could never intend that his son should go on in this course, that would be to encourage it; whereas it was enough to pardon what was passed; besides bastards cannot take (*a*) until they have gained a name by reputation, for which reason, though I give to the issue of *J. S.* legitimate or illegitimate, yet a bastard shall not take.

(*a*) 1 Inst. 3. b.

[530]

And though in the principal case the money was to be paid by the executors, as the testator by deed should appoint; and the testator afterwards made the deed of appointment; the deed of appointment referring to the will was held as part of the will. (*y*)

But then it was said, the directions of the will were, for the executors to pay this 3000*l.* as the Earl the testator should by *deed* appoint, and the Earl afterwards by deed appointed the 3000*l. to all the children of his son* (the duke) by Mrs. *Heneage*, so that this now depended upon the *deed*, and therefore must refer to the children born at the time of the execution thereof.

(*z*) A bequest to a future natural child is void, *Arnold* v. *Preston*, 18 Ves. 288. *Wilkinson* v. *Adam*, 1 V. & B. 422. So to the child of which an unmarried woman is ensient, when with reference to a particular man as the father, from the impossibility of ascertaining whether it is, or is not, the child of the man referred to, *Earle* v. *Wilson*, 17 Ves. 528. *Secus*, to the child of which she is ensient generally, for there is then no uncertainty, *Gordon* v. *Gordon*, 1 Mer. 141. Under a bequest to children as a class, legitimate children alone can take, unless it appear on the face of the will that illegitimate children were intended, *Cartwright* v. *Vawdry*, 5 Ves. 530. *Godfrey* v. *Davis*, 6 Ves. 43. *Wilkinson* v. *Adam*, ub. sup. *Swaine* v. *Kennerley*, 1 V. & B. 469. *Kenebel* v. *Scrafton*, 2 East, 530.; (and see *Vanderzee* v. *Acklom*, 4 Ves. 771. *Hercy* v. *Birch*, 9 Ves. 357.) or the bequest be to children in existence at the date of the will, as, "to my present children," and the testator had no legitimate children to satisfy the bequest, *Beachcroft* v. *Beachcroft*, 1 Mad. 430. *Woodhouselee* v. *Dalrymple*, 2 Mer. 419. And see *Bayley* v. *Snelham*, 1 S. & S. 78.

(*y*) An instrument though in form of a deed, will be construed as testamentary, when it can only take effect after the maker's death, and cannot operate as a deed, *Rigden* v. *Vallier*, 2 Vez. 258. *Habergham* v. *Vincent*, 4 Bro. C. C. 353. 2 Ves. jun. 204. And see *Healy* v. *Copley*, 7 Toml. P. C. 496.

Tamen per Cur': The deed (1) referring to the will is as to this purpose, to be taken as part thereof. METHAM v. DUKE OF DEVONSHIRE.

Also it being a question, whether a natural child *in ventre sa mere*, of the Duke of *Devonshire* by Mrs. *Heneage* should take?

Lord Parker inclined that such child could not take for the reason abovementioned, *viz.* for that a bastard could not take, until he had got a reputation of being such a one's child; and that reputation could not be gained before the child was born.

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(1) Reg. Lib. B. 1718. fol. 215. "His "lordship conceived the said deed poll "to be part of the will of the said late "earl of *Devon*, in the nature of a co- "dicil thereunto, explanatory of the "will, and that the money thereby di- "rected to be paid was a provision for "such children or reputed children of "the said duke by Mrs. *Heneage*, as "were living at the time of the date of "the said deed poll, but not for such "children as he afterwards had by her."

BABINGTON *versus* GREENWOOD. CASE 153.

A Freeman of *London* on his marriage covenanted to add 1500*l.* out of his own personal estate to 1500*l.* which was the portion of his then intended wife, and both these sums were to be laid out in a purchase of land and to be settled upon the husband for life, and then to the wife for her life for her jointure, and *in bar of her dower*, with remainder to the children of the marriage. LORD CHANCELLOR PARKER. Pre. Chs. 505. 2 Eq. Ca. Ab. 721. pl. 5. Jointure by a freeman on his wife in bar of dower, will not bar the wife's customary part; *secus* if said to be in bar of her customary part.

The freeman makes his will, and thereby (among other things) gives a legacy to his wife, and dies leaving a wife and children. [531]

Upon a demand made by the wife of her customary part, it was objected by Mr. *Mead*, that though a jointure *of land* made by a freeman on his wife in bar of dower, should not bar the wife's customary part, any more than it would bar her of her share by the statute of distribution, (as in the case of (1) *Atkins* v. *Waterson*, where the Court of Aldermen by the Recorder certified they had no custom extending to that case;) yet where the jointure was to be made out of the free-

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(1) 1 Eq. Ca. Abr. 157. pl. 5.