There is another observation very material for the defendant, that notwithstanding the plaintiff *Helen* lived with her mother at the time the second marriage was proposed, yet there is not a syllable of proof offered to shew, that either *Helen* herself, or the plaintiff, mentioned the least tittle of this affair, or even made any demand of the £650 which they have now set up by their bill.

And as it is an extreme harsh one, after all the kindness and tenderness the plaintiff *Helen* has received at her mother's hands; I am of opinion the defence is very sufficient to rebut all the plaintiff's equity.

I think it comes very near the case the defendant's counsel have compared it to, of an infant under age, who contracting a debt during his minority, shews his consent to it, by confirming it after he comes of age, which shall effectually bind him, though it was voidable at his election. (*Brooke* v. *Gally*, *ante*, 35. *Chesterfield* v. *Janssen*, *ante*, 1 vol. 354, note.)

So here, a promise by the wife to release during the coverture, it is certain could not bind the wife, but if after the death of her husband she repeats the promise, it is a confirmation of it, and is good.

The case of *Thayer* and *Gould*, *Feb.* the 9th, 1739 (*vide* 1 *T. Atk.* 615), first heard before the late *Master of the Rolls*, and afterwards before me, has been compared by Mr. *Noel* to the present, but there the circumstances in support of the plaintiff's demand, were much stronger than in the present.

[246] A wife in that case, after being very hardly and cruelly used by a husband, was prevailed upon to join with him in importuning the trustee, to convey over a trust estate, which was for the separate use of the wife, to the husband, and as the trustee was a very near relation, he could not be supposed to be ignorant of the cruelties the wife had undergone, especially as she was proved to be in tears the whole time, that the conveyance from the trustee to the husband was reading and executing.

There was another strong circumstance against the trustee, that he actually retained as much out of the trust, as would satisfy a debt of his own from the husband: besides too, it was land which had been conveyed in trust, and I remember very well a great stress was laid upon the circumstance of its being real estate: I did not make any decree there, for upon my recommendation the affair was compromised, and a middle way found out by the parties to put an end to the dispute.

In the present case the original bill was decreed to be dismissed without costs, so far as it seeks relief for the remainder of the £1000. And a cross bill brought by the defendant for the board and maintenance of the daughter, was likewise dismissed without costs.

Case 194.—BAGSHAW *versus* SPENCER, *at the Rolls*, *February* 18, 1741.

S. C. 1 Vez. 142, and post, 570, 577.

Benjamin Allison devises lands to *B.* and *C.* and their heirs, in trust by rents and profits, sale, or mortgage, to pay his debts, and funeral expences, and after in trust as to a moiety to the use of his nephew *Thomas Bagshaw* for life, without impeachment of waste; remainder to trustees and their heirs, during the life of the said *Thomas Bagshaw*, to preserve the contingent remainders, with remainder to the use of the heirs of the body of *Thomas Bagshaw*, with other remainders over. It was adjourned, after some debate, till a certificate should be made in the case of *Colson* and *Colson*: but it was said here were two material differences; 1. The clause *sans* waste (*Vide post* [3 *Atk.*], 580, where Lord *Hardwicke* made this distinction). 2. This was a trust, and the court must necessarily interpose and decree a conveyance. *Vide* the case of *Legate* and *Sewell*, 1 *P. W.* 87.

Case 195.—COLSON *versus* COLSON, *Mich.* 14 *Geo.* 2, 1741, *in B. R.*

S. C. 2 Stra. 1125.

This was a case sent out of the Court of Chancery for the opinion of the court of King's Bench on these words: "I give and devise my lands at *C.* to *Robert Colson*, my "grandson, for his life, remainder to *A.* and *B.* and their heirs to support contingent "remainders during the life of *Robert Colson*, remainder to the heirs of the body of

Robert Colson [247] lawfully begotten " ; and the question was, Whether *Robert Colson* had an estate for life or in tail (*Reg. Lib. A.* 1738, fol. 597) ? Mr. *Hollings* argued that he had an estate-tail, for that it was a rule in law, wherever the ancestor took an estate for life, with words of limitation to his heirs, or the heirs of his body, they shall not take by purchase, but by descent, and that the testator's intention would not controul the operation of a rule of law. *King* versus *Melling*, *Ventris*, 214 & 225 ; 2 *Lev.* 58. *Blackburn* versus *Ewer*, 1 *P. W.* 54, 56 ; 2 *Roll. Abr.* 258. *Trevor* versus *Trevor*, *Abr. Cas. Eq.* 387 ; 1 *Lutw.* 825 ; *Carth.* 171. *Lord Glenorchy* versus *Bosvile*, *Cas. in Eq. in Lord Talbot's time*, 3 ; 2 *Salk.* 678. There being trustees to support contingencies makes no difference, as appears from *Papillon* versus *Voyce*, 2 *P. W.* 471, which, to this question, is fully in point, there being no trustees.

Mr. *Bootle* on the other side argued, that the testator's intent was to give an estate for life to the grandson, by placing trustees to take advantage of the forfeiture, which could only be in case he was tenant for life. 2dly, The intention of the testator was the chief rule in the construction of wills, for which he cited *Papillion* and *Bois*, *Eq. Cas. Abr.* 185, and that the word *heirs* is a word of purchase. *Carth.* 272. *Pybus* versus *Mitford*, 1 *Vent.* 372.

COLSON *versus* COLSON, *November* 12, 1743. *A Re-hearing.*

Robert Bromley, seised in fee of the reversion and inheritance of several estates at *Thorpe Bulner*, in the bishoprick of *Durham*, expectant on the death of *Elizabeth Forster*, by his will, dated the 12th of *July* 1712, devised the same, expectant as aforesaid to *Robert Colson* for life, remainder to trustees during his life to preserve contingent remainders, remainder to the heirs of the body of the said *Robert Colson*, remainder in like manner to the defendant, *William Colson*, and the heirs of his body.

After the testator's death, *Robert Colson* with *Elizabeth Forster* suffered a common recovery, and declared the uses to the said *Elizabeth Forster* for life, remainder to *Robert Colson*, and his heirs.

Mr. Attorney General, counsel for the plaintiff, *Elizabeth Colson*, sister of *Robert Colson*.

The principal and only question he said arose upon the devise in *Robert Bromley's* will.

It is insisted on by the defendant, *William Colson*, that *Robert* was only tenant for life, and consequently was not intitled to suffer the recovery.

[248] This cause was heard before Mr. *Verney*, the late Master of the Rolls, in *July* 1739, who referred it to the Judges of the court of King's Bench upon this point ; in pursuance thereof a case was made, and there were two arguments before the Judges of the court of King's Bench ; but they declined giving any opinion, and therefore the parties have been advised to bring it in this shape before your Lordship.

All the directions prayed by the plaintiff's bill are consequent of the opinion the Court will give in this point.

Mr. Attorney General for the plaintiff. Connecting these two estates together, I insist makes an inheritance in *Robert Colson*, and the rule from whence I argue is laid down in 1 *Inst.* 309 *a* and *b*, and *Shelley's* case, 1 *Co.* 93 *b*.

It is not at all material, whether there is any estate intervening, for it is the same if limited to *A.* for life, and to the heirs of the body of *A.* or to *A.* for life, to *B.* for life, and to the heirs of the body of *A.*

Where the ancestor makes such a limitation as this, it is giving the devisee every thing, and the sense of the law in this respect is so very strong that nothing can be plainer. *Vide* 1 *Inst.* 28 *b*.

An ancestor cannot make his heirs purchasers ; and another reason is, the law will not suffer an estate of inheritance to be in abeyance ; the rule extends to the case of wills as well as to conveyances in the life of the party.

It is not sufficient to say that we are to be governed by the intention of the parties, for a man cannot break through the rule of law, but this intention must be consistent with it. *Vide Saul* v. *Gerard*, *Cro. Eliz.* 525.

The next consideration is, what there is in the particular framing of this will to take it out of the general rule.

It has been insisted that *Robert Colson* took an estate for life only, and that his heirs are purchasers.

But in this will the intention is very plain that the heirs of *Robert Colson* should take *per formam doni*, for here is all the appearance of an estate-tail, heirs of the body of his grandson lawfully begotten or to be begotten, words most peculiarly significant to create an estate-tail; and great stress was laid upon them by Lord Ch. Just. *Hale*, in *King* v. *Melling*, 1 *Vent.* 214, 225.

[249] It has been urged by the defendant's counsel, here are strong words to shew the testator intended only an estate for life as a devise to his grandson for and during his natural life, *&c.*

But then the contingent remainder, preserved by the limitation to the trustees, is nothing more than the limitation to the heirs of the body, and not to a remote remainder.

Suppose the testator had said to trustees to preserve contingent remainders to the right heirs of *Robert Colson*: the gentlemen of the other side would hardly say that right heirs *eo nomine* can take as purchasers, the law would not admit of it, and yet the intention is equally clear here, as it would have been there. (*Vide Godolphin* v. *Abingdon*, *ante*, 57.)

If the limitation had been to the heirs of the body of a stranger, it might have been otherwise, for they would have been purchasers, because there was no ancestor to take first, but there is no case where *heirs of the body* take as purchasers if the ancestor has the estate for life.

I will put the strongest case; suppose a devise to *A.* remainder to his heirs, and that the testator should by express words say, I intend the heirs should take as purchasers, yet it would not prevail against the rule of law *that heirs cannot take as purchasers.*

The second point I would insist upon is, that the rule of law must prevail against the plain intention of the testator: *Goodright* versus *Pullen*, 12 *Geo.* 1 [1725–26] (2 *Ld. Raym.* 1437, S. C.). Devise to *Nicholas Lisle* for life, remainder to the heirs of his body and his heirs for ever. Here the latter words were necessarily rejected, because they would destroy the estate; and the court held this was an estate-tail, for they were words of limitation and not of purchase. *Vide Legate* versus *Sewell*, 1 *P. W.* 87, and *Morris* versus *Wood*, at the *Cockpit*, a plantation cause, the 24th of *March* 1730, held to be an estate-tail by Lord Chief Justice *Raymond* and *Eyres*. In Lord *Glenorchy* versus *Bosville*, *Cas. in Eq. in Lord Talbot's time*, 3, declared there by Lord *Talbot*, that if it had been a devise of a legal estate, it would have been an estate-tail. *Vide Roberts* versus *Dixwell*, *December* 8, 1738, before Lord *Hardwicke* (1 *T. Atk.* 607). *Thrustout* versus *Peat*, *Mich. T.* 3 *Geo.* 1 [1716].

In all these cases it was plainly the intention of the testator, that there should be only an estate for life, and yet held to be an estate-tail in conformity to the rules of law.

It is observable on the cases upon the words *issue of the body and heirs of the body*, that they have never been construed words of purchase, but where the testator intended to point out particular persons.

[250] *Lord Chancellor.* I would willingly deliver the parties from any further trouble, if I could do it consistently with the rules of the court; but this is a mere question in law, and is already put in a proper course; and unless there was something executory in it, I ought not to meddle with it in equity, except there were some case already in point determined: but as there is not one determined where there is an interposition of trustees to preserve contingent remainders, I will therefore affirm the late Master of the Roll's order of reference to the Judges of the court of King's Bench, then it will go on regularly.

A certificate of the Judges of the court of King's Bench, upon the 8th of May 1744, *in the case of* COLSON *versus* COLSON.

We have heard counsel in the question referred by your Lordship to us, and as it appears by the state of the case, there is, after the determination of the estate for life to *Robert Colson*, a devise to *Isabella* his daughter, and to *Ralph Robinson* and their heirs for and during the life of *Robert Colson.*

We are of opinion, that by reason of the remainder interposing between the devise to *Robert* for life, and the subsequent limitation to the heirs of his body, the said *Robert* took an estate for life, not merged by the devise to the heirs of his body, but

by that devise an estate-tail in remainder vested in the said *Robert*. (*Hodgson* v. *Ambrose*, *Dougl.* 323. S. P. *Jones* v. *Morgan*, 1 *Bro. Cha. Rep.* 206.)

Sir WILLIAM LEE, Knight, *Chief Justice.*
Sir WILLIAM CHAPPLE, Knight,
MARTIN WRIGHT, Esq. } *Justices.*
THOMAS DENISON, Esq.

[251] Case 196.—WILLIS *versus* JERNEGAN, *February* 26, 1741.

If a person will enter into a hard bargain with his eyes open, equity will not relieve him upon this footing only.

There had been several transactions between the plaintiff and defendant, in relation to the defendant's lottery or sale, as it was called, of plate, jewels, *&c.*, and particularly an agreement in relation to the receipts or tickets in the sale, a great number of which, to the amount of no less than eleven thousand, had been delivered to the plaintiff, who was to pay a stated price for them, and if by ingrossing such a quantity he could sell them above par, the profit, let it be ever so great, was to go into the plaintiff's pocket: the plaintiff might have sold them to very great advantage, but, by out-standing his market, and insisting upon an exorbitant premium, he was a considerable loser; and now brings a bill to be relieved against the defendant, suggesting the agreement to be hard and unconscionable, and likewise for an open account between him and the defendant.

The defendant sets forth the whole agreement, and insists that there was no fraud or circumvention, but that it was a transaction carried on with the utmost fairness, and an agreement entered into at the plaintiff's own request; and that if it was not so beneficial a one as it might have been, it was intirely owing to the mismanagement of the plaintiff; and, as to the open account prayed, the defendant pleads a stated account in bar, which had been settled between him and the plaintiff some time after the sale or lottery was finished, and entered in a book that related merely to the transaction between him and the plaintiff, and to no other purpose whatever; and that the adjusting of this account had taken up a week's time at least; and the plaintiff, at the time, and often since, had declared himself extremely well satisfied with it.

There were several witnesses on the part of the defendant to support the agreement, and the several facts insisted on by the answer, but there was not a tittle of evidence on the behalf of the plaintiff to support the allegations in his bill.

Lord Chancellor. It is not sufficient to set aside an agreement in this court, to suggest weakness and indiscretion in one of the parties who has engaged in it; for, supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can shew fraud in the party contracting with him, or some undue means made use of to draw him into such [252] an agreement, which is not pretended by the plaintiff in the present case (*vide Chesterfield* v. *Janssen*, *ante*, 1 vol. 351. *Nicols* v. *Gould*, 2 *Ves.* 422, 518. *Gwyne* v. *Heaton*, 1 *Bro. Cha. Rep.* 9, 10. *Gartside* v. *Isherwood*, *ibid.* 560. *Heathcote* v. *Paignon*, 2 *Bro. Cha. Rep.* 167. *Lewis* v. *Pead*, *Ves.* jun. 19), for, from the evidence, he appears to have been so fond of this project of a sale of plate, jewels, *&c.*, that no person ever had such an easy stomach, and quick digestion, for he wanted to have monopolized the whole number of tickets.

The plaintiff's counsel have made two objections to the defendant's plea of a stated account.

1. That it was not signed by the parties.
2. That the vouchers were not delivered up at the time.

As to the first, there is no absolute necessity that it should be signed by the parties who have mutual dealings, to make it a stated account, for even where there are transactions, suppose between a merchant in *England* and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterwards. (The account was signed by a witness.)