defendants) in Furnival's Inn Court, Holborn, to consult with, advise, and assist the said Frances Savage."

N.B. It was represented, that she was too infirm and weak, to be brought into Court by an habeas corpus: (and in fact she died the next day).

DOE, EX DIMISS. LONG, *versus* LAMING. Tuesday, 25th Nov. 1760. [S. C. 1 Bl. 265.]

A devise to one, and her heirs, may in particular circumstances, make the heirs take by purchase. [See Cowp. 410. 2 Atk. 220. 2 Str. 729. 2 Freem. 186. 2 Bl. Rep. 695, 1002. Doug. 306. Brown. 206. Amb. 562. 4 Durn. 82. 1 Bos. 206. 4 Brown. 543. 5 East, 553. 6 Durn. 31. 7 Durn. 532. 1 Bosanq. 219. 1 East, 229. 3 East, 537.]

[Referred to, *Goodtitle* v. *Herring*, 1801, 1 East, 273. Distinguished, *Doe d. Bagnall* v. *Harvey*, 1825, 4 Barn. & C. 623; 7 Dowl. & R. 93. Applied, *Doe d. Atkinson* v. *Featherstone*, 1831, 1 Barn. & Ad. 950. Commented on, *Jack* v. *Featherston*, 1835, 9 Bli. N. S. 276; 3 Cl. & F. 76. Discussed, *Montgomery* v. *Montgomery*, 1845, 3 Jo. & Lat. 52; 8 Ir. Eq. R. 746.]

This was a special case, which arose upon an ejectment brought for gavel-kind lands in Kent, tried before Lord Mansfield at Nisi Prius.

The ejectment was brought by the heir at law of one Martin Long, for an undivided fourth part of one messuage, &c. in the parish of St. John the Baptist in the Isle of Thanet in Kent.

Special case stated for the opinion of the Court—

Martin Long, being seised in fee, &c. made his will, &c. and thereby devised thus —"I give and devise one equal undivided fourth part, &c. unto my nephew Martin Read, and to the heirs of his body lawfully to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common and not as joint-tenants. Also I give and devise one other equal undivided fourth part, &c. unto my niece in law Grace Read, widow of my late nephew Edward Read deceased; and to the heirs of her (*a*) body lawfully begotten, as well males as females, and to their heirs and assigns for ever, to be divided equally share and share alike, as tenants in common [1101] and not as joint-tenants. (*b*) Also I give and devise one other equal undivided fourth part, &c. unto my niece Anne, now wife of William Cornish, and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally share and share, as tenants in common and not as joint-tenants. Also I give and devise one other equal undivided fourth part, &c. unto my niece Sarah (*c*) now wife of S. Hooper, and to the heirs females and males of her body lawfully begotten or to be begotten, to be divided (as before,) and to their heirs and assigns for ever."

There were likewise in this will, other devises of other estates; viz. "I give and devise unto my nephew J. Tickner his heirs and assigns for ever, all that, &c. &c." "I give and devise my farm, &c. unto my sister Catharine, wife of William Abbot, and to her assigns, for and during the term of her natural life: and from and after

(*a*) This is a mistake; for in the will, as in the brief, the word was his and not her: and yet the reporter in page 1111, makes Lord Mansfield argue on a supposition that it was her, which must be a mistake of the reporter's; for it cannot be supposed that Lord Mansfield would found any part of his argument on a mistaking of the words of the will; or if that could be supposed, yet the other Judges, and even in such a case the counsel, would certainly have set him right.

(*b*) The like limitations in a deed as in this case were decreed to create an estate tail, in the first taker, (5 MS. 628, notes;) but there were not words of limitation superadded in that case to words of limitation, as there are in this case. See also 3 Durn. 145. And qu. whether there must not necessarily have been some blunder in drawing the will, or in the clerk's making a fair copy of it, and the blunder not discovered? And qu. as to a devise of a term for years in words not very unlike to those in this case? 7 Durnf. 555.

(*c*) Eq. Abr. Cas. 4. 3 Brown. 82. Amb. 499, 502. 4 Durn. 82, 300. Doug. 231. 2 Bl. Rep. 1002. Fearne, 107, 108.

her decease, I give the same unto my nephew her son William Abbot and the heirs of his body lawfully to be begotten, for ever: and for want of such issue, I give and devise the same to the right heirs of me, for ever."

"And as concerning my messuages, &c. I give and devise the same to Elizabeth Long, her heirs and assigns for ever."

"And as concerning, &c. I give and devise the same to my sister Sarah Tailor and her assigns, during her natural life, provided she keep the same in repair: and from and after her decease, I give the same to my sister Elizabeth Long her heirs and assigns for ever."

"Also I give and bequeath to my niece Sarah now wife of William Long, and to the heirs of her body, the sum of 150l. of like money to be divided between them equally."

The testator lived two years after making this will: he died in May 1751.

At the time of making the said will, the testator's said niece Anne Cornish, wife of Thomas Cornish, had two daughters (by her said husband) then living; viz. Elizabeth and Anne.

Anne Cornish, the testator's niece, died after the time of making the will; but in the life-time of the testator: and her two daughters, Elizabeth and Anne, survived both their said mother and also the testator Martin Long.

[1102] The whole premises are gavel-kind.

The question submitted to the Court is—"Whether, by the death of Anne Cornish (the mother) in the life-time of the testator, the devise, as to her one fourth part, was void or lapsed: (*d*) or whether the said one-fourth part devised as above, or any and what part thereof on the testator's death, descended to the lessor of the plaintiff, as heir at law to the testator."

Mr. Filmer, Junior, argued this case for the plaintiff.

He endeavoured to maintain that either the whole of the one-fourth part devised to Anne Cornish was lapsed by her dying in the testator's life-time; or, at least, that some part of it was so; and that what was lapsed would consequently descend to the lessor of the plaintiff, as heir at law to the testator.

Anne Cornish, the testator's niece, would have taken, he said, if she had survived the testator, an estate in tail general; or, if not so, then she must have taken one third part of the fee simple, as tenant in common with her two daughters: if the former, the whole is lapsed; if the latter, one third only.

But he conceived that she would have taken an estate in general tail, by purchase, under this devise.

The word "heirs" (in the plural number,) is a word of legal limitation: and there is no instance, in case of a mere legal estate, where "heirs of the body" have been construed to be words of purchase. The case of *Bagshaw* v. *Spencer* was a trust.

The Court will keep to the legal technical interpretation.

The case of *Goodright* v. *Pulleyn et Al'*, M. 11 G. 1, B. R. reported in 2 Ld. Raym. 1437, is material to this point.

There was likewise a case before the council, on 18th March 1730, at which Ld. Raymond and Ld. Ch. J. Eyre were both present. It was between *Morris, on the demise of William Andrews, and Isaac le Gay and John Wood:* upon an appeal from Barbadoes. It was a devise "to Lucretia, for life; then to the heirs of the

(*d*) The 1st point was that the will should be construed as giving an estate tail to A. C.; and consequently by her death in the testator's life, the devise of this fourth part was lapsed; and the 2d point was that if the above construction should not be admitted, it must be on this ground that the words "heirs of her body lawfully begotten or to be begotten as well females as males," must be construed in the same sense as the word children; and then the case would be the same with the common case, put Co. Lit. 9 a. and in other books of "a devise to A. and his children (he having children at the time) and to their heirs," which has always been taken to make A. and his children joint-tenants in fee; and if this construction had been allowed of, then by the death of the testator's niece Anne, in his life-time, one-third of the one-fourth devised to her and her children would have survived if it had been a joint devise; and consequently as it was not so, but a devise to them as tenants in common, the one-third of the one-fourth which the niece Anne would have taken had she survived the testator, must by her death in his life have become lapsed.

body of Lucretia, and their heirs: and if she died without such heir of her body, then over." This was holden to be an estate tail in Lucretia.

[1103] There were also two late cases in Chancery; viz. *Wright* v. *Pearson*, June 6th 1758, Trin. 31 G. 2, where Thomas Raleigh was holden to take an estate tail: (this case upon a trust-estate). The other was *King* v. *Burchell*, 20th November 1759, before the Lord Keeper Henley. John Blunt devised to his wife, for her life; then to John Harris, for life; then to the heir male of John Harris, and his heirs; and for want of such issue, then over. John Harris was holden to have taken an estate tail; though there were words of limitation over. An appeal was brought; but afterwards deserted.

The word "heirs," in the plural, with words of limitation added to it, has never been construed to be a word of purchase: but the word "heir," in the singular has been construed to be a word of limitation.

An estate tail to Anne Cornish best answers the apparent intention of the testator.

But if "the heirs of her body" are to be here construed as words of purchase; then Anne Cornish and her two daughters must take an estate in fee simple, as tenants in common and not as joint-tenants; each of them one-third of the whole one fourth part: and consequently, as she was (in that construction of the devise) made tenant in common, in thirds, with her two daughters, but died before the testator; her one-third lapsed by her death, and descends to the plaintiff as heir at law.

Mr. Thomas Clarke (of Lincoln's Inn) argued for the defendant.

He proposed to consider the question, under two general heads; 1st, the intention of the testator, to be collected from the whole will; 2dly, the operation of law, to effectuate such intention.

First—The intention of the testator plainly was, "that all the children of his niece Anne Cornish, both sons and daughters should take: and they only:" though it is not indeed so clear, whether he meant that they should take as tenants in common with their mother; or after her death. He probably meant it as a description of heirs in gavel-kind: but he certainly meant that they should take as purchasers; and that they should take an estate in fee; and not that Anne Cornish should take an estate tail.

This intention is plainly to be collected, he said, from several other clauses in the will. The several other devises shew, that, by "heirs of the body," the testator meant children: particularly, the bequest to Sarah the [1104] wife of William Long, and to the heirs of her body, of the sum of 150l. to be divided between them equally; which can be taken in no other sense. And in the devise to William Abbot and the heirs of his body, he explains his meaning, by adding "and for want of such issue."

Secondly—The operation of law will effectuate the intention of the testator, where it is plain and manifest. And here is a plain manifest intention of the testator, "that his devisees should take by purchase, and not by descent."

And "heirs of the body," (in the plural) may be words of purchase, where the intention of the testator is clear and evident. There is no such distinction ‡[1] as that which Mr. Filmer has laid down "that where the words of limitation are grafted upon the word heir in the singular number, that word shall be construed a word of purchase; but where the words of limitation are grafted upon the word heirs in the plural, that plural word heirs shall always be construed a word of limitation."

In the case of * *Bagshaw* v. *Spencer*, "heirs of the body," were construed to be words of purchase. And in that case, Lord Hardwicke mentioned a case of † *Lisle* v. *Gray:* where the word was plural, and the same determination was made: and that case of *Lisle* v. *Gray*, was upon a deed, and at common law.

Law v. *Davies et Al'*,‡[2] M. 3 G. 1, B. R. was a devise "to Benjamin Jevon and the heirs of his body lawfully to be begotten;" and words of limitation were superadded: yet it was holden to be an estate for life; not in tail.

All the parts of a devise ought to be taken into the construction: and the intention of this testator was, "that all the devisees should here take by purchase."

‡[1] Contra 1 Co. 66.
* Mich. 1748, 22 G. 2, in Canc.
† Vide post.
‡[2] FitzGibbon, 112, and 2 Ld. Raym. 1561.

And the words are sufficient and apt enough for that purpose. In proof of his allegation, he cited 1 Co. 95, *Shelley's case*, cited in 1 Ld. Raym. 205, by Ld. Ch. J. Treby, and confirmed by him. 1 Ld. Raym. 203, *Ludington* v. *Kime:* and *Clerk* v. *Day*, or *Cheeke* v. *Day*, there cited, in Pa. 205. ‖1 Inst. 26 b. devise "to Roberge, and to the heirs of John Mandevile her late husband, on her body begotten," was adjudged only an estate for life in Roberge; and that the estate tail vested in her son; "heirs of the body of his father," being a good name of purchase.

If it be objected "that this intention could not operate to the daughters of Anne Cornish as heirs of the body of Anne Cornish who was then living, (for that nemo **[1105]** est hæres viventis:") the case of *Burchett* v. *Durdant*, 2 Ventr. 211, (which was six times determined, under different names,) is a full answer to that objection; and shews that persons may take an immediate and vested estate, under the denomination of "heirs of the body of a person living."

Upon the whole, the Court will depart from the strict rules of the words of rigid legal limitation, where the intention of the testator is manifest: and it is here sufficiently plain and clear, to induce the Court to do so in the present case.

N.B. This argument was begun upon the 21st of November: from which day, it was adjourned to the present 25th. And now—

Mr. Filmer replied—He denied, that the testator's intention was clear, plain and manifest; either upon the particular clause in question, or upon the whole will taken together. The intention supposed by Mr. Clarke is opposite to the testator's plain positive words. The plain words must be adhered to; and the impertinent or inconsistent words, rejected. *Shelley's case*, 1 Co. 89.

But if the intention was clear and plain, yet there is a difference between legal estates, and trusts: in *Bagshaw* v. *Spencer*, Ld. Hardwicke made this distinction: which he founded on the case of *Coulson* v. *Coulson*. And even in Chancery, there is a distinction (upon this point) between what they call a trust executed, and a trust executory.

As to the word "heirs" (in the plural,) being descriptive of the person, although nemo est hæres viventis—He observed that Mr. Justice Fortescue, in the case of *Goodright* v. *Pulleyn et Al'*, thought that the word "his" (heirs) would, in grammatical construction properly refer to *Nicholas.

In all Mr. Clarke's cases, except *Law* v. *Davis*, there was a limitation for life: and that case stands upon its own circumstances. The words "heirs of the body" were there explained by the following words, "that is to say, to his 1st, 2d, 3d, and every other son and sons successively, &c."

So, in *Lisle* v. *Gray*, "heirs male" had a plain reference to the four sons.

The quotation from *Shelley's case*, 1 Co. 95 b. is only a case put by Anderson,(*e*) arguendo: the resolution is contrary.

As to *Luddington* v. *Kime*—it only proves that "issue" may be a word of purchase: but it does not prove, that "heirs of the body," may be so.

[1106] Upon the whole, Anne Cornish must have taken an estate tail; not an estate for her life only; but, at least, she was to have taken one third of the fee-simple, as tenant in common with her two daughters; for a devise to A. et liberis suis, and to their heirs," is a joint-fee to all. So is Co. Lit. 9 a. express; which is allowed and affirmed in the case of *Oates, on the demise of Elizabeth Hatterley* v. *Jackson*, 2 Strange, 1172.

Lord Mansfield. The words are—"To my niece A. C. and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever: to be divided equally, share and share alike, as tenants in common, and not as joint-tenants."

The question is, "whether it be contrary to the rules of law to understand, in this case, 'heirs of the body of A. C.' as a description of children: for that such was the intention of the testator, there can be little doubt."

It is to be lamented, that questions of this kind have occasioned so much

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‖ See it also in Viner's Abr. tit. Remainder, p. 393. Note on letter G. pl. 7.

* See 2 Ld. Raym. 1440.

(*e*) Anderson was not there as Judge, but was the Queen's serjeant, and one who argued as counsel for the plaintiff.

litigation and expence. The best way to settle them, is, to reduce the matter, if possible, to some certain rules.(*f*)

It is clear, that where an estate is given to the ancestor "and his heirs" (either general or special,) the term denotes the quantity of the estate which the ancestor takes; viz. either fee-simple, or fee-tail.(*g*)

It is clear too, that a person to take as a purchaser, may be described from every course of descent; as heir at law, heir in borough-English, heir or heir male of the body.

By an ancient maxim of law, although the estate be limited to the ancestor expressly "for life, and after his death to his heirs," (general or special,) the heir shall take by descent, and the fee shall vest in the ancestor.

This maxim was originally introduced in favour of the lord, to prevent his being deprived of the fruits of the tenure; and likewise for the sake of specialty creditors.(*h*)

The ancestor, had the limitation been construed a contingent remainder, might have destroyed it for his own benefit. If he did not destroy it, the lord would have lost the fruits of his tenure; and the specialty creditors, their debts. Therefore the law said, "Be the intention as it may, where an estate is given to an ancestor and his heirs, the fee shall vest in him."

[1107] The reason of this maxim (*i*) has long ceased; because tenures are now abolished, and contingent remainders may be preserved from being defeated before they come in esse; yet, having become a rule of property, it is adhered to in all cases literally within it, although the reason has ceased. But where there are circumstances which take the case out of the letter of this rule, it is departed from, in favour of intention; because the reason of the rule has ceased.

In the case of *King* v. *Melling*, (1 Vent. 231,) a case was cited by Ld. Ch. J. Hale, where a man devised "to his eldest son for life, et non aliter; and after his decease, to the sons of his body:" it was holden, to be but an estate for life, by reason of the words * "et non aliter." Yet the "non aliter" was implied, if it had not been expressed: but it shewed the clear intention of the testator; and the construction was made so as to effectuate that intention.

And in a later case of *Backhouse* v. *Wells*, M. & H. 12 Ann. where the devise was "to J. B. for his life only, without impeachment of waste; and from and after his death, then to the issue male of his body lawfully to be begotten; with remainder to the heirs males of the body of that issue." The whole Court were of opinion, that the devisee, was, by that devise, made tenant for life, with remainder to the issue in tail. They † held, that the words "for life only," clearly and expressly shewed the intention of the testator; and thereby took the case out of the general rule, and turned the words commonly used, as words of limitation, into words of purchase.

(*f*) This and all other judgments like it, must occasion an increase of litigation and expence, by rendering the constructions of wills uncertain, whereas the adhering to rules and precedents would have a contrary effect. The judgment in this case is contrary to authorities, as observed post, 1111, and warranted by none.

(*g*) This reason is an argument against the judgment in this case; because the description in the present case is clearly not applicable to any possible course of descent.

(*h*) The trustee and not the cestui qui trust, is tenant to the lord; therefore this reason never held with regard to trust. Qu. Whether trusts were assets? it seems not. And qu. also, the recital in the Statute of Uses or clauses in Acts of Parliament that made them so?

(*i*) One of the reasons of the maxims is mentioned in the last page, to be for the sake of the specialty creditors, and therefore only part of the reasons have ceased; but supposing they had all ceased, yet the law will continue the same until altered; as, for instance, the reason for the entire descent to the eldest son, which was introduced by the feudal law, namely, for the defence of the realm, has long since ceased by the abolition of military tenures, but yet the rule of descent remains.

* See this cited case discussed at large, in the case of *Robinson* v. *Robinson*, M. 1756, 29 G. 2, B. R. ante, pa. 38.

† V. Lucas's Rep. 181 to 184. Fortescue's Rep. 139, and Abr. of Cases in Equity, 184, pl. 27.

Indeed, such a construction as this, cannot be made, but in cases where it is agreeable to the clear intention of the testator, that this should be the construction. For though the devise be "for life only," yet if the intention of the testator should appear, upon the whole will taken together, to be manifestly otherwise; it shall, in such case, be construed an estate tail; as in the case of ‡ *Robinson* v. *Robinson*, M. 1756, 30 G. 2, B. R.

In the case of * *Lisle* v. *Grey* (*j*) (which was upon a deed) the words "heirs male of the body," were, by the necessary construction arising from the context, turned into words of * purchase.

In the case of *Allgood* v. *Withers*,† where one Isaac Allgood had by deed conveyed his freehold land to trustees and their heirs, and his leasehold to trustees and their executors, upon trust that they should apply the rents and the benefit of redemption, to the plaintiff Hannah Withers for life: and after her death, to the heirs [1108] of the body of the said Hannah Withers and of Isaac Allgood, (since deceased) and of Hannah Glass and Mary Allgood, their heirs, executors and assigns, during the continuance of the estate in the premises; the question was, whether Hannah Withers took for life, or in tail: and Lord Talbot held, "that she took an estate for life; and that the heirs took as purchasers."

In the case of *Bagshaw and Spencer*, all the cases upon this subject were ransacked and thoroughly considered; and Lord Hardwicke held "that heirs of the body, (after an estate for life to the father,) should be construed words of purchase."

To take off the authority of decisions in Chancery, it was contended at the Bar, "that as to this point, there was a distinction between a trust and a legal estate; and that even in Chancery, there was a distinction upon this point between what they call a trust executed, and a trust executory."

It is true, these distinctions are to be met with, and have often been mentioned: but there does not seem to be much solidity in either.(*k*)

All trusts are executory; they are to be executed by a conveyance: and the parties have a right to apply to a Court of Equity, for such conveyance.

In *Bagshaw and Spencer*, the trust was executed, in the sense of the distinction, and as contrasted with a trust executory.

There seems to be as little ground, in respect of this point, for the other distinction between a trust and a legal estate.

A Court of Equity is as much bound by positive rules and general maxims concerning property (though the reason of them may now have ceased,) as a Court of Law is.

Whatever is sufficient, upon a devise, to make an exception out of the rule, holds in the case of a legal estate, as well as in the case of a trust. If the intention of the testator be contrary to the rules of law, it can no more take place in a Court of Equity, than in a Court of Law; if the intention be illegal, it is equally void in both.(*l*) A

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‡ V. ante, pa. 38, (ut supra).

* V. Sir Tho. Jones, 114. 2 Lev. 223. Pollexf. 582. Raym. 273, 302, 315.

(*j*) In *Lisle* v. *Grey*, after the limitation to Edward the father for life, there were limitations to the first son, and the heirs male of his body, with like remainders to the second, third, and fourth sons in tail-male, and so "to all and every other, the heir male of the body of Edward respectively and successively, and to the heirs male of their bodies according to their seniority of birth," with remainders over, as appears from 2 Lev. 223, and T. Jones, 114, so that the words of reference and so, (which are relative and signify eodem modo,) and the words every other, make the words of the limitation in effect the same as a limitation to heir in the singular number; and therefore as words of limitation were superadded, that was within the same reason as *Archer's case*.

See also in 2 Vern. 131, a distinction as to the construction of devises, because the testator had only an equitable estate; but that seems wrong.

† In Chancery, on 4th July 1735. [See Vin. Abr. Rem. H. 2 Dal. 69. Fearne, 29.]

(*k*) 2 P. Wms. 478, 314. 1 Wms. 762 to 766, and the note there. 1 Co. 100 a. b. *Bagshaw* v. *Spencer*, cited post, 1109. 2 Atk. 1 Atk. 590, and 582. 1 Vez. 26, 27, and many other authorities long before these shew that the distinction should not have been so slightly spoken of.

(*l*) At law the legal operation controuls the intent; but in equity the intent

Court of Equity cannot support an intention in the testator to create a perpetuity, or to limit a fee upon a fee, or to make a chattel descend to heirs, or land to executors. On the other hand, if the intention be not contrary to law, a Court of Common Law is as much bound to construe and effectuate the will according [1109] to that intention of the testator, as a Court of Equity can be. Upon the very point now in question, the determinations have been agreeable to this reasoning,(*m*) therefore where the trust of a real estate was devised "to A. for life, and after his death to the heirs of his body," Lord Hardwicke decreed a conveyance to A. in tail; although the estate devised to A. expressly "for life," left no room to doubt of the testator's intention; but the rule of law said, "the heir of the body should take by descent, and not by purchase:" and he thought, the rule bound a trust, as well as a legal estate.*[1]

Where there are circumstances which take a case out of the rule, the exception holds upon a legal estate, as much as upon a trust.

The case of *Lisle* v. *Gray* was a legal estate, upon a deed; and the judgment was affirmed, (though, by mistake, it is said in Sir Thomas Jones, to have been reversed).

Sir Joseph Jekyll's decree in *Papillion and Voyce*, was upon a legal estate: and Lord King, after considering, did not differ from him; but reversed the decree, expressly upon a new point, upon the discovery of articles in 1697.(*n*)

Some of the other cases I have mentioned, were likewise upon legal estates.

It is true, Ld. Hardwicke, in *Bagshaw and Spencer*, laid hold of this distinction, to avoid expressly overruling the certificate in *[2] *Coulson and Coulson.* But he certainly did not agree in opinion with that certificate. In speaking of it, when he delivered his judgment in *Bagshaw and Spencer*, he expressed himself thus—"If that case be law;" and one of the last things he did in the Court of Chancery was to send a like case to this Court for their opinion; and he told me, "he did it, to have *Coulson and Coulson* reconsidered.*[2]

It appears therefore from all that I have been saying, that there is no such fixed invariable rule as has been supposed, "that words of limitation shall never in any case be construed as words of purchase."

And the present case is the strongest that I can form any imagination of, to justify a construction, "that the heirs of the body of Anne Cornish shall here take as purchasers." The devise cannot take effect at all, but must be absolutely void, unless the heirs of her body take as purchasers.(*o*)

[1110] It must be observed, that the lands devised by this will are gavel-kind. The testator had nephews and nieces, and great nephews and great nieces: and he provides for them, by four distinct clauses in his will, according to the four distinct stocks.

It is agreed, that where words of limitation are grafted upon the word "heir" in

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controuls the legal operation of the deed. Mr. Clarke, Master of the Rolls, in *Burgess* v. *Wheate*, 1 Black. 137.

(*m*) That the construction of the limitations of the trusts of a term, is in equity the same as the construction is at law of the limitations of the legal estate of a term, was agreed by Lord Nottingham and the assistant Judges, 3 Ch. Cas. 48, in which case he said, "being afraid that I may shake more settlements than I am willing to do, I am not disposed to keep so closely and strictly to the rules of law, as the Judges of the Common Law do, as not to look to the reasons and consequences that may follow upon the determinations of this case." Yet in the same page he afterwards says, "the trusts of a term in gross can be limited in law, for I am not setting up a rule of property in Chancery, other than that which is the rule of property at law."

*[1] *Garth* against *Baldwin*, in Chancery, 18th July 1755. [Qu. 1 P. Wms. 765, 76. 62 P. Wms. 478, contra. 1 P. Wms. 145, acc. 1 P. Wms. 89, 90. Eq. Abr. 183, Cas. 24.]

(*n*) In 2 P. Wms. 478, in the note, it is said that the Lord Chancellor's opinion was, as there reported, viz. that as to the land devised, the devisee took an estate-tail; though the question as to the land was given up, the plaintiff having brought a supplemental bill, whereby it appeared he was by his father's marriage articles intitled to an estate-tail.

*[2] V. *Perrin and Another* v. *Blake, Widow*, P. 1769, B. R.

(*o*) Qu. This is a reason from matter arising after the making the will: as to which see 8 Vin. 186, pl. 54. 1 P. Wms. 399, 400. 1 Vez. 153. 2 Vez. 237.

the singular number, such heir shall take by purchase.(*p*) This is settled ‡ in *Archer's case*, and was admitted in the case of *Dubber, on the demise of Trollope* v. *Trollope*, P. 8 G. 2, B. R. (though that case was distinguished from *Archer's case*, by having† no words of limitation superadded to the words "first heir male"). The distinction is, that where it appears to be the intention of the testator, that there should be a succession in tail, it would totally defeat that intention, if all were to vest in the first son: but where it does not appear that the testator intended a succession in tail, there indeed the using the word "heir" in the singular number, may be a circumstance of great weight.

Now the term "heirs" (*q*) (in the plural,) in the case of gavel-kind lands, answers to the term "heir" (in the singular) in the common case of lands which are not gavel-kind: for the word "heir" (in the singular) would not serve for gavel-kind lands; it must be "heirs" (in the plural).

Therefore all the arguments and reasonings that are applicable to the word "heir" (in the singular,) in the common case of lands not being gavel-kind, hold with equal strength and propriety, when applied to the plural termination "heirs" when the lands are gavel-kind.

And it is manifest that the testator does not here mean, that this one-fourth should go in a course of descent in gavel-kind: for he gives it to the heirs of her body, as well females, as males; and mentions females, not only expressly and particularly, but even prior to males. Therefore they can not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation: for he breaks the gavel-kind descent, by giving it to females as well as males. It cannot descend to females as well as males, by the rules of gavel-kind: and yet he seems to lay the chief stress upon the word "females." [He adds likewise, "and to their heirs and assigns for ever, to be divided equally share and share alike;" nay, he goes further—"As tenants in common and not as joint-tenants." But this could not be, if they were to take in the course of gavel-kind descent: for in such case, they must take as co-parceners.]

[1111] The testator's disposition of one of the proportions of his estate shews his intent as to the rest; I mean the devise of the one-fourth to the widow of his deceased nephew Edward Read, and to the heirs of her (*r*) body, &c. which can receive no other construction, but that those heirs of the body must take as purchasers. For though his nephew was dead, yet he uses the very same words in this devise as in the rest: but he could not mean that his nephew's widow should take an estate tail in that whole one fourth, or a joint fee with her children in any part of it. Therefore the necessary construction of that devise is a strong argument of his intention and meaning as to the rest.

As to Anne Cornish's taking a fee jointly with her two daughters, in thirds, as tenants in common; there can be no ground for such a construction. (*s*) For it is clearly the testator's intention, that the heirs of Anne Cornish's body should not take till after her death; and as the devise to her has no words of limitation added to it, it is of course a devise to her for her life; and what she would have taken, if she had survived the testator, would have been an estate for life.

(*p*) 8 Vin. 233, pl. 1213. Amb. 379, 380. Eq. Abr. 184, Ca. 27.

‡ Co. 66.

† V. Robinson on Gavelkind, p. 96, and Abridgment of Cases in Equity, vol. 2, p. 317, pl. 31.

(*q*) Males and females cannot take together as directed to take in this case.

(*r*) It should be his and not her.

(*s*) It is strange that this should have been said, when express authorities, and such as were never denied, had been before cited, by Mr. Filmer in page 1106, proving that if heirs of the body of A. C. were to be taken as a description of children (as before mentioned in page 1106), that then A. C. and her children would have taken a fee, if she had survived the testator; yet the reporter has made Justice Denison say the same post, 1112, and makes Justice Wilmot not only say so, but puts a reason in his mouth, not warranted by the words of the will.

N.B. In the cases cited, by Mr. Filmer, A. and his children took a joint fee; but here they could not take jointly, by reason of the express words in the will to the contrary.

Upon the whole, as no man can doubt of this testator's intention; and as this is the only method of effectuating it; and as there is no rule of law that prevents heirs taking as purchasers, where the intention of the testator requires that they should do so; I am of opinion that judgment ought to be given for the defendant.

Mr. Just. Denison concurred with his Lordship in opinion, "that Courts of Law (as well as Courts of Equity) will always construe wills agreeably to the intention of the testator, if such intention be not contrary to and inconsistent with the rules of law:" and he shewed that the intention of the testator in the present case, must have been, "that the heirs of the body of his niece Anne Cornish should take as purchasers;" making the like observations as his Lordship had done, upon the lands being gavel-kind, and their being devised to the heirs female as well as male.

And he held, that it is not disagreeable to or inconsistent with the rules of law, that "heirs of the body" should, in some cases, be construed as designatio personæ; (a position, not to be disputed, at this time after so many concurring resolutions). And this case now before the Court is one of the cases where they must be so construed. Therefore the heirs of the body of A. C. must here take by purchase; they can take no other way.

[1112] And there is no foundation for supposing that Anne Cornish, if she had survived her uncle, could have taken any estate jointly with her daughters, as tenants in common.

(Mr. Just. Foster was absent.)

Mr. Just. Wilmot premised, that the Court were obliged to the gentlemen who had argued this case at the Bar, for declining to go into that long string of cases usually cited upon this subject. For the principle that must govern all cases of this kind, is the intention of the testator, provided it be not inconsistent with the rules of law. And all cases which depend upon the intention of the testator (which is the pole-star for the direction of devises) are best determined upon comparing all the parts of the devise itself, without looking into a multitude of other cases: for each stands pretty much upon its own circumstances; and one is no rule for another, or very seldom at least.

Here, the testator intended, beyond all doubt, that the children of his nephews and nieces should take the inheritance in fee simple, both males and females, per capita, as tenants in common. And this is a legal intention.

But this intention can not take effect by giving an estate in tail or in fee to the first taker: for the intention of the testator must be subservient to the law: and not the law to the intention of the testator. Now a testator, be his intention what it will, can not make an estate descend to males and females all together; nor gavel-kind lands to descend to them as tenants in common. The testator's intention cannot, therefore, take place, by giving Anne Cornish an estate tail.

Well then! what is to be done? why (as my Lord Coke says) you are to mould the barbarous words and expressions of the testator, so as to effectuate his intention; if you can do so, without going contrary to the rules of law: but you cannot do this, contrary to the rules of law.

The question therefore, in the present case, comes to this: "whether it be absolutely necessary, that the words heirs, or heirs males, or heirs of the body, must be in all cases, and under all circumstances, words of limitation."

Now it is certain, that in some cases and under some circumstances, they may be construed words of purchase; either upon a will, or upon a deed. The case of **Lisle* v. *Gray* was upon a deed. And there is a case in Palm. [1113] 359, *Waker* v. *Snowe*, which was likewise upon a deed: "Edward Egerton conveyed lands by fine, to the use of himself for life, remainder to his first son and the heirs male of his body begotten, &c. and so to his six sons; remainder to the right heir male of the said Edward Egerton to be begotten after the said sixth son, and of his heirs male. This was holden to be only a contingent estate, and not as estate tail in Edward Egerton; because it was limited to particular persons." They are not to be construed as words of limitation, either upon a will or upon a deed, when the manifest intention of the testator or of the parties is declared to be, or clearly appears to be, "that they shall not be so construed."

* V. ante, p. 1107.

Now it is plain, in the present case, that the testator did not mean to use the words "heirs of the body," as words of limitation: it is as clear as if he had expressly said, "I do not intend these words in that sense."

And as to Anne Cornish's taking an equal share in fee simple in common with her daughters—that construction can never hold; for it is most certain, that the testator did not intend the division into equal shares to be made till after Anne Cornish's death.

This same construction is further confirmed by the clause which devises one fourth to his niece in law Grace Read, the widow of his deceased nephew, and to the heirs of her body, in the same form of expression. For it can never be imagined, that it was his intention to give her, (who was only the widow of his nephew,) an equal share of the fee simple and inheritance, with his natural relations.(*r*)

Per Cur. unanimously,

Judgment for the defendant.

HAWARD *versus* BANKES, ESQ. Wednes. 26th Nov. 1760. Trespass vi et armis, and trespass on the case, cannot be joined in the same action. [See 3 Wils. 408. 8 Durn. 189. 1 Bosanq. 475.] [8 Durn. 189, 191.]

[Distinguished, *Smith* v. *Kenrick*, 1849, 7 C. B. 563.]

Mr. Serj. Hewitt, supported by Mr. Aspinall, Mr. Campbell, and Mr. Winn, moved in arrest of judgment, after a verdict for the plaintiff.

This was an action upon the case, (or at least, it was so laid,) for damage done to the plaintiff's colliery, by what the defendant had done in his own colliery and within his own soil: which colliery belonging to the defendant lay near to that of the plaintiff, and communicated with it, though not immediately but mediately, there being some other collieries lying between them.

[1114] The declaration consisted of three counts, all laid as in trespass upon the case. A verdict passed for the plaintiff: and the judgment was taken as an entire judgment on all the three counts.

The objection now made by the defendant's counsel, in arrest of judgment, was, that two of these three counts are really and essentially in trespass, (though they are laid as in case;) and that trespass and trespass on the case can not be joined in the same action. Hardress, 60, *Preston* v. *Mercer*. 2 Ld. Raym. 1399, *Reynolds* v. *Clarke*. 1 Ld. Raym. 272, *Courtney* v. *Collett*. Carthew, 436, S. C. *Courtney* v. *Connett*. Register of Writs (two places) De fossato terra el fimo impleto; per quod, &c.

The distinction between ‡ trespass and case, they said, was this: immediate damage to the plaintiff's property, is a ground for trespass; consequential damage to it, is a ground for case. Now two of these three counts are immediate acts, ("that the defendant caused great quantities of water to be conveyed through divers other collieries, into the plaintiff's colliery: whereby, &c.") and they are therefore, properly, in trespass vi et armis: but the third count lays the damage to be consequential; and is therefore rightly laid in case. So that it appears upon the face of the declaration, "that trespass and case are here joined together."

The plaintiff's counsel agreed the law; but denied the fact: for they insisted, "that all the three counts were strictly and properly trespass upon the case, and laid the damage to be consequential, and not immediate."

The Court (without hearing the plaintiff's counsel,) over-ruled the objection.

The plaintiff describes, in his declaration, a fact which, as it comes out at the trial, may or may not, be a proper strict trespass: it might, at the trial, be proved to be either trespass, or case; either one or the other of them, according to the evidence. And it appears, that it was here proved at the trial, to be trespass upon the case. If it had been proved to be trespass vi et armis, the plaintiff must, in that event, have been non-suited. Before the trial, it stood indifferent, whether it would come out to

(*r*) If it be asked, what words are there in the will to warrant this; the answer can only be warranted, (if at all) by confining the words to be divided to the latter part of the sentence, for if they are referred to the whole they will relate to the niece as well as to heirs.

‡ Vide ante, p. 1087, 1088.