Richard Morris } on the Demise of William Andrews
of Barnshall Gentleman

Plff in Ejectment in Barbados and Appellant Here

Isaac Lazay & } Defts and Respondants
John Wood - } The Case

In Eject brought in the Common Pleas at Barbados on a Special
Verdict Finds

That Thomas Wardall seized in fee simple had Issue a Daughr Lucretia
That she married George Andrews and had Issue
by him { a Son Wardall and
a Daughter Sarah now wife of Robert Hale Esqr

That the said Thomas Wardall so seized, and Lucretia being of full life &
having such Issue as aforesaid, the sd Thomas Wardall Devised in ye following
Item - I give and bequeath unto my Daughr Lucretia Wife of George An-
drews of Barbados Esqr all my before named Plantation together with all
my negroes and all other Freehold with the Live and Dead Stock thereon being
or thereto belonging at the time of my decease Charged as aforesaid Viz with a
£100 a year to my Wife Margrett Wardall as also my Store house at Michaels
Town During the natural life of my said Daughter
Item I give and bequeath to the Heirs of the body of my sd Daughr Lucretia
begotten or to be begotten and to his or her heirs for ever, after my said Daughr decease
all my before named Plantation together with my negroes Cattle other Stock Freehold and
Utensils thereto belonging Charged as aforesaid as also sd named Store house
But for want of such heirs of the body of the said Daur I do give Bequeath
the aforesd Premes after the decease of my said Daur to my own next
Heirs and their heirs for ever

Then the Verd.t finds the Identity of the Lands in the Declaraon and those Devised the death of the Devisor seised &c — The surv.l and Seisen of Lucretia under y.e s.d w the Death of George Andrews — And that Wardel Andrews survived Lu-crelia and George and was only Son and Heir of said George and also of y.e said Lucretia who was only Child and Heir of y.e s.d Thom.s Wardell y.e Testat

Then finds the seisin of said Wardal Andrews by Virtue of the s.d will that he was seised devised in these words &c (by which w.ds y.e Lands in Question are devised to the Lessor of the Pl.ff in fee in Case W.m son of the s.d Wardall sh.d die - without Issue or before 21) and that Wardall Died so seised - Wm became seised &c / and died without Issue and under 21. & y.t y.e Pl.ff Clam.d in time — Upon arguing the Special Verdict in y.e Com: Pleas at Barbadoes Judgm.t was given for the Pl.ff - but a writ of Error having been bt before the Govern.r and Council there as a Court of Error, that Judgm.t was reversed and Judgm.t given for the Def.ts

And from y.t Judgm.t of the Govern.r and Council the Pl.t in Eject appealed to his Majesty in Council — & this day being the 16.th of March 1730/1 the Case was argued upon the appeal at the Council Chamber at the Cock pit by

Mr. Attor Genl. S.r Chil York } for the appelants
Mr. Sol Genl. — M.r Talbot } for the Respond.ts
M.r Fazakerley }
M.r Rider }

M.r Atty stated the Case reading over the spel Verd.t and then

My Lords if Wardale Andrews under whose will the Lessor of the Pl.t Claim had such an Estate in the Lands demised as by the Law he may Devise the Judgm.t in the Comon P.s at Barbadoes was right and the reversal thereof by the Gov.r and Council wrong and the appell. has a good Title

That

That Est. wch can be devised is only a Fee simple and whether Wardall Andrews had such Estate or not must be determd by the will of Thomas Wardall & particularly by ye Clause of 11 Item & ye Construction of that Clause the Contend. of a will must arise from the words of it & ye Intent. of the Testr. if agreeable to the rules of Law — The words are to Lucretia during her natural life and after her decease to the heirs of her body begotten or to be begotten and to his or her heirs for ever wch words to his or to her heirs for ever limitted Inheritance in fee simple to such a person as should happen to be heir of the body of Lucretia at the time of her death & Consequently Wardall Andrews by whose will the appell. Claims bein found by the Verdt. to ve been only son & heir to Lucretia had such an Estate in this Plantation as by the Law he may Devise

The Intention of the Testr. is the great Rule wh. guides the Construction of Wills & ye Contrary Construction to ye wh. is Contended for one on the other side for I see it is hinted in printed Case would give Lucretia an Estate Tail manifestly against this Intention and the whole scope of the will

There cannot be a Stronger Proof of the Intention than ye wo. of the will — Ist the words are expressly for life — the Devise is to Lucretia during her natural life wh. makes it still the Stronger and the Circumstances of the Family at ye time of making of ye will as found by the Verdt. for we cannot go out of that Est. ... very Obvious reason for ye Intention & are a farther Confirmation of it —

For Lucretia being at that time married and having a son & a Daur. who were Grand Children to the Testr. it was natural for him to provide for ye & had he given Lucretia an Estate Tail she might be possibly be Influenced by her husband to bar the Est. and Cut them of from the Inherit to prevt. wh. ye Testr. has given her only an Est. for life — and because it was uncertain who would be heir to Lucretia whether the son or the Daur. for it was possible that Either of them might have died before her he therefore devis ye Inheritance in Fee simple to such person

as Should happen to be heir of her body at the time of her Death —

And 'tis Evident from the words — Heir or heirs for ever which are undeniably words of limitation of Estate and relate only to the Children of Lucretia for they cannot possibly be applied to herself — Ob. But it will be objected for I see it hinted in the printed Case that these words Heir of the body are w.ds of limitation & when ever an ancestor takes an Estate for life and after words there is a limitation to his heirs or heirs of his body the heir shall not take by purchase but the Estate Vests in the ancestor. and therefore by this Devise Lucretia takes the Estate Tail —

A: These words are sometimes words of purchase —

Words of limitation are such as ascertain and determine the Quantity of the Estate wch is to pass and are used only for the benefit of the first Devisee — words of purchase are us.d for the sake of the Person Described by them and not for advantage of the 1st Devisee — and therefore if these words Heir of the body of any Law be Construed Words of limitation, it would follow that they were used for the sake of Lucretia only and not for the sake of the heir of her body the Grand-Children of the Test.r wch is plainly Inconsistent with the will —

The Devise is to the heirs of the body &c is by a new Clause introduced with new drawing words wch shews the Test.r designed to give to a new Person and Consequently such a new Person must be a purchaser —

The Devise to them w.th Item I give &c —

Hopewell and Nokland v: Salk. 239 by m.r L.d Ch.r L.d Trevor — Item is an usual word in a will to introduce new distinct matter. Therefore a Clause thus Introduced is not influenced by or to Influence a preceding or subsequent unless it be of itself imperfect & Unintelligible without reference — But here the Clause to the heirs of the body is perfect and Compleat in itself —

The words after my Daughters Decease shew he meant no more by the wd. heirs of ye body but such Issue as should be living at her Death & from them it was to pass by ye Clause till the Death of Lucretia & to make ye plainer ye Testr. has again repeated these wds. Vizt. &c The words to his or her heirs for ever Clearly distinguish ye Case from all the Cases that have been resolved on the genl. rule - wherever ye ancest &c and from Shelleys Case 1 Co — for in that Case the additional wds. of limitn. were adjudged surplusage because they Could not Carry the Estate any Farther yn the former — But in this Case a new Est. is Created by these wds. quite different from and Inconsistent with that which would have passed without ym —

for without these words the Issue of Lucretia would have had only an Est. Tail but now by the force of these wds. they take a Fee simple —

And if these wds. shd. not be Construed to Convey a Fee simple to the Issue they wd. be rendered absolutely Insignificant & must be Intirely rejected and thrown out of the will for they can serve no other end whatsoever because without ym. the words are sufficient to Convey an Estate Tail — And such a resolution as this would I humbly submit to your Lordship be inconsistent wth. ye maxim rule that no part of a will shall be rejected wch. is Capable of any reasonable Construction —

The words to his or to her being applicable only to the Children of Lucretia shew ye Testr. knew he was describ.g a Person to take & ye. being so the Case very near yt of Archers 1 Co And tho these wds. heirs in the plu: numb. be here used yet ye little Impropriety of Expression shall never prevl. the plain mean.g of the Testr. from tak.g effect any more than in the Case of Clarke and Day Reported by Moor where the Devise was to Rose for life & if she have Issue of her body then I will that her heir after her Death shall have the Land and to the heirs of their Bodies &c The Impropriety of the wd. Their was not regarded but the Intentn. of the Testr. prevailed - And so in our Case it ought to prevail notwithstanding ye Incorrectness of the Expression wch. probably was ye fault of the Injudicious Writer —

there is a Case put by anderson in the Argum.t of Shelly's Case 1: Co wch is much Stronger than this Case & tho' law not there resolved is quoted in the Case of Loddington & Kime & Lo. and not denied to be Law and I don't know if it was ever denied — The Case is if one makes a Gift in tail to the use of himself for life and after his decease to the use of his heirs and their Heirs Females of their bodies in this Case these words his heirs are words of purchase & not of limitation for then the subsequent words and of their Heirs Females of their bodies wd be void — The word Heirs is a stronger word of Limitation than heirs of the body and yet the words of limitation the heirs of the body & yet these words of Limitation being superadded did made it a word of purchase because they Carried a different Estate from that wch would be passed by it and therefore by the same reason the words to his or to her heirs for ever being in our Case superadded to the words Heirs of the body and Carrying a Different Estate from wch wd be passed by them words must also make them words of purchase —

Sapillion } At the Rolls 2: Geo: 2. M: October 1728 —
& Price } 1 Cases in Lord Ray & Hardw.r 27.

Is also a much stronger Case which was —

A Devise of the personal Estate that shd be invested in Land to the use of A for life without Impeachm.t of Waste Remainder to Trustees to preserve contingt remainders and after the Death of A. Remd. to the Heir male of his body Remd thus there was also a Parallel Devise of the real Est & appeared the remaind.r was Executed in himself brought a Bill praying an Execution of the Trust — But it was decreed ag.st him as to the personal Estate for it appeared to have been the Intention of the Test.r that the Sons of A should take respectively & successively & by.r Est. Tail should not be vested in A otherwise the Limitation to the Trustees to support Contin.t Remainders wd be to no purpose —

And tho there may be a difference between Articles of Intermariage wholly a Settlem.t to be made & an actual Settlem.t made upon Marriage & yet there is none between an actual Devise of Land and a Devise in Trust to the same purposes but the Trust may be Construed as if it were a Devise of the Land in the very words of the Trust shall not be carried further in a Court of Equity and this is so resolved in the Case of Baile & Coleman adjudged in Chancery Peer. Rasch. 1711. Vide 2: Vern: 670 —

Lisle and Gray — S.r T. T. This is a much stronger Case to reason — John Lisle for the Settlem.t of his Lands in his Family and Blood Covenanted to stand seized to the use of himself for life Rem.r to Edw.d his Son for life remain.r to the 1.st Son of Edw.d in Tail Male with like remain.r to all & 2: & 3.d Sons in Tail Male severally and respectively to every of the Heirs males of the Body of Edward & of the heirs males of their Bodies Rem.r to W.m Lisle — Resolved that Edw.d had only an Estate for life & for the words every of the heirs Males to intend every other Son — and the Jones says this Judgm.t was after words reversed in the Ex. Chamber & in a Writ of Error for those reasons the Record and find the Judgm.t was affirmed — In this Case the words, Heirs Males of the Body are adjudged words of Purchase even in a deed from the Intention of the Parties and therefore in our Case the Case of a Will where the Intention is more regarded ought to be so adjudged — And this Case of Lisle and Gray proves if the Intention in our Case is agreable to the rules of Law even of strict rules it shd extend to the words used by the Test.r in this case — But the true notion of that rule is that a man cannot by his will create any Est.e which cant be created by a Conveyance at Com: Law — for a man may use words in what sense he pleases provided his intention be clear & evident and what he designs agreable to Common Law — Ob: But it may be objected that here is a remainder over to his own right heirs and so he can be Lunatick &

upon a Fee and Consequently no Fee Simple to the heirs of the body of Lu-cretia &c. This is not a Fee upon a Fee but a Fee simple with a Double aspect as in the Case as in the Case of Lodd and Hime in Salk. Title Devise then he Stated this Case at large as in Salkeld —

And this Construction w^d. ans^r. every View of the Test^r. for if Lucretia has any heir of her body such heir will have the fee and when the Heir Dies the near heir of the Test^r. will have the Land by Decent —

And if Lucretia had no Heir of her body then the Fee simple Vests in the next Heir of the Test^r. by his will — And there can be no person who co^d. take by giving Lucretia an Estate Tail y^t. w^d. not take by this Construction —

And tho the w^ds. of purchase in Lodd and Hime are not heirs of the body but Issue Male this is no material difference for Issue Male in a will is Equivalent to Heirs Male of the body — And in King and Melling the w^ds. Issue male are resolved proper w^ds. of limit^n. in a will and yet in that Case of Lodd & Hime they were adjudged words of purchase from the Intent^n. of the Test^r. & by the same reason Heirs of body tho otherwise Words of Limita^n. should here from the plain design & mean^g. of the will be taken as words of purchase —

Ob: — But it may be objected y^t. an Est. Tail shall arise to Lucretia by Implication from the Clause "But for want of such Heirs of the body of my s^d. Daur. —

A. Such Heirs are words of Reference — And if the former Construction w^ch. gives the Heir a Contingent remaind^r. in fee according to the resolution in Lodd & Hime be right then no Estate can arise by Implication — Then he stated the Case of Popham & Bamfield out of Salkeld and gave the reason there ment^d. why an Estate sh^d. not arise by Implication and the distinction put at the End of that Case but took no notice that Salkeld mis reports that Case and Concluded w^th. a recapitulation of his principal reasons and hoped the Judgm^t. of the

The Governour and Council of Barbadoes would be reversed

Mr Sollicitor General

My Lords I am of Council wth the appellant and I doubt but unprofitably; for there is not a Case in the Law nor a Circumstance of the wd in favour of my Client at least of those of wch Mr Atty has so already with great Judgmt layd before your Lordships so whatever I can say must be only a repetition of what has been already Offered but this wch Mr Atty has made unavoidable to me and therefore the best service which I can do my Client is to take up as Little of yr Lordships time as is possible —

My Lords the Single Questn upon the special Verdict now before your Lordships is whethr Lucretia by the wd of Thom. Wardale took an Estt in Taile or for life only for if she took an Estt to Taile I doubt it will be hard for us to maintain a Title in the appellant —

This Questn depends upon the Construction of that Clause of the wd wch has been already read to yr Lordships Item I give and bequeath &a —

The principal rule in Construction of Wills is the Intention of the Testr — I dare say no man who has not been bred a Lawyer would Entertain the least doubt upon readg these words but that Mr Wardales design was yt Lucretia shd take an Estate for life only for the devise is to her Expressly during her natural life — and if the other parts of the will be Considered 'twill appear there is nothing in them to Correct or restrain this design but tis apparent throughout the whole will — The devise to Lucretia is Compleat in itself and Concluded before the Devisees to the heirs of her body — and yn he begins a new devise wth ye wd Item an usual word in Wills to Introduce new distinct matter in wch new devise Lucretia is mentioned not for her own sake but only a parcell of ye description of the persons in favour of whom he designs this new Devise — And this Evidt from the wd After ye sd my Daurs Decease for these wds plainly shew that the Testr intended by this new devise was to arise and take effect not in her

her life time and Consequently that he designed it not for her but for the heirs of her body, who sh.d therefore be Purchasers of it since it was designed for their benefit and advantage only — The words to his or to her heirs for ever are a furth.r Proof of y.e design — for they being relative only to the Heir &c shew he Intended to Vest the fee simple in the Heir by purchase and Consequently to give Lucretia only an Estate for life — And if they do not make the Heirs Purchasers of the Fee simple they must be rejected and are absolutely useless when at the same time they are Capable of a very just & proper Construction and agreable to the Law {Contrary to the rule of a Construction even in y.e Case of a Deed}

The Circumstances of the Family &c as the Atty Genl: In the last Limitation to his own next heirs is manifestly a word of purchase — And since the Test.r has used it in that sense in one part of the will we may reasonably Conclude he meant it so in the other — His meaning therefore could be no other but that Lucretia should take an Estate for life with a Conting.t remainder to the heirs of her body in fee — And if she happened to Die without heir of her body that then y.e Land sh.d go to his own next Heirs — And y.s is the natural Construction of the will & gives to every w.d of it a proper sense and meaning and no Ble is rejected. The next Consideration is whether this design this Intention of Mr. Wardales be agreable to the rule of law — {My Lords there is no rule in Law ag.t the Test.rs puting the said the death of the Tenant for life — and as to the words heirs of the body here made Choyse of they are often proper words of purchase as where there is no limitation or a limitation for years only to the Ancestor — {In the Case of John De Mandavil Co. L. 26. b. the word Heirs of the body of his Father are a good name of purchase even in a Deed — {and there is a great difference between Deeds and Wills — {In a will if the Intention is Clear no Impropriety of Expression shall prevent its taking effect provided that Intention be in itself Consistent with the Rules of Law — And in Wills words as they

they best answer the Intent of the Test.r are Construed words of purchase or of limit.n Indifferently } The word Issue is a proper word of limit.n in a will as Kinge and Melling but not in a deed yet when the Circumstances of the will require it That word is adjudged word of purchase in a will as in a Case of Lodge & Hume it was because the words of Limitation superadded to it Carried a different Estate from that w.ch w.d have passed by it without them words and this is exactly y.e Case before your Lordships, for the words Heirs of the body of my Dau.r w.d have Conveyed an Estate Tail without the words and to his or her heirs for ever, but these words Convey a Fee simple to the heirs of the body of Lucretia w.ch is an Estate intirely different from and even inconsistent with an Est. Tail w.ch w.d be passed without them — for tho one may have an Est. Tail Remainder in Fee yet no man can have an Est. Tail and an Est. in fee in the same Land to Commence in possession from y.e same point of time and therefore in y.e Case as well as Issue was in y.e Case of Lodge & Hume y.e words Heirs of the body ought to be Construed words of purchase —

Backhouse v Wells { Gent. Trin. 11 Ann. Ro: 220 / Macclesfields Case 188 } is a farther authority

Which was — R: B: Devised to T. B. for his life only without peachment of waste from & after his decease then to the Issue Male of his body lawfully to be begotten (if God should Bless him) and to the heirs males of the body of such Issue male lawfully begotten and for default of such Issue Rem.r to R. B. and the heirs males of his body and for want of such Issue Rem.r over in the same words & it was adjudged that T. B. tooke only an Estate for life and that the Issue tooke by purchase the word Issue male being a description of the person who has to take the Estate Tail because otherwise the additional words of limitation grafted upon y.e s.d Issue where y.e Test.r would Lodge the Inheritance — { Ob: But it may be said that the word Issue w.ch is y.e used in these Cases differs from the words Heirs of the body w.ch are the words of the present Case —

As those words are equivalent to heirs of the body —

2 Archers Case 1 Co: is an Express authority for there ~~the~~ additional words of limitation grafted on the sd Heirs made it a word of purchase as is observed by my Ld Hale in ye argument of King & Mellings Vent — { and tho the word heir be there used & that heirs in ye plural numbr yet is no material difference because heir in the singular number is nomen Collectivum — { In Capillion & Bacey ye Interposition of Trustees to preserve Conting. Remrs made the words heirs Males of the body words of purchase

And surely in our Case the addition of the words and to his or to her heirs forever is as strong to shew the Intention of the Testr to make the Heirs of the body of Lucretia purchasors — Otherwise as is argued by Anderson in the Case put by him in Shelleys Case they co'd be Intirely Void — { Nor can an Estate arise by Implication to heirs of the body of Lucretia from any Clause in ye Will because Estates by Implication are always raised to such persons to whom no other Limitation is made —

And this is the ~~reason~~ of Langley & Baldwins Case and of Popham & Bampfield which are reported in Salkeld — But in this Case all the heirs of the body of Lucretia are provided for before & therefore can take no Estate by Implication —

Since therefore it was the design of the Testr to give Lucretia only an Estate for life & Vest the fee simple by purchase in the heir of her body & since ye design is agreeable to the rules of law & the whole Tenor of his will — & the Devisor under whom the Appellant Claimes is found to've been heir of the body of Lucretia we humbly apprehend the appellant is well Intitled to this Plantation and hope the Judgmt of ye Court of Error at Barbadoes will be reversed by yr Ldships —

Mr. Fazaherley —

My Lords the Construction put upon this will by the Gentlemen of the other side would and submit to your Ldships intirely destroy the Intent of ye Testr & is not at all agreeable to the rules of law — But our Construct. preserve the design

design of ye Testr. and is agreable to the rules of Law by ye Construction in similar Cases —
The General Intent of the Testr. was that all the Children of Lucretia should take by this will which is of much greater Importance than that one of them only should take a fee Simple — { This intent is Evident, from his devise to the heirs of ye body of his Daur. begotten and to be begotten, and also from his Limiting the remainder to his own next heirs for want of such heirs of ye body of his sd. Daur. —

But if the heir of the body of Lucretia should take a fee simple by purchase as is Contended for on the other side then all the rest of the Children of Lucretia tho there were ever so many of them wd. be deprived of ye benefit designed Them by ye will —

And it is in vain to say they may take by decent for tis plain the Testr. design they should take by this will and if by this Construction they Cannot then by this Construction his Intention is frustrated tho they sh. happen to take by Descent —

Our Construction my Lord fully answrs. ye View this Genl. Intent of the Testr. by givg Lucretia an Est. Tail wch shall descend to all her Children as they happen to be heirs of her body — and it is also agreable to the Rules of Law For tis a General Rule and has never been denied — { That whenever the ancestor takes an Est. for life And afterwards there is a limitation to his heirs or heirs of his body that the heirs should take by descent & not by purchase } —

This is layd down in Shelleys Case 1:60 & Col. 22:6 —
In our Case Lucretia takes an Estate for life the Gentlemen of the other side deny it; he did tis true my Lords; but then this brings it Exactly within that the rule & therefore the heirs of the body of Lucretia cannot be purchasers, but the Estate Tail is Executed in her and they take by descent according to that Rule — and this shews how disagreable and Inconsistent the Construction Contended for on the other side is with the rules of law — { But it has been sd. if the Intention of the Testr. be Clear tis no matter what wds. he uses provided ye est. wch he wd. devise be in itself Consistant with the Law — My Lords I must beg leave to differ in the particular — for to Change the Common known & accepted wds.

words would Introduce the greatest uncertainty and Confusion in the w[orld]
and be exceed[ingly] dangerous and therefore the Intention must not only be in it-
self, but also be Expressed Consistent with the rules of Law and then he quot-
ed Co. Lit 525 Soul and Gerald where he said it was to held
My Lords were this the Case of a deed there cd be no doubt but it would Create an
Intail to Lucretia & there is no reason to depart from the Rule of Law in ye Case
because a different Construction would be absolutely Inconsistant with
the design and entent of the Testator — 2. Ob. But it is objected that
the devise to Lucretia is expressly for life — and the devise to the heirs of the
Body is after her decease A: The Devise in King and Melling is Exactly in this man-
ner for the words are "To B. Melling my son for and during his natural life and
after his decease I give the same to the Issue of his body lawfully begotten on
the body on any 2d Wife wch he shall happen to marry with — And yet in this Case
it was resolved in the Exch: Cha. upon great deliberation by the advice of Lord
Hale that by the Son had an Est. Tail — Therefore if the Case Stood here there would
be no doubt — 2. Ob: But its farther Objected yt ye devise to the Heirs of the
body of Lucretia begins with new devising wds wch is Item; on wch great Stress
is laid, and the Case of Hopewell and Ashland is quoted to shew the meaning
of that wd — and it was also sd that the devise to Lucretia is compleat & finished be-
fore that to the heirs begins — 2. A: My Lords I beg leave to observe yt
makes no difference for if there be a devise to one for life & after a limitation to
his heirs the Heirs shall not take by purchase but this limitatn vests in ye
Ancestor tho there be 20 Intermediate devises because the heir is looked up-
on as pars antecessoris and he can have no other dur: ye his life Co. L. 21 b
Ob: There was no other Objectn made taken from the Circumstances of the
family & was yt ye Test. design to vest ye Inheritance in ye Son whose the . . .

to Lucretia least give it to her she should be Influenced by her husband to Cutt off ye Son and Daur: of Lucretia who were then alive and to whom this Objection would Insinuate the Testator had a View in making ye will

If my Lords had the Testr any such Intention nothing was Easier than to have given ye Son the Estate by name – and since he has not done so but devised to the heirs of the body of Lucretia not only begotten but to be begotten wch wds cannot possibly be applied to the Son and Daur: ye alive tis plain he cd have no particular View to them – & And since he had not the Circumstances of the Family prove the direct Contrary to this Objection they prove his design was to vest an Estate Tail in Lucretia wch wd should descend to and benefitt not ye Son only but all her Children as they should happen to be her heirs whether ye were in being or not

Ob: The main Objection is that the wds to his or her heirs for ever being Superadded to the wds Heirs of the body must make them wds of purchase or be Absolutely Void

A.V. Tis of much more Importance that all the Children of Lucretia sh.d be provided for pursuant to the plain meaning of the will that that one of ye sd should be a fee simple and therefore a less Inconvenience to Reject or Restrain these wds than wd be Introduced by the Contrary Construction which wd Create Rejection of the most Important parts of the will

Those wds to the heirs of the body gave Lucretia an Est Tail by the rule already mentioned to your Lordships & ye subsequent wds cannot Change it – & My Shelly v Cave 1. Co. is an authority Expressly in point, wch was a Conveyance to the use of Ed: Shelly for life without Impeachmt of waste & after his decease to the use of others for 24 years and after the sd Term, then to the use of the heirs male of ye body of ye sd Edwd & of the heirs male of the body of such heirs male – And tho it was argued yt the Intent of the parties appeared very plain yt ye heirs male of the body of Edwd Shelley sh.d take by purchase – and also that the additional wds of Limitn & of the heirs male of the body of such heirs males must be rejected if they did not take by purchase both wch are the great arguments made use

use of On the other side yet it was adjudged by all the Judges of England Except one of the Justices of the Coīon Pleas that the heir of the body of Edw.d Shelley was in course and nature of a descent because he claim.d the use by w.ds of Limit.n And so of Rchase —

D: B He made no answer to the Attrey Gen.l His Distinction of this Case —

There have been sev.l Cases quoted on the other side but I hope not one of any Weight against us — 1 Archers does not at all come up to ours for it was a Devisee to Rob.t Archer for life & afterw.ds to the next heir male of Rob.t — & heir in the singular Number is not a proper word of Limitation for if Land be given by deed to A and his heir tis a void Limitation and therefore y.e Case is not at all Parallel to ours wherein where in the word Heirs in the plural number which is a proper word of Limitation is used — And I apprehend my Lords tis with great difference I say it that your L.dships have no authority to change the word Heirs to Heir in the singular number — 2 Clerk & Day which has been quoted is of the same nature with Archers Case and needs no other answer —

Papilion & Voice was an Executory Trust and Conting.t remainders to be preserved & therefore not at all similar to our Case. And besides as to y.e real Est.s it's still undetermined — 3 Seale and Grayson was a Devis.t to stand seised —

Loddington and Kime was a Devise to the Issue Male & not heirs of the body & therefore not at all Equal to our Case for the w.d Issue is not a proper w.d of Limit. But as Judg.t so from the Circumstances of the will and my Lords there is no rule in Law y.t whenever the ancestor takes an Est. for life and after there is a Limitat.n to his Issue that the Issue should not be purchasers — so that the Case of Lod. & Kime was by no means within the rule but ours is Exactly within it & therefore requires a different Construction from y.t Case — 4 The case put by Anderson in Shelley's is not adjudged but put as a Case and he was y.n no judge but a Counsellor in Common with Council to put Cases for Argument sake but I believe y.r Lordships will not think Cases thus put of any Authority —

Then he quoted the Case of Sparrow and Shaw in the house of Lords Viz. Lid
M.r Shaw and Wright and then the Case of Goodwright and Pullen adjudg.d mine in
the Case a great many Circumstance and Absolutely in in point Viz —
I give and bequeath unto M.r Lisle for and during the Term of his natural life &
from & Heath of the said M.r L then I give & bequeath Ea. in tail to the heirs male of the body
of the said M.r L Lawfully begotten and his heirs for ever and in Case the said M.r L should dye
without such heir Male then I give and bequeath unto Edw.d L. for & during the Term of
his natural life & after his death then I give the same to and for the use of the heirs
male of the body of the s.d Edw.d L and his heirs for ever. and for default of such heir
male then I give the same to and for the use of J and his heirs for ever — Wherein
are new. add.ns of limit.n superadded as in our Case — and words w.ch carry a differ.t Estate
from the former words and yet was adjudged an Est. Paid in Fee — Tho my L.d is
Absolutely in point as therefore we humbly hope your Ships will — Affirm
the judgm.t of the Governour and Council of Barbados —
M.r Atwood said he himself was of Council in this Case of Goodwright and
Pullen and Sitted in and Offered to shew his notice — M.r Ryder —
My Lords if the words heirs of the body in this will are words of limit.n of Est. And of
purchase y.t an Est. Paid Vested in Lucretia and from her descended to Wardall An-
drews y.t Est having never been heard Wardall Andrews could not devise it and Consequen-
tly the appellant has no title — 2. That these words are generally words of limit.n would
not be denied and it must be owned also that they may be w.ds of purchase —
The rule is where ever the Ancestor takes an Estate for life & after there is a limit.n to his
heirs & heirs of his body &c. y.t sh.d be w.ds of limitation in & y.t is our Case —
3. But this Object.n That this may be varied by the Intention of the Test.r —
4. This Int.n must be very Clear as is adjudged in Wilds Case 6 Co — But this so far
from it in the present Case that it was manifestly the design and Intention of
Wardall the Test.r to give Lucretia an Est. Paid — And this will appear by your —

&c your Lordships by Considering the Consequences of such Construction, & Comparing with the sev^ll^ parts of the Will — But before I come to this w^d^ beg your Lordships Indulgence while I Endeav^r^ to shew the grounds of the Gen^l^ rule —

1 The first my Lords is because the word heirs Ex vi Termini implies persons who take by descent — and this holds tho there be sev^ll^ Intermediate Estates —

2^d^ The heir is looked upon as part of the ancestor, for no man can have an heir while he lives — & 3^d^ The Abhorrence the Law has to put the Est. in Abeyance

4^th^ The uncertainty y^t^ w^d^ otherwise ensue not only who shall be heir but also whether a Contingent remainder shall ever Vest or not —

My Lords all these reasons should most strongly in y^e^ Case for if these w^ds^ sh^d^ not be Construed w^ds^ of limitation the remaind^r^ to the heirs of the body of Lucretia w^d^ be Contingent & Uncertain & Lucretia may bar it with y^e^ greatest Ease —

The remainder also to the Testators own next heirs would be Contingent & Uncertain & may be bared in the same manner — & and this fully answers all the objections that can be taken from the Circumstances of the Test.^rs^ Family at the time of the devise — For the Estate Contended for, w^d^ ans.^r^ no end for it may be destroyed by a Comon Feoffment by a Lease and Release and I doubt by even bargain and sale made by Lucretia and tho such an Est. may be created, yet it cant be Immagined y^t^ any man w^d^ design such an Est. because such a Design would be Absolutely fruitless and Vain —

But an Estate Tail can be barred only by a perticular mann^r^ of Conveyance w^ch^ carries with it a good deal of difficulty & very often the person dyes before it can by affected — & The remainder to the next heirs of the Test.^r^ is to be no more than the Law w^d^ Imply and the right heir shall take the Reversion — Now my Lords Lucretia is found to have been heir to the Test.^r^ & therefore by the descent of the Rever^n^ upon her before the Contingency happens y^e^ Conting.^t^ remainder

Remainder contended for w^d be destroyed tho' she had made no Conveyance at all

And tho' when both Estates are Created by the same deed there shall be an opening

[to let in a] Contingency when it happens as in Lewis Bowles Case it by [no] means shall

never be when the Estates arise from different Conveyances

{This remark m^r Ridesman
{laid a little stress upon but he was at a loss
{how to apply it on either
{Side and I believe he de-
{signed here

My Lords the intention of the Testator is the principal rule in Construction of

Wills — By your Construction the purpose and design of m^r Wardall w^d be affected

but the Contrary Construction Contended for on the other side would Intirely prevent

and destroy it and this will sufficiently evince to your L^dships y^t it was his de-

sign and Intention to give Lucretia an Estate Tail — His principal view

was to provide for all the Children of his Dau^r Lucretia — This appears not only

by his devise to the heirs of the body of Lucretia begotten and to be begotten but al-

so by his limit^g a Remainder over to his own next heirs for want of such heirs of y^e

body of his Dau^r — For by these words he has not only provided for all the decen-

dants of Lucretia expressly — but also determined the time when he designed

[the Re]mainder over sh^d take affect in possession and that my Lords is not a while there are

heirs of the body of Lucretia, but when there happens to be a failure of y^m for y^e

words are and for want of such heirs of the body of my s^d Dau^r so y^t it is most Evident he

designed all y^e Children of Lucretia sh^d have benefit & advantage from y^e will

Now my Lords by your Construction Lucretia takes an Estate Tail & y^t will descend to

all her Children as they happen to be heirs of her body

And the remainder also to his own next heirs may take affect upon failure

of heirs of the body of Lucretia accord^g to the words and plain mean^g of y^e W^ll — But

by the Construct^n Contended for on the other side the Eldest son of Lucretia takes

a fee simple by purchase, and all the rest of the descendants of Lucretia are de-

prived of the benefit designed y^m by y^e will & the remaind^r to the Test^r own next

heirs to be Void and Vain for it never can take affect. Indeed

Indeed it is said on the other side that the rest of the decendants of Lucretia [illegible]
may take by decent but this I apprehend were it so is an answer —
For still they do not take by this will and therefore the Intention of the Test.r who de-
signed they should is not Complied with — But my Lords the Case is quite
otherwise for suppose Lucretia takes a fee Simple by purchase the whole vests
in the Elder son and if he dies without Issue it shall go to the heir on the part of
his father who is no relation at all to the Test.r — and the second son
who is then heir of the body of Lucretia and of the blood of the Test.r for whom the be-
nefit of y.e devise was Intended w.d be disinherited & can never take because not of the
whole blood of the Elder — Our Construction is not lyable to any
Objections as these — Tis a natural and Easy Construction and In-
troduces such a Settlem.t as is Commonly made and such as every man who
Considers would make — Ob: But tis obj. that the Devise is to Lucretia
Expressly dur. her natural life — A: In a Common sence she has it for life
— and y.e is the Comon Case Lies so in King and Melling and yet that was adjudg-
ed an Est Tail in B to whom it was devised for and during his natural life —
Ob: Tis also an obj: of the devise to the heirs of the body of Lucretia is after her decease
A: This Circumstance is also in the Case of King and Melling & is implied in ev-
ery Case — My Lords all these Objections were made to that Case & overruled —
Ob: Tis Obj.d by M.r Att.y y.e words of limit.n are used for the sake of y.e first Devisee
only & therefore if the words heirs of the body in our Case be words of limitati-
on it follows then were used only for the sake of Lucretia & not of the heirs of that body
A My Lords I must beg leave to differ in y.t particular for w.ds of limit.n are
sometimes used for the sake of the heirs of [illegible] 1.st Devisee
In Case of Entail the Issue Claims param.t his Father he Claims f-
orman Don. by force of the stat and therefore the words of Limitation are
used for his benefit and yet this does not make him a purchasor —

Ob: But the great objection is that there are additional wds. of limitn. — to his other heirs forever grafted upon the words heirs of the body, & unless these additional words do make the former words of purchase they must be absolutely rejected. Contrary to the rule of Construction &a — A: 1: 'Tis common in Wills to restrain the word heirs when generally used, to make it Consist with ye design of the Testr. there are sevl. Cases to this purpose but I shall only quote one and yt the Case of Domer and Meynel. Raym. 452 which was a devise to his Daurs. and their heirs and in Case happened to dye without Issue, then a remainder over in this Case it was resolved the Daurs. took an Estate Tail the word heirs being restrained by the Intentn. of the Testr. to heirs of their bodyes — and so in our Case it must be restrained otherwise the Intention of the Testator is limiting ye remainder over for want of such heirs of the body of Lucretia shd. Inherit as yt shd happen to be her heirs wch is a reasonable & just provision wd. be Intirely Frustrated —

2°. 'Tis most probable the Testator did not know the force of the wds. heirs forever for he adds wds. of limitn. to the remaindr. to his own next heirs which would carry without ym. words — The Cases quoted on the other side are —

Archers Case 1:60 which was a devise to Robert Archer for life and afterwds to the next heir male and a in the singular number — and the reason given for the Judgmt. in my Lord Cookes report of this Case is founded on this very Circumstance and there is not the least notice taken of the additional words of limitation in ye report as a reason for the Judgmt. so yt it is not at all parallel to our Case — Clerk and Day is of the same nature —

Papillion & Boice was an Executory trust and no doubt when a Settlemt. is to be made in a Court of Equity the Intentn. of the Person who directed ye settlemt. wd. be the rule and guide — and since there were in that Case Trustees appointed by the will to support Contingent remainders there must be Con-

Contingent remainders to be supported — It was the manifest design of the Testor
there should be such — There was also in that Case a power to make a Jointure
and that a limitted one Limitted to be in proportion to the fortune of the Jointu-
-ress and since Tenant in Tail may make a Jointure in Consequence of his Est.
and does not need such a power — And the limitn. of that power to make a Join-
ture in proportion to the fortune would be void if the devise should take an Est.
Tail it was therefore from these reasons Construed an Estate for life but there a[re]
no such reason in our Case — 2 Lisle and Gray was adjudged
merely on the words which Could no other way be Satisfied for after a Limitn. to [the]
1. 2. 3 and 4 Son of Edward the words are and so severally and respectively to every of
the heirs males of the body of Edward wh. shews that by heirs males was meant on[ly]
by the other Sons of Edward — and besides the words severally & respectively ac-
cord. to their ages and Seniority are applicable only to sons & not at all to ye heirs of Edw.
The Case put by Anderson in Shelleys Case is not adjudged but by him as a Counc[il]
— As to what has been said by Mr. Attey. that is put and not denied in the Case of Lod[dington] &
Hime in Leo. Surely that goes no farther than ye. ye the Book does not say it was denied
Loddington and Hime does not at all come up on to our Case for that was —
1. Without the Impeachmt. of Waste 2: The word of purchase was Issue and not heir[s]
3: The words were in Case he gave Issue male which are manifest words of Conting[ency]
— whereas in our Case the words are for want of such heirs of the body and begotten
and to be begotten — 2 It appears by Lev. Rept. of that Case that the Testator ha[v]-
ing Devised several rent Charges out of the Lands adds these words Earnestly [re]-
quest my Nephew to whom I have devised the Inheritance of my Lands wh. to
see them paid and these Words are again repeated in ye Will wh. Clearly shews his [de]-
sign that Le Armin should be only Tenant for life it appears also that Le Armin
at the same time of the will was an Old man & had no prospect of Issue — all
which are very material differences — 2 My Lords the Case which

which support our Construction are not Cases put by Council or Cases not yet resolve[d] but Cases Solemnly adjudged and upon great deliberation and such is Shelley's Case & and then he Stated it at large — {This my Lords is an express autho-rity in point which is notwithstanding what Mr Nobby has said to distinguish it — for here are words of Limitn superadded as in our Case and words which carry a different Est from that wh passes by the former words and yet notwithstanding it was resolved by all the Judges of England Except one of the Jus. of the Com: Pleas That the heir of Edwd Shelley was in by descent and the reason given is because he took by words of Limitn and not of purchase — & That a Differt Est. wd have passed by ye additional words of Limitn in ye Case from yt wh passes by the former words will be clear to yr Lordships if it be considered that if the heir of Edwd Shelley had taken an Estate Tail by purchase by force of these additional words that would have been an Estate decendable unto the heirs Males of the body of such heir and Consequently whenever there happened a failure of Issue male of that heir ye Est. must have reverted to the Donor tho there were heirs male of the body of Edwd Shelley in being — But now the heir of Edw. Shelley being in by decent takes the Estate descendable not to the heirs males of his body only but also to every heir male of the body of Edward — So that tho there should be a failure of Issue male of his body the land shall not but shall descend to that person who shall then be heir male of the body of Edward Shelley which is quite differt Est. from ye former — Legatt & Sewell 2 Ver 551 is another Authority & a much Stronger Case than ours Viz George Legatt by will directed Welles his Exr to invest the residue of his personal Est in land and Settle and in Tail the same on William Legatt for life he paying &a and after his decease to the heirs male of the body of the said William, and the heirs male of the body of every such heir male severally & successively as they should be in priority of birth and Seniority of age and for want of such Issue remainder over — This Case was refered to the Judges of the Common Pleas for their Opinion all of the Except Tracy agreed yt Wm Legatt was Tent in Tail and the Lord Chance-llor agreed accordingly — & My Lords there is another Case which I should not

not Trouble your Lordships with the repetition of but it agrees so exactly with the Case now before your Lordships that I dont know how to omit it — And if ever there was a Case exactly in Point this must be it and then he quoted the Case of Goodright and Dullen before quoted by Mr. Fazakerly — From the Resolutions I hope it sufficiently appears that Lucretia took an Estate Tail by this will that Wardale Andrews her Son took only by decent from her — But if your Lordships should be of Opinion that Wardale Andrews took by purchase by this will, yet I humbly apprehend he took only an Estate Tail — And if there was an Estate Tail anywhere Either in Lucretia or her Son the appellant has no Title — My Lords in all these Cases where the words heirs of the body are words of purchase they are not only so but are also words of Limitation — This was the Case of John de Mandevil and Maud quoted by Mr. Soll. where John de Mandevil took an Estate to him by heirs of the body of his father which after his death without Issue descended to Maud his Sister as heir of the body of her father — and this also is the Case of Lile Tilson Co. Litt. 26 a — And therefore in our Case the words, heirs of the body of my Daughter shall vest an Estate Tail in the son tho he takes by Purchase which shall be descendable to the heirs of the body of Lucretia

Ob: But tis obj: that the additional wds of limitn in our Case convey a fee simple to the

A: Twod be more reasonable to restrain or even make void these additional words than by giving the Son a T. to frustrate the Primary Intention to the Testator —

But my Lords there is no occasion for this — These words are Capable of a very proper Construction Consistant to our Scheme which is that Wardale Andrews the Son took an Estate Tail with a fee simple Expectant — And this is not a Constructtion of mine but of my Lord Cookes 1: Ins. 21. where he says if Lands are given to one and the heirs of the body habendum to him and his heirs he shall have an Estate Tail with a fee simple Expectant — and

And if more also the Son takes by purchase by the Devise to the heirs of the body of Lucretia tis the same as if the Lands had been devised to him and to the heirs of the body of Lucretia, and the additional words to his or her heirs for ever are the same as habendum to him and to his heirs wch. brings it exactly to my Lord Cokes case

Since therefore &a

The Wenesday following Mr. { Attorney / Sollicitor } Replied

Mr. Attey — My Lords the Case of Andrews and Dales comes again before your Lordships upon the Appellants reply – but before I proceed in this I believe it may not be improper to throw what has been said on the other side into some method or order that your Lordships may with the greater Ease see the Justness and sufficiency of what we shall say in our reply —

My Lords the heads insisted on by the Gentlemen were four. 1st. it does not appear with sufficient Clearness from ye words of this will yt ye Testr. Intended Lucretia should take an Estate for life only — 2d. That tho such Intention should appear from one part of the will yet it would be Contrary to another part of it — 3 Admiting such Intention in the Testator and that it appeared with sufficient Clearness, admiting also that it would not be Contrary to any part of the will yet the Testator having used the word heirs in the plu: number such Intention would not be agreeable to the rules of law — 4. admiting that Wardale Andrews was a purchasor by this will and that Lucretia took only an Est. for life yet Wardale took only an Estate Tail — &. To these 4 heads that has been said on the other side may I think be properly reduced — & 1st. As to the first my Lords the Gent. did not quite agree between themselves Mr. D. allowed yt. by the Express devise to Lucretia she took an Estate for life and if this be a proper admission it follows

This point is with us for it must be something Exceeding Strong in this Will & [illegible] consistant with this Express Devise that Can over rule it nothing of which appears in the Case but on the Contrary a full Intention to make Lucretia a Tenant for life only is Evident from every part and runs through out ye whole Will

The Gentleman who Spoke second did not quite agree yt Lucretia took Est. for life But sd yt supposing her Tenant in Tail she had the Est. in a Comon sence for life

This my Lords I apprehend is a distinction without any manner of foundation - for an Est. Tail and an Estate for life are absolutely different Estates and have different powers annexed to them - Tenant in T. may bar the Intail & all reversions & remainders but Tenant for life cannot & if Tenant for life levies a fine &c it is a forfeiture of his Est.

And therefore the admission yt Lucretia had the Est. in a Comon sence for life is either nothing at all & so no ansr. to the argumt. drawn from the express devise to her for life or Else it is an admission yt She had an Est. for life in a proper sense, wch is intirely distinct from an Estate Tail but to consider this point more fully your Ldships will see what an ansr. has been made as to the Argumt. taken from ye additional wds of limitn. to his or her heirs for ever wch wds we Insist, Evidently shew the Intentn. of ye Testor that Lucretia should take only an Est. for life & yt ye person who shd. happen to be heir of her body at the time of her death should take the Inheritance in ffee simple - & yt if these wds are not Construed thus they must be Intirely rejected and the words of the will Contrary to the known rule of Construction — Those who had distinguished ye Case from Shelleys they Endeavoured to get rid of these additional wds of limitn. as in Shelleys Case but my Lords there is no Colour of this — In Shelleys Case the additional wds of Limitn. were rejected because they were surplusage - because they Could Carry the Est. no farther than the former and were therefore Immaterial — Now my Lords what is the Consequence the Gentlemen of the other side would draw from this - Whether from the authority of this Case [illegible]

would reject words that are not surplusage, words that have a quite different
sense from the former words that are the most material and Operative in the Deed
& capable of a very proper Construction — Vivelyn my Lords there is no
Warrant in that Case for such a Consequence as this — But I must insist
that the additional w.ds of Limitation in Shelley's Case would Carry the Estate to
different persons from those who should take by the former words —
This my Lords is not so for the former words are to the heirs males of the body of
Sir Edw.d Shelley & additional w.ds and to the heirs males of the body of such heirs males
of the body & additional w.ds are included in the former for as long as there are heirs males of the
body of the heirs males of Sir Edw.d Shelley there must be heirs males of the body of Sir Edw.d Shelley
himself so that all such heirs take by the force of the first Limitation therefore the subsequent words
of Surplusage & can Carry the Estate to no other person but such as would have taken without it
My Lords the Gent.n Counsel would have the words to him & his heirs forever signifie
nothing or at least be understood as heirs of the body — and it was said
there are many Cases wherein the Gen.l w.ds heirs have been restrained to heirs of the body
My Lords I admit there are such Cases but they are only to comply with and support
the Intent of the Testator which I am advised to be and that his heirs and if the die without
heirs then to his Brothers in this Case because it appears the Test.r used the w.ds heirs
& heirs of the body, because it is impossible for one Brother to dye without heirs in
the life of the other there to support this Intent the word heirs shall be construed
as he designed it — It shall be restrained to heirs of the body to make the Clause
effectual — But what Conclusion do the Gent.n Draw from this which
is not here in our Case for the w.ds to him & his heirs forever will clearly shew and express the
Design of the Test.r shall also be restrained — This my Lords is no Consequence
no Consequence at all for those words which are inconsistent with the Intentions of
the Testator shall be restrained to support the Intention & make the Clause
effectual & tho' it does not follow those words which are not inconsistent shall
be

be restrained now my Lords the Clause is already Effectual in our Case and this would be to prevent & not support the Intention of the Testator —

These are the answers which have been made to our Argument on this head and I hope I have shewn your Lordships y.t they are not at all Satisfactory — And when the words his or her come to be Considered this will be still plainer —

When the words his & the body are words of purchase they are Called in Law descriptio Personæ, now the word his or her being related only to the heirs of the body of Lucretia and not to her are a plain description, and shew the Testators principal View was the benefit of the heirs, and that he designed them the Inheritance and that Lucretia should be only Tenant for life and not have it in her power by Cutting off the Intail to deprive the Test.r Grand Children of the Inheritance he designed them — & From these reasons I apprehend it appears with sufficient Clearness that the Test.r designed Lucretia an Est.e for life only — I won't Contend that the w.ds for life or after decease alone would make Lucretia Ten.t for life, but when they fall in with y.e other Circumstances of the will as here they do they are of great Weight —

2 The second head I intended on was that it should appear from one part of the will that the Testator designed Lucretia an Estate for life, yet such Intention not be Consistent with another part of the where by he limits the remainder of his own real heirs for want of such heirs of the body of Lucretia — I am y.t of the will they say I've plain the Testators had it in View to provide for all y.e Descendants of Lucretia and this is to be effected only by giving her an Est.e Tail which must descend to them all — But this my Lords is not well founded — for the Construction provides for all the descendants of Lucretia as well as their Sons Could not take at once by either Construction, but the Eldest must have the whole by both Constructions the Eldest must distribute

and bar the rest of the descendants, as well by one as the other Construction
if he should not but suffer it to descend then the rest of the descendants of Lucr
tia are provided for by your Construction as well as theirs with this only difference
that by ours they take a fee simple by descent, by theirs a fee Tail except some Cases of
the half Blood put by Mr. Ryder and that the Testator had not no Law at the tim
of the will or if he had it appears it was not his design to provide for that Contin
gency for this is the very force of these words to his or her heirs forever, and 'tis
what distinguishes this Case from Shelley's and all the other Cases and by our Con
struction the Issue of Lucretia by a second husband may take the remainder li
mited to the next heirs of the Testator — It was insisted on our side that words
of limitn. are used only for the sake of the 1st Devisee, here the words heirs of the body are used
only for the sake of the Issue of Lucretia, as appears by the words his or her which relate on
ly to the Issue and can no way be applied to her, and therefore they cannot here be
words of limitn. but of purchase — To this it was sd. the Issue in Tail claims per for
man Doni paramount to his Father — But this does not prove the words of limitn.
are not used for the sake of the Donee on the contrary 'tis plain they are for if Devisee
in T. dies in the life of the Devisor the Issue shall not take as was adjudged in the
Case of Goodright and Wright — in the K. B. 8o. Geo. { Vid 1 P. W. 397 and Maclesfields Cases pa. 869
And there it was compared to the Case of Bret and Rigdon in Plowden —
It was objected that our Construction would give the Issue of Lucretia a more
uncertain Estate — and that the Estate we contended for would answer no
end because being contingent it may be easily destroyed by Lucretia
But my Lords if it be considered that Lucretia was a married Woman at the time of
the will that Objectn. will point the other way — for by the act of assembly in Barbados
Lucretia may bar an Est. Tail but I have read the Act and there are no words in the 1.3
Sections which will Enable her to bar a Contingent remainder —
Nor can there be any Construction on them which will Enable her to this because such

Such a Construction w^d was a wrong — { And Lucretia being married
could not make a Discontinuance to destroy them it was said the Contingent remain-
der would be destroyed by the descent of the reversion — { But this is
not so for this is a Case of a new devise for want of such heirs of the body of Lucretia
like the Case of Lod and Plime — { 3 The 3^d head Insisted on was Viz:
My Lords the rule y^t the Intent^n must be agreable to the rules of Law, must as
was before Observed to your Lordships extend to things & not towards the true no-
tion of it is that a man by his will cannot Introduce any new kind of Estate
cannot Create any Estate which Cannot be Created by deed at the Com. Law —
To take it in any other sense w^d be to tye us down to those forms of the Common Law
which are of the greatest Nicety and attended with the greatest difficulty in y^e Observa-
tion of positive & arbitrary rules of Expression — w^ch w^d surely give no Indulgence to a
Devisor w^ch yet was the Original design of y^e rule y^e ~~Test^r~~ being supposed Inops Concilii
Indeed it was said y^t the Intent^n must be Expressed agreably to the rules of Law
but y^t Cannot be unless it may be s^d that useing words in a sense different from
that of the Common Law is Creating a new kind of Estate w^ch cant be Created by
the Common Law — { It was admitted y^t y^e w^ds heirs of the body may be w^ds of
purchase however if not it has been fully proved by authoritys w^ch are not Ins^ft
1^st The Case put by Anderson in Shellys Case is not denied there & in Leo Rep. of L^d
& Plime tis stated as the Opinion of the Court and tis a Case directly in Point & stronger
ours, because of a Deed — { 2^d Archers Case is still unanswered. for tho y^t was
a Devise to the next heir Male yet it was admitted y^t the word heir was a proper w^d
of Limit^n in a will and so tis adjudged in King and Melling and in one Rolls
686. and yet in that Case of Archer it was resolved a word of purchase from the force
of the additional w^ds of limit^n as my Lord Hale Observes in Vent Rep of King & Melling
And therefore in our Case y^e w^ds heirs of the body tho a proper w^d of limit^n ought to be adjudged
w^ds of purchase from y^e force of the additional w^ds of limit^n to his and her heirs for ever annexed
— to them — &

3 Loddington & Kime was quoted by us to shew y^t the remaind^r to y^e Issue ... may subsist with a fee simple to the heirs of the body of Lucretia — But we may use it to another purpose — to prove that the heir of the body of Lucretia took by purchase for in King and Melling the word Issue is resolved a proper word of limit^n in a will and yet in that Case it was resolved a word of purchase from the addition^l words of Limit^n and other Circumstances of the will — And so in our Case the words heirs of the body tho otherwise proper words of limit^n ought by a parity of reason to be Construed w^ds of p^rchase from y^e additional Limit^n and y^e oth^r concur^g Circumstances of the will — {and tho Issue by the word of purchase in Lodd^n & Kime y^e no material difference for in K^g & Melling my Lord Hale argues upon y^e principal That Issue in a will is Equivalent to the heirs of the body —

4 Papillion & Voice is Still an authority for us for there has been no answer to the Case of Bale and Coleman quoted by us to shew y^t there is no difference between an Executory Trust and an actual Devise of the Land &c: & y^t was so far Carried by my L^d Hoper that upon a Bill of review he reversed a Decree formerly made upon the Supposed difference And the Law is also declared to be so in the Case of Legatt and Jewell 2 Ver 558 —

I was indeed s^d y^t the Case of Pap: to Voice as to the real Est^e is still undetermined but y^t can make no difference since y^e p^sonal Est^e was to be invested in Land and y^e executory trust must be Construed as an actual Devise in y^e w^ds of the Trust —

Lisle & Gray tho determined on the force of the words as was said on the other side is still an authority unanswered for it proves y^t the Son may take by p^rchase by the w^ds from y^e Intent^n of the p^ties tho the ancestor by the same Conveyance takes an Est^e for life — {and tho the Case of Lisle & Gray was a Covenant to stand seised as has been also s^d on the other side yet that is not the reason of y^e Judgm^t for since these & 10 w^ds are Construed the like Estates at Com Law the reason is because it appears to be the Intention of the p^ties that the Son should be a p^rchasor and y^t tho in the case of a deed made him such — and therefore in our Case since the w^ds heirs w^ch are words of Limit^n that are the words heirs of the body are and since the Inten

Intention Equally as Clear as in this Case it ought also to guide the Construction and make the Son of Ja. Casselian Purchasor — § The Cases quoted on the other side are

1 King & Melling wch was a Case of great doubt and my Lord Hale himself was of a Contrary Opinion upon the 1st argum.t but afterwds observ.d yt if the remainder over was not to take place as long as there was any Issue of B: Melling; he s.d it was Clearly the Intention of the Testator that the Land should go to all the Issue of B. Melling which he justly Concluded was an Estate Tail

But my Lords what distinguishes that Case from ours this, yt in that Case there are no additional words of limit.n as in ours for suppose there were, then the Judgm.t wd have been yt B. M had only an Est. for life & ye Issue took by Purchase, for there is no Warrant from ye Case to say otherwise & this so actually resolved in ye Case Lodd & Kime —

2 Sparrow & Shaw was unanimously resolved in the K.B. to be an Est. for life in the Sisters — and in the house of Lords 7 of the Judges were of the same Opinion I must own three Learned Judges differed from them: — But those who were of Opinion that ye Sisters took an Est. Tail in that Case went upon this, that the addition w.ds of limit.n could not Carry the Estate farther then the former words and therefore were merely Surplusage as in Shelleys Case — But if the additional words of limit.n had been otherwise as in our Case ye Judgm.t had also been differ.t for the Case wd ye be like yt of Lodd & Kime —

Goodright & Fullen was Ita as Pay & Kerly only he omitted ye remaind.r over for want of such heir male of ye body of J. S but I saw ye record & the Case was wm. Pay & Kerly &c

My Lords by a Ms. kept which I have of this Case it appears the word his was that which made the difference for yt w.d must relate to ye next antecedent wch was B. himself and Could not therefore be referred to the heir male & so the Est. T. was lost in him — But the w.d his or her in our Case cannot possibly be applied to Lucretia but relate to h. Issue wch may be male or female & therefore not at all like that Case.

4 Legatt & Sewell was Ita — as m.r Onslow — § My Lords I must own yt three of the judges of the Com: Pl. were of Opinion that William Legatt took an Est. T. & yt Clerk But Tracy differed from them and sent my Lord Hooper a seperate Certificate

Certificate with the reasons of this Opinion.

and ye heard a Copy of Gray's reasons and Certificate

My Lords in ye Case the additional words of Limitn. are surplusage as in Shelly's Case - For they can carry the Estate no farther than the former words & it is a Considerable abatemt. of the authority of this Case That my Lord Hopes when he read Grays reasons sd. he thought ym very good however since he had sent the Case to the Judges of the Com: Pleas for their Opinion he wd Decree accordg to yt of ye Majority

4 The last head Insisted on was, that tho Cardall Andrews should be admitted to have taken by purchase by this will, yet that he took only an Est. Tail

and to support this a Case was quoted out of the 1st Inst: as a Vey

But my Lds yt Case is not at all like ys for in yt Case there are sevl Limitations and 2 different Estates - but here the words of Limitation are used only in one Instance

The Judgment of the Court of Errors was affirmed