Richard Morris { on the Demise of William Andrews of Barnshall Gentelman

Plif in Ejectment in Barbadoes and Appelant Here

Isaac le Gay & John Wood - } Defts and Respondants

The Case

In Eject brought in the Common Pleas at Barbadoes on not guilty a spel

Verdict finds

That Thomas Wardall seised in fee simple had issue a Daug.r Lucretia

That she married George Andrews and had Issue

by him { a son Wardall and a Daughter Sarah now wife of Robert Hales Esq.r

That the said Thomas Wardall so seised, and Lucretia being in full life & having such Issue as aforesaid, the s.d Thomas Wardall Devis.d in y.e w.ds follow.g

Item - I give and bequeath unto my Daug.r Lucretia Wife of George Andrews of Barbadoes Esq.r 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.t with a £100 a year to my Wife Margrett Wardall as also my store house at St Michals Town During the natural life of my said Daughter

Item I give and bequeath to the Heirs of the body of my s.d Daug.r Lucretia begotten or to be begotten and to his or her heirs for ever, after my said Daug.r Decease all my before named Plantation togeth.r w.th y.e negroes & all other Stock Freehold and Utensils thereto belong.g Charged as aforesaid as also few named Store house But for want of such heirs of the body of the said Daur: I do give & bequeath the afores.d Premes After the decease of my said Daur: to my own next.e Heirs and their heirs for ever

Then the Verd.t finds the Identity of the Lands in the Declaron and those Devis
the death of the Devisor seised &c — The survi and Seisen of Lucretia under y.e
the Death of George Andrews — And that Wardel Andrews survived
-cretia and George and was only Son and Heir of said George and also of
said Lucretia who was only Child and Heir of y.e s.d Thom.s Wardell y.e Fest

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 Qu
-tion are devised to the Lessor of the Plf in fee in Case W.m son of the s.d Wardall
sh.d die - without Issue or before 24) and that Wardall Died so seised -
became seised &c (and died without Issue and under 24 & y.t y.e Plf Clam.d
time — Upon arguing the Special Verdict in y.e Com. Pleas at Bar
badoes Judgm.t was given for the Plf - but a writ of Error having been
bit before the Govern.r and Council there as a Court of Errors that Judgm.t was
reversed and Judgm.ts given for the Def.ts

And from y.e Judgm.t of the Govern.r and Council the Plt in Eject appeal
his Majesty in Council — & this day being the 18.th of March 1730/1 the C
was argued upon the appeal at the Council Chamber at the Cock pit by

Mr. Attor Genl Sr. Chil York } for the appelants
Mr. Sol Genl — Mr. Talbot - }
Mr. Pazakerly } for the Respondts
Mr. Rider - - - }

Mr. Attry stated the Case reading over the apel Verd.t and then
My Lords if Wardall Andrews under whose will the Lessor of the Plt Cla
had such an Estate in the Lands demised as by the Law he may Devis
the Judgm.t in the Com.on Ps at Barbadoes was right and the reve
thereof by the Gov.r and Council wrong and the appell. has a good Ti

That

That Est wch can be devised is only a T'sple and whether Wardall Andrews had such Estate or not must be determ.d by the will of Thom.s Wardall & pticularly by y.e Clause of it Item & y.e Construction of that Clause the Construct.n of a will must arise from the w.ds of it & y.e Intent.n of the Test.r if agreable to the rules of Law — The w.ds 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 w.h w.ds to his or to her heirs for ever limitt.d 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.t Claims being found by the Verd.t to be been only son & heir to Lucretia had such an Estate in this Plantation as by the Law he may Devise

The Intention of the Test.r is the great Rule w.h guides the Construction of Wills & y.e Contrary Construction to y.s w.h 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 y.e w.ds of the will — But the words are Expressly for life — the Devise is to Lucretia during her natural life w.h makes it still the Stronger and the Circumstances of the Family at y.e time of making of y.s will as found by the Verd.t for we cannot go out of that P.t but every Obvious reason for y.s Intention & are a farth.r Conformation of it —

For Lucretia being at that time married and having a son & a Dau.r who were Grand Children to the Test.r it was natural for him to provide for y.m & had he given Lucretia an Estate Tail she might be possibly be Influenced by her husband to bar the Est.r and Cut them off from the Inherit to prev.t w.h y.e Test.r has given her only an Est for life — and because it was uncertain who would be heir to Lucretia whether the Son or the Dau.r for it was possible that Either of them might have died before her he therefore devis.d y.e Inheritance in T'sple to such Person as

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

And y^t is Evident from the words — It is or her heirs for ever w^h are undeniable wd^s of Limitation of Est and relate only to the Children of Lucretia for they can possibly be applied to herself — Ob. But it will be objected for I see it is hin in the printed Case that the w^ds Heirs of the body are w^ds of ye Limitation & whenever ancestor takes an Estate for life and after w^ds there is a Limitation to his heirs 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 us^d only for the benefit of the first Devisee — words of purchase are us^d for the sake of the p^son Described by them and not for advantage of the 1st devisee — and therefore if these words Heirs of the body of Son Daur be Construed Words of Limith, it would follow that they were used for the sake of Lucretia only and not for the sake of the heirs of her body the Grand Children of the Test^r w^h is plainly Inconsistent with the will —

The Devisee is to the heirs of the body &c is by a new Clause introduced with new divising words wch shews the Test^r designed to give to a new p^son and sequently such a new p^son must be a purchaser —

The Devise to them is Item I give &c —

Hopewell and Ackland 1: Salk 239 by m^r L^d Ch: Ld Grever — Item it an usual word in a will to Introduce new distinct matter. Therefore a Clause this Introduced is not influenced by or to Influence a preced^t or subseq^t sentence unless it be of itself imperfect & Insensible 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 wds heirs of ye body but such Issue as should be living at her Death & ye noth. I was to pass by ye Clause till the Death of Lucretia & to make ye plainer ye Test. has again repeated these wds Viz. & a The words to his or her heirs for ever Clearly distinguish ys Case from all the Cases that have been resolved on the Gen'l rule - wherever ye ancestr. & a and from shelleys Case 1:60 - for in that Case the additional wds of Limitn were adjudged surplussage, because they Could not Carry the Estate any Farther yn the former - But in this Case a new Estr. 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 Estr. 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 Psple 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 Lordships be inconsistent wth ye known rule that no part of a will shall be rejected wh is Capable of any reasonable Construction -

The words to his or to her bei. Gapplicable only to the Children of Lucretia shew ye Testr. knew he was describ. Gapson to take & ys brings the Case very near ye of Archer 1:60 And to the wd heirs in the plu: numbr. be here us'd yet ys little Impropriety of Expression shall never prevt. the Plain mean. Gof the Testr. from tak. Gaffect 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 & a - The Impropriety of the wd. Their was not regarded but the Intent. of the Testr. prevailed - And so in our Case it ought to prevail notwithstanding ye Incorrectness of the Expression wh probably wy. 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 tis not there resolved tis quoted in the Case of Lod-dington & Hime & Leo and not denied to be Law and I dont know y.t it was ever denied — The Case is if one makes a P.ffin.t to the use of himself for life and after his decease to the use of his heirs and of their Heirs Females of their bodies in this Case these words his heirs are words of purchase & not of Limi-tion. for then the subsequent words and of their Heirs Females of their bodies w.d be Void — The word Heirs is a Stronger word of Limitation than heirs of body and yet the words of Limitation than heirs of the body & yet these words of Limitation being supperadded to it made it a word of purchase because they Carried a different Estate from that w.h 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 Sup-added to the words Heirs of the body and Carrying a Different Estate from w.h w.d've passed by them words must also make them w.ds of purchase —

Papillion & Voice } At the Rolls 2: Geo: 2: 11: October 1728 — Cases in Lord Ray & Hardw.r 27.

Is also a much stronger Case which was —

A Devise of the Personal Estate that it sh.d be invested in Land to the use of A for life, without Impeachm.t of Waste Remainder to Trustees to preserve ting.t remainders and after the Death of A: Remd.r to the Heirs male of his Remd Over ther was also a Parallel Devise of the real Est. & apprehend.g there-maind.r was Executed in himself brought a Bill praying an Execution of the Trust — But it was decreed ag.t him as to the Personal Estate for it appears have been the Intention of the Test.r that the Sons of A should take respiv. & successively & y.t y.e Est. Pail should not be Vested in a Otherwise the Limitation to the Trustees to support Conting.t Remainders w.d be to no purpose —

And tho there may be a difference between Articles of Intermariage whereby
Settlem.t is 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
trust may be Construed as if it were a Devise of the Land in the very words of ye Trust
& not be Carried farther in a Court of Equity and this is so resolved in the Case of
Baile & Coleman } adjudged in Chancery Term Pasch Q: 1711: Vide 2: Vern: 670 —

Lisle and Gray Sr T T: 114 is a much stronger Case wh was —
John Lisle for the Settlem.t of his Lands in his Family and Blood Covenanted to
stand seised in the use of himself for life Remd. to Edw.d his Son for life remaind.r
to the 1st son of Edw.d in T Male with like remaind.rs to the 2: 3 & 4th Sons in T M &
so severally and respively to every of the Heirs males of the Body of Edward & ye
heirs males of their Bodies Rem.r to Wm Lisle — Resolved that Edw.d had only
an Estate for life for the words every of the heirs Males & a intend every other Son —
And the Jones says this Judgm.t was after words reversed in the Ex: Chamber
if a mistake for I have searced 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 ye ought to be so adjudged —
And this Case of Lisle and Gray proves yt the Intention in our Case is agreable
the rules of Law even if ye rule sh.d extend to the w.ds used by the Test.r in his will —
But the true notion of that rule is that a man Cannot by his will Create any Est.
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 next heirs and a fee Cant be limitted upon

upon a Fee and Consequently no Fee Simple to the heirs of the body of Lu-
cretia. It 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 Ludd and Kime in Salk Pitt Devise then he Sta
this Case at large as in Salked

And this Construction wl. ans. every View of the Pest. for if Lucretia has any
heir of her body such heir will have the Fee and when the Heir Dies the ne
heir of the Pest. will have the Land by Decent

And if Lucretia had no Heir of her body then the Fee simple Vests in the ne
Heir of the Pest. by his will — And there can be no person who wd. take by gwin
Lucretia an Estate Pail. y. wd. not take by this Construction

And tho the wds. of purchase in Lod. and Kime are not heirs of the body but
Issue Male this is no material difference for Issue Male in a will is Equi-
valent to Heirs Male of the body — And in King and Milling the w
Issue male are resolved proper wds. of Limtn. in a will and yet in that Case of Lo
& Kime they were adjudged words of purchase from the Intentn. of the Pest.
& by the same reason Heirs of body tho otherwise Words of Limitan. should here
from the plain design & mean. of the will be taken as words of purchase

Ob: — But it may be objected y. an Est. Pail shall arise to Lucretia by Implica-
tion from the Clause. But for want of such Heirs of the body of my s. Dawr.

A Such Heirs are words of Reverence — And if the former Construction wch. gi
the Heir a Conting. remaind. in fee according to the resolution in Lodd & Kime
right then no Estate can arise by Implication — Then he stated the
of Topham & Rampfield out of Salked and gave the reason therement. why an
Estate sh. not arise by Implication and the distinction put at the End of that
Case but took no notice that Salked mis reports that Case and Concluded
a recapitulation of his principal reasons and hoped the Judgmt. 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 wll in favour of my Client at least yt I know of wh. Mr. Ply has not already with great Judgmt. layd before your Lordships so whatever I can say must be only a repition of what has been already offered but this Mr. Ply 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 whether Lucretia by the wll of Thom. Wardall took an Estn. in Fail or for life only for if she took an Estn. to Fail 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 wll wh. has been already read to yr. Lordships Item: I give and bequeath &a

The principal rule is Construction of Wills is the Intention of the Testr. & I dare say no man who has not been bred a Law yr would Entertain the least doubt upon reading these words but that Mr. Wardalls 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 it will 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 yd wd Item an usual word in Wills to Introduce new distinct matter in the new devise Lucretia - is mentioned not for her own sake but only a parcell of yd Description of the Psons in favour of whom he designs this new Devise

and this Evidt from the wd after aftr my Dauns Decease for these wds plainly shew that the Testr intended by this new devise was to arise and take affect not in her

her life time and Consequently that he designed it not for her but for the heirs of
body, who sh^d therefore be Purchasers of it since it was designed for their benefit
advantage only — The words to his or to her heirs for ever are a furth^r Proof of
design — for they being relative only to the Heirs &c: she whe Intended to Vest the
fee simple in the Heir by purchase and Consequently to give Lucretia only an
-tate for life — And if they do not make the Heirs Purchasers of the Fee simple
must be rejected and are Absolutely useless when at the same time they are Capa
of a very just & Pp^er Construction and agreable to the Law { Contrary to the rule of a
{ struct^n even in ye Case of
The Circumstances of the Family &c as the Atty Genl In the last Limitat
to his own next heirs is manifestly a word of purchase — And since the Pest^r
used it in that sense in one part of the will we may reasonably Conclude he me
it so in the other — It is meaning therefore could be no other but that Lucretia
should take an Estate for life with a Conting remainder to the heirs of her bo
in fee — And if she happened to Die without heir of her body that then ye Land
go to his own next Heirs — And y^s is the natural Construction of the w^ll & gives
every w^d of it a proper sense and mean^g and no Pte is rejected — The next Consid
-ration is whether this design this Intention of m^r Wardales be agreable to the
rule of Law — My Lords there is no rule in Law ag^t the Pest^r puting this
the death of the Tenant for life — and as to the words heirs of the body here
made Choyse of they are often Pp^er words of purchase as where there is no
-mitation or a Limitation for years only to the Ancestor — In the Case of
John De Mandavil 60 L 26 b 6 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 be
-tween Deeds and Wills — In a will of the Intention is Clear no Impro
-priety of Expression shall prevent its taking Affect provided that Intention
be in itself Consistent with the Rules of Law — And in Wills words as the

they best answer the Intent of the Test.r we Construed words of purchase or of Limit.n

Indifferently } The word Issue is a proper word of Limit.n in a will as in Ling and Milling 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 Lodd & Kime it was because the words of Limitation supaded to it Carried a different Estate from that w.h 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.h is an Estate entirely different from and even inconstant with an Est. Tail w.h w.d we passed without y.m — 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 of Lodd & Kime y.e w.ds Heirs of the body ought to be Construed words of purchase

Backhouse & Wells { Int. Prin: 11 Ann Ro: 220 } is a farther authority
Macclesfields Case 188

Which was — Th: B: Devised to J.B for his life only without peathment of Waste from Jaffer 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 P.B and the heirs male of his body and for want of such Issue 2 Rem.rs over in the same words & it was adjudg that J.B took only an Estate for life and that the Issue took by purchase the w.ds Issue male being a description of the person who has to take the Estate Tail because it has said the additional words of Limitation grafted upon y.m shew where y.e Test.r would Lodge the Inheritance } Ob: But it may be said that the w.d Issue w.h is y.t used in these Cases differs from the w.ds Heirs of the body w.h are the words of the present Case

A 8 Issue in a will is Equivalent to heirs of the body —

2 Archers Case 1 Co: is an Express authority for there ~~the~~ additional wds of Limitation grafted on the wd Heir made at a wd of Purchase as is Observed by my L. Hale in ye Arg of King & Millings Vent — { And tho the word heir be there used & the heir in ye pral numbr ye is no material difference because heir in the singular num is no men Collectum — { In Capillion & Boice ye Interposition of Trus to preserve Conting Rem made the worlds heirs Males of the body wds of purchase And surely in our Case the addition of the wds and to his or to her heirs forever is 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 ye Case they wd be Intirely Void — } Nor can an Estate arise by Implication 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 Topham & Rampf wh is misreported in Salkeld — But in this Case all the heirs of the body of Lucr 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 ly Vest the fee simple by purchase in the heir of her body & since ye design is agreeable 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 apperhend the appellant is well Intitled to this Plantation and hope the Judgmt of ye Court of Errors at Barbadoes will be reversed by ye Ld ships —

Mr Fazaherley —

My Lords the Construction put upon this will by the Gentlemen of the side would and submitt to your Ld ships intirely destroy the Intent of ye Ld & is not at all agreable to the rules of Law — But our Constructn preserve the des

design of ye Pest.r and is agreable to the rules of Law & ye Construct.n in similar Cases —
The General Intent of the Pest.r 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 Dau.r begotten and to be begotten, and also from his Limiting the remain
der to his own next heirs for want of such heirs of ye body of his s.d Dau.r —
But if the heir of the body of Lucretia should take a fee simple by purchase as is Con-
tended for on the other side then all the rest of the Children of Lucretia tho there
we ever so many of them w.d be deprived of ye benefit designed them by ye will —
And tis no ans.r to say they may take by decent for tis plain the Pest.r design they
should take by this w.ll and if by this Construction they cannot then by this Construction
the Intention is frustrated tho they sh.d happen to take by Descent —
Our Construction my Lord fully ans.s ye View this Gen.l Intent of the Pest.r by giv.g Lu-
cretia an Est. Pail w.h 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.e 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 & Vol. 22:6 —
In our Case Lucretia takes an Estate for life the gentlemen of the other side Insist,
Pedid tis true my Lords; but then this brings it Exactly within within the rule &c
Therefore the heirs of the body of Lucretia cannot be purchasors, but the Estate Pail
Executed in her and they take by descent according to that Rule — and this
shows how disagreable and Inconsistent the Construction Contended for
on the other side is with the rules of Law — { But it has been s.d
of the Intention of the Pest.r be Clear tis no matter what w.ds he uses, provided ye
w.ds he w.d 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 sense of w.ds

words would Introduce the greatest uncertainty and Confusion in the
and be Exceed Jdangerous and therefore the Intention must not only be in
-self, but also be Expressed Consistent with the rules of Law and then he q
-ed bo: El 525 Soul and Gerald where he said it was to held

My Lords were this the Case of a deed there c.d be no doubt but it would Create
Intail to Lucretia & there is no reason to depart from the Rule of Law in y.s Ca
because a different Construction would be Absolutely Inconsistant w
the design and entent of the Testator — Ob: But it is objected th
the devise to Lucretia is Expressly for life — and the devise to the heirs of
body is after her decease A: The Devise in King and Melling is Exactly in this m
-n or the words are "To B: Melling my son for and during his natural life an
after his decease I give the same to the Issue of his body Lawfully begotten o
the body on any 2.d Wife w.h he shall happen to marry w.th — and yet in this
it was resolved in the Exch: Cha: upon great deliberation by the advice of Lo
Hale that by the Son had an Est Tail — Therefore if the Case Stood here there wou
be no doubt — Ob: But it is farther Objected y.t y.e devise to the Heirs of
body of Lucretia begins with new deviseing w.ds w.th y.e w.d Item; on w.h great Stre
is laid, and the Case of Hopewell and Ackland is quoted to shew the mea
of that w.d — and it is also s.d that the devise to Lucretia is Compleat & finished
fore that to the heirs begins — A: My Lords I beg leave to observe y
makes no difference for if there be a devise to one for life & after a limitation
his heirs, the Heirs shall not take by purchase but this limitat.n Vests in
ancestor, tho there be 20 Intermediate devises because the heir is looked
on as par's antecessoris and he can have no heir dur: g his life bo: L: 21 b
Ob: There was no other Object.n made taken from the Circumstances of th
family & was s.d y.t y.e Test.r design.d to Vest y.e Inheritance in y.e Person who sh.d be

to Lucretia least giv. Jit 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 objecti-
on would Insinuate, the Testator had a View in making ye will

May Lords had the Testr. any such Intention nothing was easier than to
have given ym. the Estate by name - and since he has not done so but devised
by the heirs of the body of Lucretia not only begotten but to be begot on wh. wds. cannot
possibly be applied to the Son and Daur: yn. alive tis plain he cd. have no particular View
of 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 wh. wh. should descend to and benefitt not ym. only but
her Children as they should happen to be her heirs wheth. yn. in being or not

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

Ans: Tis of much more Importance that all the Children of Lucretia sh. be pro-
vided for pursuant to the plain mean. of the will that that one of ym. should
take 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
a Rejection of the most Important parts of the will

Obj. The word to the heirs of the body and a give Lucretia an Est. Tail by the rule
already mentioned to your Lo. ships & ye Subsequent wds. cannot Change it - &c
ye Shelly's Case 1: 60 is an authority Expressly in point, wh. was a Conveyance
to the use of Ed: Shelly for life without Impeachmt. of life & after his decease to the
use of others for 24 years and after the sd. Term, then to the use of the heirs males of ye
body of ye sd. Edwd. & of the heirs males of the body of such heirs males - And tho it was
argued yt. the Intent. of the parties appeared very clean yt. ye heirs males of the
the body of Edwd. Shelly's sh. take by purchase - and also that the additional
wds. of Limitn. of the heirs males of the body of such heirs males must be rejected
they did not take by purchase both wh. 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 Comon Pleas that the heir of the body of Edw.d Shelly was in Co
and nature of a decent because he Claim.d the use by w.ds of Limit.n & not of Purchase —
N. B. He made no answer to the Attey Gen.ls distinction of this Case —
There have been sev.ll Cases quoted on the other side but I hope not one of any weight
against us — Archers does not at all Come up to ours for y.e was a
see to Rob.t Archer for life & after w.ds to the next heir male of Rob.t — & heir in the sin
lar Number is not a proper word of Limitation, for if Land be given by deed to
and his heir tis a Void Limitation, and therefore y.e Case is not at all Parallel to
wherein, wherein the word Heirs in the plural number which is a proper word
Limitation 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 — 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
served & therefore not at all similar to our Case. And besides as to y.e real Est.n is Still
determined — Lisle and Gray was a Coven.t to stand seised —
Loddington and Hime 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.n but
judg.d 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 & Hime
was by no means within the rule but ours is Exactly within it & therefore requ
a different Construction from y.e Case — The case put by Anderson
Shelly & is not adjudged but put as a Case and he was y.e no judge but a Ca
=cellor tis Common with Council to put Cases for Argument sake but I
=lieve y.r Lordships will not think Cases thus put of any Authority —

Then he quoted the Case of Sparrow and Shaw of in the house of Lords Vize, Vid
Mr Shaw and Weigh and then the Case of Goodwright and Pullen adjudg.d Mi: 1691: B
the Case agreeing in every Circumstance and Absolutely in in point Viz —
I give and bequeath unto N Lisle for and during the Term of his natural life &c
y.e death of the said N L then I give & bequeath & a unto the heirs male of the body
y.e s.d N L Lawfully begotten and his heirs forever and in Case y.e s.d N L should dye
without such heir Male then I give and bequeath unto Edw.d L for & dur. y.e 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 forever. and for default of such heir
Male then I give the same to and for the use of Z and his heirs forever — Here my
L.ds are w.rds of Limit.n superadded as in our Case — and words w.h carry a differ.t Estate
from the former words and yet was adjudged an Est. Pail in N L — This my L.ds is
Absolutely in point and therefore for we humbly hope your L.ship w.ll — Affirm
y.e judgm.t of the Governour and Council of Barbadoes —
N B Also said he himself was of Council in in this Case of Goodright and
Pullen and Pullin and Offered to shew his notice — Q Mr Riders —
My Lords if the words heirs of the body in this will are words of Limit.n of Est. & not of
purchase y.n an Est. Pail Vested in Lucretia and from her descended to Wardall An-
drews & y.e Est. having never been heard Wardall Andrews could not devise it and Consequen-
ly the appellant has no title — Q That these words are generally word.s of Limit.n will
not be denied and it must be owned also that they may be w.rds of purchase —
The rule is whenever the Ancestor takes an Estate for life & aft.r there is a Limit.n to his
his heirs y.e heirs of his body y.e y.n y.e sh.ll be w.rds of Limitation, & y.s is our Case —
N B But this Object.n That this may be Varied by the Intention of the Pest.r —
A This Int.n must be very Clear, as is adjudged in Wilds Case 6. Co — But this so far
from y.t in the present Case that it was manifestly the design and Intention of Mr
Wardall the Pest.r to give Lucretia an Est. Pail. And this will appear by your —

Pr. Your Lordships by Considering the Consequences of Each Construction, & Compar
with the sevl. parts of the Will — But before I come to this wd. beg your Lordships Indi
gence while I Endeavr. to shew the grounds of the Genl. rule —

1 The first my Lords is because the word heirs Extr. Termini implies Persons
who take by descent — and this holds tho there be sevl. Intermediate Estates —
2d. The heir is looked upon as part of the ancestor, for no man can have an he
while he lives — 3d. The Abhorence the Law has to put the Est. in Abeis
4 The uncertainty yt. must otherwise ensue not only who shall be heir but
so whether a Contingent remainder shall ever Vest or not —

My Lords all these reasons should most strongly in ys. Case for if these wrds. sh
be Construed wrds. of Limitation the remaind. to the heirs of the body of Lucretia
wd. be Contingent & Incertain & Lucretia may bar it with ye. greatest Case —

The remainder also to the Testators own next heirs would be Contingent
Incertain & may be bared in the same manner — And this fully
swers all the Objections that can be taken from the Circumstances of the Test.
mily at the time of the devise — For the Estate Contended for, wd. ans. no end
it may be destroyed by a Comon. Poffment by a Lease and release and I dou
by even bargain and sale made by Lucretia and tho such an Est. may b
created, yet it cant be Immagined if any man wd. design such an Est. be
such a Design would be Absolutely frintless and Vain —

But an Estate Tail can be barred only by a perticular mann. of Conveyan
wh. carries with it a good deal of difficulty & very often the person dyes before
can by affected — 4. The remainder to the next heirs of the Test. is Vo
no more than the Law wd. Imply and the right heir shall take the Reversion
— Now my Lords Lucretia is found to have been heir to the Test. & therefore
the descent of the rever's upon her before the Contingency happen. ye. Conti
remain

remainder Contend'd 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

let in y.e Contingency, when it happens as in Lewis Bowles Case 11 Co yet this shall

never be when the Estates arise from different Conveyances { This remark m.r Rider made last of all but he was a little at a loss hav. I misplea'd some of his trapers and I believe he designed 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 Wardale w.ll be affected but the Contrary Construction Contended for on the other side would Intirely pervert and destroy it and this will sufficiently evence to your L.ships y.t was his design and Intention to give Lucretia an Estate Tail — & His principal view was to provide for all the Children of his Daur. Lucretia — This appears not only by his devise & to the heirs of the body of Lucretia begotten and to be begotten but also by his limit. & a Remainder over to his own next heirs forwant of such heirs of y.e body of his Daur — For by these words he has not only provided for all the decendants of Lucretia expressly — but also determined the time when he designed Remainder 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 w.ds are and forwant of such heirs of the body of my s.d Daur. so y.t 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.e 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. & to the words and plain mean. & 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 deprived of the benefit designed y.m by y.e will & the remaind.r to the Test.r own next heirs w.ll be fruitless 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 may take by decent but this apprehend were it so in an answer —

For still they do not take by this will and therefore the Intention of the Pest.r who signed they should is not Complied with — But my Lords the Case is otherwise for suppose Lucretia takes a fee simple by purchase the whole blood 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 Pest.r — And the second who is then heir of the body of Lucretia and of the blood of the Pest.r for whom the nefit of y.e devise was Intend'd w.ll 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 troduces such a Settlem.t as is Commonly made and such as every man Considers would make — Ob: But tis obj: that the Devise is to Lucretia Expressly dur. y.e her natural life — A: In a Common sence she has it for — and y.e is the Comon Case tis so in King and Melling and yet that was adjud ed an Est. Tail in B to whom it was devised for and during his natural life

Ob: Tis also an obj: y.e the devise to the heirs of the body of Lucretia is after her de

A: This Circumstance is also in the Case of King and Melling & is implied in ry Case — My Lords all these Objections were made to that Case & over ruled

Ob: Tis Obj.d by M.r Ad Ey: 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 Limitation on it follows then were used only for the sake of Lucretia & not of the heirs of he

A My Lords I must beg leave to differ in y.e perticular for w.ds of Limit.n are sometimes used for the sake of the heirs of the 1.st Devisee

In Cases of Entail the Issue Claims param't his Father he Claims for mam Domi by force of the stat and therefore the words of Limitation used for his benefit and yet this does not make him a purchasor

Ob: But the great Objon is that here are additional wds of limitn — to his or her heirs forever grafted upon the words heirs of the body, & unless these additional words do make the former words of purchase they must be Obsolutely rejected. Contrary to the rule of Construction &a — ¶ A: 1: Tis Comon in Wills to restrain the word heirs when generally used, to make it Consist with ye design of the Pestr there are sevle Cases to this purpose but I shall only quote one and ye the Case of Homes and Meynel Ray 452 which was a devisee to his Dawrs and their heirs and in Case happened to dye without Issue, then a remainder over in this Case it was resolved the Dawrs took an Estate Tail the word heirs being restrained by the Intentn of the Pestr 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 ye shd happen to be her heirs wh is a reasonable & just Provision wll be Intirely Frustrated —

2. Tis most probable the Testator did not know the force of the wds heirs forever for heads wrds 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 5:60 which was a devise to Robert Archer for life and after wds 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 limiton in yt 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 & Voice 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 yt settlemt wll 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 Test
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 Joyn-
-tress and since Penn't in Pail may make a Jointure in Consequence of his
and does not need such a power — And the limit.n of that power to make a Joyn-
-ture in Proportion to the fortune would be void if the devise should take an
Pail, it was therfore from these reasons Construed an Estate for life but there
no such reason in our Case — Lisle and Gray was adjudged
merely on the words so which Could no other way be Satisfied for after a Limit.n
1. 2. 3 and 4 Son of Edward the words are and so severally and respively to every
the heirs males of the body of Edward wh shews that by heirs male was meant
-ly the other Sons of Edward — and besides the words severally & respively a
cord. to their ages and Seniority are applicable only to sons & not at all to y.e heirs of
The Case put by Anderson in Shelly's Case is not adjudged but by him as a Coun
-as to what has been said by m.r Atty that is put and not denied in the Case of Lod
Kime in Lev.s Surely that goes no farther than y.s y.t the Book does not say it was den
Loddington and Kime does not at all come upon to our Case for that was
1. Without the Impeachm.t of Waste 2. The word of purchase was Issue and not
3. The words were in Case he gave Issue male which are manifest words of Contin
- whereas in our Case the words are for want of such heirs of the body and begott
and to be begotten — It appears by Lev. Rep.t of that Case that the Testator
-ing Devised several rent Charges out of the Lands adds these words Earnestly
treat my Nephew to whom I have devised the Inheritance of my Lands in
see them paid and these Words are again repeated in y.e will wh clearly shews his
sign that Ere. Armin should be only Tenant for life it appears also that Ere. Arm
at the same time of the will was an Old man & had no prospect of Issue —
which are very material differences — My Lords the Cases wh

which support our Construction are not Cases put by Council, or Cases not yet resolved but Cases Solemnly adjudged and upon great deliberation and such is Shelly's Case &c and then he Stated it at large — { This my Lords is an Express authority in point with us notwithstand. J what mr Attey hass. to distinguish it — for here are words of Limitn supaded as in our Case and words which Carry a different Estate from that wh passes by the former words and yet notwithstand. J twas resolved by all the Judges of England Except one of the Jus. of the Com: Pleas That the heir of Edwd Shelly was in by descent and the reason given is because he took by words of Limitn and not of purchase — & That a Differt Estate wd have passed by ye additional words of Limitn in ye Case from yt wh passes by the former wds wl be Clear to ye Ld ships, if it be Considered that if the heir of Edwd Shelly had taken an Estate Tail by purchase by force of these additional words that must have been an Estate descendable unto the heirs Males of the body of such heir and Consequently wherever there happened a failure of Issue male of that heir ye Estate must have reverted to the Donor tho there were heirs males of the body of Edwd Shelly in being — But now the heir of Edwd Shelly 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 Shelly wh is quite differt Estate from ye former — Legatt & Sewell 2 Ver 55 is another authority & a much Stronger Case than ours Viz — George Legatt by will directed Weller his Exr to invest the residue of his personal Estate in Land and Settle and in Tail the same on William Legatt for life he paying & 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 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 Pent in Tail and the Lord Chancellor agreed accordingly — { My Lords there is another Case which I should not

not Trouble your Lordships with the repition of but it agrees so exactly with the Case
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 an
Dullen before quoted by mr. Fazakerly — From the Resolutions I hope
it sufficiently appears that Lucretia took an Estate Tail by this will that Wardall
Andrews her Son took only by decent from her — But if your Lordships should
of Opinion that Wardall Andrews took by purchase by this will, yet I humbly app
hend he took only an Estate Tail — And if there was an Estate Tail any where Eith
in Lucretia or her Son the appellant has no Title — My Lords in all the
Cases where the words heirs of the body are words of purchase they are not only
are also words of Limitation — This was the Case of John de Mandevil a
Mand quoted by mr. Tollr. where John de Mandavil took an Estate to him
heirs of the body of his father which after his death without Issue descended
to Mand his Sister as heir of the body of her father — and this also is the
Case of Lite Titon 30 Viz &a — And therefore in our Case the words, heirs
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 wds.
yn. by giving the Son a Pto frustrate the Primary Intention to the Testator —
But my Lords there is no occasion for this — The wds. are Capable of a very proper
Construction Consistant to our Scheme which is that Wardall Andrews the
Son took an Estate Tail with a fee simple Expectant — And this is not a Con
tion of mine but of my Lords Cookes 1: Ins 24: where he says if Lands are given
to one and the heirs of the body habendum to him and his heirs he
have an Estate Tail with a fee simple Expectant — and

And if in our Case 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 forever are the same as habendum to him and to his heirs wh brings it Exactly to my Lord Cokes Case

Since therefore &a

The Wenesday Following Mr. { Attorney / Sollicitor } Replied -

Mr. Attorney — My Lords the Case of Andrews and Hales 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 Case 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 yt it does not appear with sufficient Clearness from yd wds of this will yt yd Pestr Entended 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 —

Admiting such Intention in the Pestator and that it appeared with sufficient Clearness, admiting also that it would not be Contrary to any part of the Will yet the Pestator having used the word heirs in the plu: number such Intention would not be agreable to the rules of Law — 4 admiting that Wardall Andrews was a purchasor by this will and that Lucretia took only an Est. for life yet Wardall took only an Estate Pail — 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. Callowed yt by the Express devise to Lucretia she took an Estate for life and if this be a proper admission it follows yt

This point is with us for it must be something Exceeding Strong in this Will
consistant with this Express Devise that Can over rule it nothing of which appear
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 Gentlemen 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 Tail may bar the Entail & all reversions & remainder but Tenant for life cannot & if Tenant for life Levies a fine & a tis 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 ans. to the argumt drawn from the Express devise to
for life or Else tis an admission yt She had an Est. for life in a Pper sense, wh is intirely
distinct from an Estate Tail but to consider this point more fully your Ld ships will
see what an ans. has been made as to the Argumt taken from ye additional wds of
Limitn To his or her heirs for ever wh wds we Insistd, Evidently shew the Intentn of ye Gen.
that Lucretia should take only an Est. for life & yt ye person who shd happen to be heir
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 thrown
of the will Contrary to the known rule of Construction — Tho we had
tinguished ye Case from Shelly's they Endeavoured to get rid of these additional wds of Limitn
in Shelly's Case but my Lords there is no Colour of this — In Shelly's Case
the additional wds of Limitn were rejected because they were surplusage — because
they Could Carry the Estn 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 — Why they from the authority of this Case

would reject words that are not surplusage, words that carry a quite different
it from the former words that are the most material and operative in the whole
ile and capable of a very proper construction — Surely my Lords there is no
rrant in that case for such a consequence as this — But it was insist
that the additional w.ds of Limitation in Shelly's case would carry the Estate to
ferent 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 y.e body of
Ed.d Shelly y.e additional w.ds and to the heirs males of the body of such heirs males
y.e additional w.ds are included in the former for as long as there are heirs males of the
body of the heirs males of Ed.d Shelly there must be heirs males of the body of Ed.d Shelly
himself so y.t all such heirs take by the force of y.e first Limit.n & therefore y.e subseq.t is mere
surplusage & can carry the Est. to no other person but such as w.d have taken w.th out it
My Lords the Gent. Ga: would have the words to his or her 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 has been restrain.d to heirs of the body
My Lords I admitt there are such cases, but they are only to comply with and sup
port the Intent of the Pest.r as if Land are devised to one and his heirs and if he die w.th out
heirs then to his Brother, in this case because it appears the Pest.r used the w.d heirs
for heirs of the body, because tis 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 y.e body to make the clause
effectual — But what conclusion do the Gent. Ga Draw from this why
therefore in our case y.e w.ds to his or her heirs forever w.h clearly shew and express the
design of the Pest.r shall also be restrained — This my Lords is no consequence
no consequence at all for tho words which are inconsistent with the Intention of
the Pestator shall be restrained to support the Intention and make y.e clause
effectual surely it does not follow the words which are not inconsistent shall
be

be restrained no 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 ans.rs w.h have been made to our Argum.ts on this head and I hope I have shewn your Lordships y.t they are not at all Satisfactory — And wh the words his or her come to be Considered this will be still plainer —

When the words heirs of the body are words of purchase they are called in in Law description of sons, now the word his or her being relative only to the heirs of the body of Lucretia and not to her are a plain description, and shew the Testors 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 of the Entail to deprive the Test.rs Grandchildren of the Inheritance he designed them — From these reasons I apprehend it appears with sufficient Clearness that the Test.r designed Lucretia an Est.r for life only — I wont Contend that the w.rds for life or after decease alone w.d 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 Insisted on was that tho 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 it where by his limitts the remainder his own next heirs for want of such heirs of the body of Lucretia — from y.e part of the will they say t is plain the Testator had it in View to provide for all y.e decen of Lucretia and this is to be affected only by giving her an Est.r Tail which decend to them all — But this my Lords is not well founded — for our Construction provides for all the descendants of Lucretia as well as theirs — all sons Could not take at Once by either Construction, but the Eldest must the whole by both, & by both Constructions the Eldest may dispose of the

and bar the rest of the descendants, as well by one as the other Construction &
he should not but suffer it to descend then the rest of the descendants of Lucre
tia are provided for by our Construction as well as theirs with this only difference
that by ours they take a fee simple by descent, by their's a fee Tail Except of one Case of
the half Blood, put by mr. Rider and that the Testator had not no Law at the time
of the will, or if he had it appears 'twas 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 ys is
what distinguishes this Case from Shelly's and all the other Cases and by our Con
struction the Issue of Lucretia by a Second husband may take the remaind.r Li
mitted to the next heirs of the Testator — } Twas insisted on our side y.t w.ds of
limit.n are used only for the sake of the 1st Devisee y.t here the w.ds heirs of the body are used
only for the sake of the Issue of Lucretia, as appears by the w.ds his or her w.h relate on
to the Issue and Can no way be applied to her, and therefore they Cannot here be
of Limit.n but of purchase — } To this 'twas s.d y.t y.e Issue in P. Claims p.r for
man Dom.i paramount to his ffather — But this does not prove y.t y.e w.ds of Limit.n
are not used for the sake of the Donee on the Contrary 'tis plain they are for if Devisee
in P. Dies in the life of the Devisor the Issue shall not take as was adjudged in y.e
Case of Goodright and Wright — in y.e K.s B.c Geo { Vid 1 P.W. 397 and Macclesfields Cases pa. 369
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
firm Estate — and that the Estate we Contended for would answer no
ord because being Contingent it may be Easily destroyed by Lucretia
But my Lords if it be Considered y.t Lucretia was a married Woman at the time of
the will y.e Object.n w.ll point the other way — for by the acts of assembly in Barbadoes
Lucretia may bar an Est. Tail but I have read y.m acts & there are no words in y.m y.t I
remember w.h w.d Enable her to bar a Contingent remainder —
Nor can there be any Construction on them w.h w.d Enable her to this because such

Such a construction wd work a wrong — { And Lucretia being married could not make a Affeasment to destroy them 'twas said the contingent remainder 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 Kime — { 3 The 3d head Insisted on was &a. —

My Lords the rule yt the Intentn must be agreable to the rules of Law, must was before Observed to your Lordships Extend to things & not to words the true 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 wd be to tye us down to those forms of the Common which are of the greatest Nicety and attended with the greatest difficulty in ye Obtention ye positive & arbitrary rules of Expression — wch surely wd be no Indulgence Devisor wch yet was the Original design of ye rule ye Pest being supposed Inops Con

Indeed 'twas said yt the Intentn must be Expressed agreably to the rules of but ye cannot be unless it may be sd that useing words in a sense different from that of the Common Law is Creating a new kind of Estate wh cant be Created the Common Law — { Twas admitted yt ye wds heirs of the body may be purchase however if not it has been fully proved by authoritys wh are not Any

1st The Case put by Anderson in Shelly's Case is not denied there & in Lev: Rep: & Kime tis Stated as the Opinion of the Court and tis a Case directly in Point & Strong ours, because of a Deed — { 2d Archers Case is Still unanswered. for tho yt a Devise to the next heir Male yet it it was admitted yt the word heir is a proper of Limitn in a will and so tis adjudged in King and Melling and in one Rolls 636, and yet in that Case of Archer it was resolved a word of purchase from the of the additional wds of Limitn as my Lord Hale Observes in Vent: Rep: of King & Mell

And therefore in our Case ye wds heirs of the body tho Proper wds of Limitn ought to be adjudged wds of purchase from ye force of the additional wds of Limitn & to his and her heirs forever annexed to them —

Loddington & Kime was quoted by us to shew y^t the remaind^r to ye Pest^r own need
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 Pur
chase 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 additional
words of Limit^n and other Circumstances of the will — And so in our Case the w^ds
heirs of the body tho, otherwise proper words of Limit^n ought by a Parity of reason
to be Construed w^ds of Pchase from ye additional Limit^n and ye oth^r Concur^g Circumstan
ces of the will — and tho Issue by the word of purchase in Lod & Kime y^s no
material difference for in K: & Melling my Lord Hale argues upon y^s principal —
That Issue in a will is equivalent to the heirs of the body —
Capillion & Boice is still an authority for us for there has been no ans^r
given to the Case of Bale and Coleman quoted by us to shew y^t there is no x diffe
rence between an Executory Trust and an actual Devise of the Land &a: & y^s was
so far Carried by my Ld Hooper that upon a Bill of review he reversed a Bill a Bill
of Decree formerly made upon the supposed difference And the Law is also de
clared to be so in the Case of Legat^d and Sewell 2 Ver 668 —
It was indeed s^d y^t the Case of Cap: to Boice as to the real Est^r is still undetermined
but y^s can make no difference since ye Psonal Est^r was to be invested in Land and y^e
Executory trust must be Construed as an actual Devise in ye w^ds of the Trust —
Lisle & Gray tho determined on the force of the words so as was said on the other
side is still an authority unswered for it proves y^t the Son may take by Pchase by the w^ds
heirs from ye Intent^n of the Pties tho the ancestor by the same Conveyance takes an Est^r
for life — and tho the Case of Lisle & Gray is a Covenant to stand seised as has
been also s^d on the other side yet that is not the reason of ye Judgm^t: for since the 27 H 8:10
Uses are Construed like Estates at Com: Law the reason is because it appears to be
even the Intention of the Pties that the Son should be a Pchasor and y^s tho in the
Case of a deed made him such — and therefore in our Case since the w^d heirs is a
stronger word of Limit^n than 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 Construc
and make the Son of Lucretia a Purchasor — { The Cases quoted on the other side
1 King & Melling wch was a Case of great doubt and my Lord Hale him
was of a Contrary Opinion upon the 1st argumt but afterwds observ. J. f. the remain
over was not to take place as long as there was any Issue of B: Melling, he
was Clearly the Intention of the Testator that the Land should go to all the Issu
of B. Melling which he justly Concluded was an Estate Tail
But my Lords what distinguishes that Case from ours this yt in that Ca
there are no additional words of Limitn as in ours for suppose there were, then
Judgmt wd have been yt B. M had only an Est. for life & yt ye Issue took by Pchase for
is no Warrant from ye Case to say otherwise & tis so actually resolved in ye Case Lod & Him
2 Sparrow & Shaw was unanimously resolved in the Hs B an Est. for life in
Sisters — and in the house of Lords 7 of the Judges were of the same Opinion I mu
three Learned Judges differed from them: — But those who were of Opinion that y
ters took an Est. Tail in that Case went upon this, that the addition wds of Limit
not Carry the Estate farther then the former words and therefore were merely Su
sage as in Shelly's Case — But if the additional words of Limitn had been other
as in our Case ye Judgmt had also been differt for the Case wd yn be like yt of Lod & Him
Goodright & Fullen was & a as Pazaherly only he omitted ye remaind. over for
want of such heir male of ye body of N L but I saw ye record & the Case is as mr Pazaherly
My Lords by a Miss kept which I have of this Case it appears the word his w
that which made the difference for yt wd must relate to ye next antecedent wch was
himself and Could not therefore be referred to the heir male & so the Est. P. was Exec
in him — But the wds his or her in our Case cannot possibly be applied to Lucretia
relate to her Issue wh may be male or female & therefore not at all like that Case.
4 Legatt & Servel was & a — as mr Rider — { My Lords I must own yt three of
judges of the Com: Ps were of Opinion that William Legatt took an Est. P. Trev
But Tracy differed from them, and sent my Lord Hooper a seperate Certif
cate

Certificate with the reasons of this Opinion.

and yn he read a Copy of Pracys reasons and Certificate

My Lords in ys Case the additional words of Limitn are surplusage as in Shelly

Case - For they can Carry the Estate no farther than the former words & it is a Consi

derable abatemt of the authority of this Case That my Lord Hooper when he read Pra

cys 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 ys of ye Majority

4 The last head Insisted on was, that tho Ward all Andrews should be ad

mitted 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 Vty

But my Ld ys Case is not at all like ys for in ys Case there are sevll 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