REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR THE RICHMOND DISTRICT.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. The second edition, revised and corrected by the "authors. Volume I. By William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie-"tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

JUNE, 1807.

*William Smith and Margaret his wife, late Margaret Carr, relict and administratrix, &c. of William Carr the younger,

against

T. Chapman, surviving acting executor and trustee of William Carr the elder, and others.

Friday, June 5.

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced by the late Judge of that Court.

This case turned upon the construction of the will and codicils thereto annexed of *William Carr* the elder, which were made in the year 1790. So far as the present question is influenced by them, they may be resolved into the following parts:

1. A devise to *Betsey Tebbs* of sundry tracts of land particularly described, together with a negro woman *Hannah* and her children, during the life of the devisee; then to her child or children, if any living at her death, to be equally divided between them; if none living, then to *William* and *John Carr* for life; then to be equally divided between their children.

2. To *William Carr* sundry tracts of land; and, after the death of the testator's widow, a negro woman named *Agga* and her children;—*during the natural life* of the devisee, and after his decease to his child or children; *if none*, to *John Carr* and *Betsey Tebbs* for life; and then to be equally divided between their children.

3. To *John Carr* the lands on which the testator lived, after the death of his widow; and several other tracts of land in the will described, together with sundry negroes therein named;—during his life, and then to his child or children, if any living at his death; if none, to *Betsey Tebbs* and *William Carr* during life; and then to their children to be equally divided.

A testator makes three devises, (to his two sons and daughter, severally,) for the life of each devisee; and, after his or her decease, to his or her child or children; *if none*, to the other two devisees for life; and then to be equally divided between their children; and annexes a codicil, in which he says that, if *all his children should die without issue of their bodies, his wife living*, the life estate should go to his wife during her natural life, and after her death, remainder to other persons.—The two sons and daughter take each an estate for life; and the remainders over are good and may take effect; the contingencies not being too remote.

In construing wills made since the acts of Assembly, of 1776 and 1785, on the subject of estates tail, *it seems* that the Courts in this country will not, by implication, turn an express estate for life, with limitations over in remainder, into a fee tail, (as in like cases in *England*,) because, although it is done *there*, to effectuate the general intention of the testator, such a construction under the operation of our laws, would defeat that intention.

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In a codicil to the will, was the following clause:— "Should all my dear children die without issue of their "bodies, my dear wife living, the life estate to go to my "dear wife during her natural life; the other half to *T. C.* "*S. L.* and *R. S.* and *T. C.'s* children, namely, *C. C.* and "*J.* during their natural lives; then to their children, if "any; and, after the death of my wife, the whole of what "she has for life in the last clause, to *T. C.* in trust for "the forementioned children, and my trusty boys, *D.* and "*A.* to be equally divided between them."

* 241 *This will was dated on the 23d of *January*, 1790; soon after which the testator died, leaving a widow, the daughter *Betsey*, and his sons *William* and *John*, both infants and unmarried. *Betsey* at that time had several children.

William Carr the younger died on the 8th of *November*, 1801, intestate, leaving a widow, but no children. His widow intermarried with *William Smith*, (one of the appellants,) who filed a bill in the High Court of Chancery, claiming in right of his wife, (among other things,) dower in the lands which had been devised to her first husband, *William Carr* the younger.

The Court of Chancery dismissed the bill, from which decree an appeal was prayed to this Court.

Botts, for the appellants. This case, so important, as well from the great property depending upon it, as from the questions of law which it involves, turns wholly upon the construction of the will of *William Carr* the elder, and the codicils thereto annexed.

The point now to be discussed is, whether *William Carr* the younger took a *fee*, or an estate *for life* only: if the former, his widow is entitled to dower in the lands devised to him; if the latter, she is not entitled.

I shall contend that *William Carr*, the devisee, took a fee conditional at the common law, upon the four following distinct and sure grounds.

I. By the words in the devise to *William's* "child or "children," when he had none, an EXPRESS estate, in fee, in *William*, was created.

II. That, if the first point should fail, yet, by the words in the devise over, "if none," (i. e. no child or children,) "to *John Carr*, and *Betsey Tebbs*," an IMPLIED estate in fee was created.—A distinction between a limitation to "children" in *England*, where they *are not* collectively heirs, and such a limitation in *Virginia*, where they *are* collectively heirs, will be relied on.

III. That by the limitation " should all my dear chil- " dren die WITHOUT ISSUE of their bodies," then over to his wife and the *Chapman* family, an IMPLIED fee would be raised—should the other points fail.

IV. " That upon the true construction of the will, the " son *William* must, by *necessary* implication, to effectuate " the MANIFEST GENERAL INTENT of the testator, be con- " strued to take an estate in fee."

The devise in question is, in effect, to *William Carr* the younger, during his natural life, and after his decease *to his child or children; if none, to *John Carr* and *Betsey Tebbs;* and if all three die without lawful issue of their bodies, then to others. * 242

For a long time it was contended that an express estate for life could not be turned into a fee. It is presumed, however, that gentlemen will not say that this is law at this day. A long list of cases might be cited to prove the old doctrine exploded.

It may be admitted that it was the plain and evident intention of the testator that *William* should take only an estate for his life; but then the reason of confining it to an estate for life must by the appellees be conceded to have been to preserve the inheritance for *William's* posterity. To restrict it to a life estate in the first taker was the *particular* intent—to preserve the inheritance *for the issue* was the *general* intent. The former was the *intended means*, the latter the intended *end.* If the two intentions cannot stand together, the particular intent or the intended *means* shall be sacrificed to the *general* intent or the *end.*

That the two intentions cannot, in the principal case, prevail, according to the rules of law, and that the *particular* shall so yield to the *general*, seems abundantly proved by a long string of cases, of settled and unimpeached authority. The 1st is *Shelly's* case, 21 *Eliz.*(*a*)

(*a*) 1 *Rep.* 89.

The case was upon a covenant to lead to uses. " To " *Edward Shelly* and his assigns, *for, and during the term* " *of his life* without impeachment of waste, and after his de- " cease to the use of *C.* for twenty-four years; then to the " use of the heirs male of the body of the said *Edward* " lawfully begotten, *and the heirs male of the body of such* " *heirs lawfully begotten;* and, for default of such issue, " to the use of the heirs male of the body of *John Shelly.*"

It was ruled by eleven out of twelve Judges that *Edward Shelly* took an estate in tail male.

[In *Lyles* v. *Gray*, (*Thomas Raymond's Reports*, 315.) the Court says, " the rule in *Shelly's* case is positive law not to " be reasoned upon. It is a land-mark, by which other

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"cases are to be bounded." In *Douglas*, 507. *note*, it is solemnly sanctioned. In *Roy* and others v. *Garnet* (2 *Wash. Rep.* p. 16.) the counsel for the life estate, admitted its authority, and the Court in that case, p. 31. say, "this (*Shelly's*) case is constantly referred to, in most, if not all, the subsequent cases; and its principle, as well as its authority is no where denied;" v. also *Black. Com.* 245. *Ray.* 334. 2 *Lev.* 60.]

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*The 2d case, *Lyles* v. *Gray*, in 31 *Car.* II. (*a*) was thus:—

(*a*) *T. Raym. Reports*, 278. 302. 316.

John Lyle, by covenant, was to stand seised to the use of himself *for life*, without impeachment of waste; remainder to *E. L.* for, and during the term of his natural life; and after his decease to his first son; and in default thereof to the heirs male, &c.

Resolved, that *E. L.* took an estate tail.

(*b*) 1 *P. Wms.* 57.

3. The *Attorney General* v. *Sutton*, in 1721.(*b*)

Devise to *Thomas* for life; and afterwards to the first son or issue male of his body, and to the heirs male of such son; remainder to *Thomas's* second son, and his issue male in tail; and that immediately upon the death of *Thomas* without issue male, the estate should go over.

Adjudged that *Thomas* had a fee tail.

(*c*) 2 *Lord Ray.* 1438.

4. *Goodright* v. *Pullen*, in 1726.(*c*)

Devise to *A. for life;* and after his decease to the heirs male of his body, *and to his heirs forever;* and, for default of such heir male, to *C.* in fee.

Adjudged, that *N.* took an estate tail, and the Court added, that

If a devise be to *A. for life*, (though the words without impeachment of waste, or with power to make a jointure are put in,) and after his decease to his heirs male; *A.* takes an estate tail; and that this is so settled that it cannot be disputed;—and furthermore,

A devise to *A. for life*, and, after his decease, to his issue, (without more words,) will give *A.* an estate tail.

(*d*) 1 *P. Wms.* 142.

5. *Bale* v. *Coleman*, in 1711.(*d*)

Devise to *A. for life*, with power to make leases for 99 years; remainder to the heirs male of his body.

Adjudged that *A.* took an estate tail.

(*e*) 1 *P. Wms.* 622.

6. *Trevor* v. *Trevor*, in 1720.(*e*)

Marriage articles "To himself for life; remainder to the heirs of his body by his intended wife." The Court agreed that if this were other than a marriage settlement, it would be an estate tail.

See *Lewis Bowles's* case, to the same effect, in 13 *Jac.* I. 11 *Co. Rep.* 79.

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7. *Garth* v. *Baldwin*, in 1755.(*a*)

Devise to *A.* for life; and, after his death, to the heirs of his body.

Lord *Hardwicke* decreed an estate tail to *A.*

8. *Langly* v. *Baldwin*, in 1707.(*b*)

Devise to *A.* for life, without impeachment of waste; with a power to make a jointure; remainder to his 1st, *2d, 3d, 4th, 5th, and 6th sons in tail; and, if *A.* should die without issue male, then to *B.* in fee.

Adjudged that *A.* took an estate tail.

9. *Bernard* and *Fenton* v. *Reason.*(*c*)

The words "and, if he dies without issue, then to *B.* "will turn an express estate for life in *A.* to an estate tail."

10. *Coulson* v. *Coulson*, in 13 *Geo.* II.(*d*)

11. *King* v. *Burchell*, in 1759.(*e*)

12. *Allason* v. *Clitheron.*(*f*)

13. *King* v. *Melling*, in 24 *Car.* II.(*g*)

14. *Blackborne* v. *Edgley*, in 1719.(*h*)

15. *Long* v. *Laming*, (*i*) decided in 1760.

16. *Pinbury* v. *Elkin*, in 1719.(*k*)

17. *James's claim* in Superior Court of *Pennsylvania*,(*l*) are like the preceding cases; and may be referred to, if necessary.

The cases already cited are accurately abridged; and the Judges may save themselves the trouble of examining them, unless requested by the counsel on the other side; but the three cases of *Robinson* v. *Robinson*—*Doe*, on the demise of *Cook*, v. *Cooper*—and *Roy* and others v. *Garnet*, are of such strength, and contain such clear and apt reasoning, that an inspection of them at large is requested.

18. *Robinson* v. *Robinson*, in 1756.(*m*)

The devise was to *L. H.* for life *and no longer;* and, after his decease, to such sons as he shall have lawfully begotten, taking the name of *Robinson;* and, for default of such issue, to *W. R.* in fee.

The Judges of the Court of King's Bench unanimously certified,

"We are of opinion that, upon the true construction of "the said will of the testator *George Robinson*, the said *L.* "*H.* must (by necessary implication to effectuate the mani- "fest *general* intent of the said testator) be construed to "take an estate in tail male; (he and the heirs of his body

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(*a*) Cited by Lord *Mansfield* in 2 *Burrow*, 1109.

(*b*) *Eq. Ca. Ab.* 1 vol. 185. *Ca.* 29.

(*c*) Cited in 3 *Wilson* 244. per Lord Chief Justice *Rider*, in delivering the opinion of the Court.

(*d*) 2 *Stra.* 1125.

(*e*) Cited in 2 *Burr.* 1103.

(*f*) 1 *Vezey*, 24. 26.

(*g*) 1 *Ventris*, 214, 215. and in 2 *Levintz*, 58.

(*h*) 1 *Peere Wms.* 601.

(*i*) 2 *Burr.* 1106.

(*k*) 2 *Vez.* 766.

(*l*) 1 *Dallas*, 47.

(*m*) 1 *Burrow*, 38.(1)

(1) In the report of this case it is said "that by law the testator "could by NO WORDS have made the father tenant for life, and the heirs "male of his body purchasers."

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"taking the name of *Robinson*;) notwithstanding the express estate devised to the said *L. H.* for his life *and no longer.*"

The Chancellor confirmed the certificate: and, upon an appeal, the twelve Judges unanimously concurred, and the Lords affirmed the decree.

19. *Doe*, on dem. of *Cook*, v. *Cooper.*(a)

(a) 1 *Burrow*, 51. 1 *East's Rep.* 229.

The devise was to *R. C.* for the term *only* of his natural life; and, after his decease, to his issue, as tenants in common; but in case he died without issue, then to *E. H.* in fee.

* 245 *Adjudged, that to effectuate the *general* intent, *R. C.* took an estate tail.

(b) 2 *Wash. Rep.* 9.

20. *Roy* and others v. *Garnett.*(b)

Devise to *James* for and during the term of his natural life; *remainder to the son Muscoe in fee; in trust for the use of the first and every other son of James, who should survive him, in tail male, equally to be divided;* but, if *James* should die without issue male, then to *Muscoe*, &c.

Upon the ground of the interposition of the legal estate in fee, in trust, between the estate for life and the implied remainder to his issue male, it was determined to be only an *estate tail* in remainder, which could never take effect; affirming, nevertheless, that an express estate for life may be turned into an estate tail by implication.

The whole of the *English* law upon this point is collected and methodised in 2 *Fonblanque*, page 58. in the notes.

But, though the cases from 1 *Burrow*, 39. and 1 *East*, 229. be stronger than the following case, yet, from the more striking similarity between that and the case now in question, it is selected as the one by which the nature of the estate taken by *William Carr*, the devisee, can be at once unerringly tested.

(c) 2 *Wilson*, 322.

21. *Roe, on the demise of Dodson*, v. *Grew et al.* in 1767.(c)

Devise to *G. G.* [*Wm. Carr*] to hold for and during the term of his natural life; and, from and after his decease, to the use of the issue male, of his body lawfully to be begotten, and to the heirs male of such issue; and, for want of such issue, to *D. the lessor of the plaintiff.* [*John Carr* and *Betsey Tebbs.*]

[As a particular comparison of the two cases is intended to be resumed hereafter, when every difference between them will be marked, I will, for the present, content myself with requesting that for "*G. G.*" "*Wm. Carr*," may be read; and for "*D.*" that "*John Carr* and *Betsey Tebbs*" may be substituted, in the case just stated; and that the

opinions of the Judges may be read with such variations in terms only, as the words used in the two cases will justify. They will be found, in effect, to be precisely the same.]

WILMOT, Chief Justice.

The intention of the testator was clearly to give *G. G.* [*Wm. Carr*] an estate for life only; but his intention also clearly was, that all the sons [children and issue] of *G. G.* [*Wm. Carr*] should take [in succession.] Both of these *intentions cannot take place; for if the devisee, *G. G.* [*Wm. Carr*] took only an estate for life, his *sons* [children] could never have taken: and although it eventually happened that he had no sons, [children,] yet we must consider this case as if he had had issue; therefore the Court must put themselves in the place of the testator, and determine as he would have done, if he had been told that both of his intentions could not take effect by the rules of law, and had been asked, which of them he desired should take effect, and stand, if both could not. He certainly would have answered that so long as *G. G.* [*Wm. Carr*] had any *issue male*, [children or issue,] the premises should not go to *the lessor of the plaintiff.* [*Bestey Tebbs* and *John Carr.*] The weightiest intention was, that all the *sons* [children or issue] of *G. G.* [*Wm. Carr*] should take; [in succession;] and to do that *G. G.* [*Wm. Carr*] must take an estate tail. [V. *Hargr. L. Tracts*, 503. *Brown's Ch. Rep.* 280.]

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CLIVE, Justice. In the present case the great intention is to give [in succession] to all the *sons* [issue] of *G. G.* [*Wm. Carr;*] which cannot be without construing it an estate tail.

BATHURST, Justice. It is a rule that where the ancestor takes an estate of freehold, if the word issue in a will comes after, it is a word of limitation. Where there appears a *particular* intent, and a *general* intent, the general intent must take place.—The great view here was, that the land should not go over to *D.* [*J. C.* and *B. T.*] so long as *G. G.* [*Wm. Carr*] had issue; but that general intent cannot take effect unless *G. G.* [*Wm. Carr*] be tenant in tail.

Upon an attentive examination of this case, it will be found that the Judges' opinions are pointedly fitted to the case now in discussion.

The twenty-one cases, condensed, exposed, and numbered in the order in which they have been cited, (in all of which estates for life were *expressly* limited) may be put into the following classes:

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*CLASS I.

Cases, in which, "*without impeachment of waste*," "*with a power to make a jointure, or leases*," &c. or words of like import, were added to an express estate for life.

	No.
1 *Shelley's* case	1
2 *Lyle* v. *Gray*	2
3 *Goodright* v. *Pullen*	4
4 *Bale* v. *Coleman*	5
5 *Bowles's* case	6
6 *Roy and others* v. *Garnett*	20
7 *Langley* v. *Baldwin*	8
8 *Blackborne* v. *Edgley*	14

CLASS II.

Cases, in which the words of limitation, express, or implied, are to the heirs of the body.

	No.
1 *Garth* v. *Baldwin*	7
2 *Coulson* v. *Coulson*	10
3 *Shelley's* case	1
4 *Lyle* v. *Gray*	2
5 *Goodright* v. *Pullen*	4
6 *Bale* v. *Coleman*	5
7 *Blackborne* v. *Edgley*	14
8 *King* v. *Burchell*	11

CLASS III.

Cases, in which the word of limitation was "*issue*."

	No.
1 *Goodright* v. *Pullen*	4
2 *James's Claim*	17
3 *Blackborne* v. *Edgley*	14
4 *In same case*	14
5 *Pinbury* v. *Elkin*	16
6 *Allason* v. *Clitheron*	12
7 *King* v. *Burchell*	11
8 *Attorney General* v. *Sutton*	3
9 *Roe* v. *Dodson*	21
10 *Bowles's* case	6
11 *Langley* v. *Baldwin*	8
12 *King* v. *Melling*	13
13 *Roy* v. *Garnett*	20
14 *Doe* v. *Cooper*	19
15 *Robinson* v. *Robinson*	18

CLASS IV.

Cases, in which words of limitation have been engrafted on words of limitation; as, "to *A.* for life, "and thereafter to his issue, *and* "*the heirs of that issue*."(1)

	No.
1 *Shelley's* case	1
2 *Lyle* v. *Gray*	2
3 *Attorney General* v. *Sutton*	3
4 *Goodright* v. *Pullen*	4
5 *Roe, ex dem. Dodson,* v. *Grew*	21
6 *Langley* v. *Baldwin*	8

CLASS V.

A case, in which an express estate tail was given to *all* the sons and daughters of the first taker; and in which an estate tail was adjudged in the first taker; though *expressly* declared for *life*.

	No.
1 *Blackborne* v. *Edgley*	14

CLASS VI.

Cases, in which estates tail were adjudged on express, and also on implied limitation; in opposition to the life estate *expressly* declared.

	No.
1 *Shelley's* case	1
2 *Goodright* v. *Pullen*	4
3 *King* v. *Burchell*	11
4 *Doe* v. *Cooper*	19

CLASS VII.

Cases, where the words of limitation only were *express*.

	No.
1 *Goodright* v. *Pullen*	4
2 *Same* v. *Same*	4
3 *Bale* v. *Coleman*	5
4 *Trevor* v. *Trevor*	6
5 *Bowles's* case	6
6 *Garth* v. *Baldwin*	7
7 *James's Claim*	17
8 *King* v. *Melling*	13

CLASS VIII.

Cases, in which estates tail have been raised *by implication* only, in opposition to *express life estates*.

	No.
1 *Lyle* v. *Gray*	2
2 *Attorney General* v. *Sutton*	3
3 *Langley* v. *Baldwin*	8
4 *Blackborne* v. *Edgley*	14
5 *Pinbury* v. *Elkin*	16
6 *Bernard, &c.* v. *Fenton*	9
7 *Allason* v. *Clitheron*	12
8 *Roy* v. *Garnett*	20
9 *Goodright* v. *Pullen*	4
10 *Robinson* v. *Robinson*	18
11 *Doe* v. *Cooper*	19

CLASS IX.

Cases, where, without either words of limitation express or implied, but, in order to effectuate the general intention of the testator, his strongest negative words have been overruled.

	No.
1 *Robinson* v. *Robinson*	18
2 *Doe* v. *Cooper*	19

(1) If the words of perpetuity annexed to "*issue*," would not prevent the express estate for life, from being turned into an inheritance, will our act, (c. 90. sect. 12. of *Rev. Code*,) supplying words of perpetuity, prevent the construction for an estate tail?

*Mr. *Botts* offered the following remarks upon the classes, which he had thus arranged.—

Upon the 1st Class.

In almost every case of a power of committing waste, and of making jointures conferred on the first devisee, such power has furnished arguments in favour of the life estate. See 2 *Wash. Rep.* 14.

Upon Class the 4th.

The superaddition of words of limitation to words importing a limitation has always been the source of much argument against the estate of inheritance. It was greatly relied on in *Shelley's* case by the counsel, as conclusive in favour of the life estate.

Before we enter into the application of the foregoing cases to the principal case, it should be premised,

1st. That "the construction of wills is not to vary with "events;" and, therefore, this will is to bear the same construction, NOW, (when the devisee is dead without issue,) that it did bear in his life-time, when there was a prospect of issue.(*a*)

2dly. That, where there is an express estate for life, so restricted to preserve the inheritance for the issue, and both intents cannot prevail, the express estate for life shall be enlarged into an inheritance, to enable the issue to take through the ancestor.

(*a*) Vide Lord Ch. J. *Wilmot's* opinion on *Dodson* v. *Grew*, and 2 *Fonbl.* p. 61.

All the cases affirm this.

I. Upon the first proposition, that an express fee is created.

If, instead of "child or children" the word "issue" or "heirs" had been used, the principal case would fail in nothing of being thoroughly settled by *all* the cases before stated, to convey a clear, certain, and unquestionable estate tail.

That "child or children" is equal to *issue*, is to be proved; 1st. From express opinions of Judges, and, 2dly. From the reason and dialectical, as well as legal import of the words.

And 1st. From Judges' opinions. *Wild's* case confounds "children" and "issues" as meaning the same thing.(*b*) "Children" and "issue" in their "natural sense have the "same meaning."(*c*) A devise to a man *and the children* or issue of his body, is an estate tail "if he had none at "the time."(*d*)(1) Lord *Hardwicke*, in 1 *Vezey*, 201. says, "in *Wild's* case, 6 *Co.* and *Bendloe*, 30. it is settled "that '*children*' bear a coextensive sense with issue; and,

(*b*) 6 *Rep.* 17.

(*c*) Per Judge *Buller*, 3 *Term Rep.* 493.

(*d*) *Fearne on Contingent Remainders*, p. 140. 2 *Fonblanque*, p. 71.

(1) *William* had no issue at the time.

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"according to *authorities, grandchildren and great-grand-"children come within that rule, to certain purposes."—"Child or children" is declared by Lord *Mansfield* to be the same as issue or heirs. *Douglas*, 320, 1, 2, 3, 4.

2dly. From the reason and sense of the words.

"Children" in *England* might not have been so apt or strong for a word of limitation as "heirs." But this was the result of the peculiar structure of their law of primogeniture. "Heirs" in *England*, could not be satisfied but by a *succession* of the eldest males—children there, in the natural sense of the word, would embrace the whole in the first degree of blood collectively, and not the eldest in the males successively: but in *Virginia* all the children are heirs. When a man gives to his children, he gives to his issue and his heirs. These are, in *Virginia*, all different names for precisely the same thing. The rule of law first solemnly settled in *Shelley's* case is founded in policy and sense, and not in mere words or sound. That case was confined to "heirs," but a distinction between "heirs" and "issues," where the testator meant the same thing, would have been disgraceful to the Courts; and accordingly, "*issue*" was brought at once within the rule in *Shelley's* case.

The idea, that *A.* an illiterate testator, using the word "issue" or "children" in a will, would turn his estate into a different channel from his neighbour *B.* who should chance to use "heirs," when both words meant the same thing, as well in law as in common parlance, would be making the system of testaments, with those not learned in the law, a system of chance and uncertainty, and more a system of *frustrating* the *will* than of publishing the *will*.

By limiting the estate to the child or children then of the devisee, (*i. e.* to his child, if but one; if more, to them all,) in law and common sense, as much was done, as if he had limited it, in other words, to his *heirs* or *issue*.

That those words were intended to designate the inheritance rather than any particular persons to take, is to be proved from the following considerations.

First. Because the testator hath added no words of perpetuity to "child or children;" though, from the devise of the house to *Betsey* and "her heirs," he hath shewn that he knew the importance of them; but, by understanding that the difference between the different modes of expressing the inheritance used by the testator ("heirs" in one instance, and "child or children" in the other) was occasioned by the difference between the estates intended to

*be created, and by making "heirs" apply to the fee-simple, and "child or children" to the fee-tail, all the parts of the will will harmonize ;—

Secondly. Because the testator hath not added words of restriction to confine the estates of the "child or children" for life, as he would have done, had his meaning been such ;

Thirdly. Because the testator thought that "child or "children" would make an inheritance in the blood of *William ;* otherwise he meant to die intestate as to the remainder after the death of the "child or children ;" (which cannot be believed ;) for the limitation over to *Betsey* and *John* is not after the death of *William's* children, but in case he had none ;

Fourthly. Because, by limiting the estate devised to his three children to go out of his blood, upon their dying without issue, he shews that he considered all the issue of those three children in perpetual succession, as provided for ;

Fifthly. Because, whenever the testator speaks of his devises to his children, he calls it an estate devised to them.(*a*)

II. and III. I shall consider the second and third propositions together.—They affirm, that

An estate tail was created by implication, from the words "if none," and also from the words "If all my dear chil- "dren die without issue," &c.

(*a*) 1 *Wash.* 100, 101, 102. 1 *Call*, 15. 1 *Eq. Ca. Ab.* 178.

And the consideration of these must, indeed, be short—for the authorities are so conclusive upon the last proposition, that it would be a waste of time to reason upon it. In the consideration of the fourth proposition, some things must be said illustrative of these points ; and to them reference is had.

IV. The fourth proposition is,

That to effectuate the main general intent of the testator, this must be construed an estate tail in *William*, the devisee.

The testator's intention was either, 1st. That the estate devised to *William* should go over to *Betsey* and *John* before the extinction of the remote issue of *William*, and return back to that remote issue, only in the event of the extinction of the descendants of *John* and *Betsey*, before it could go into the *Chapman* family ; or, 2dly. It was the intention that it should never be enjoyed by *John* and *Betsey* till the total failure of issue, remote as well as immediate, of *William*. That the former was not the intention requires no proof.—That the latter was the clear intention would seem to be as plain.

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*The testator must have known, at least, that by the law his children were his heirs, and, that in case of intestacy, they would take fee-simple estates.—His complicated provisions by will could only be with a view to benefit his children's posterity.—This he thought he could most effectually do by confining it to his posterity without otherwise abridging their power over it.—The preservation of the estate for that posterity may be admitted then to have been the great end of the devise: the restriction of the estate to *William*, during life, may be admitted as the intended means to effect that end. The inquiry then is, whether the *end* can be attained without a sacrifice of the *means*; for, beyond all dispute, if a sacrifice in the case is necessary, the means must fall to the *end*, and not the end to the *means*.

William, the devisee, was an infant, unmarried, and childless when the will was made.—His posterity had not then become the objects of the testator's bounty, from habits of intercourse, or from personal attachment. But the blood derived from the testator to run in the veins of *William's* posterity was the filament that bound the former to their interests.—And wherever that blood should be found, the person that contained it was within the sphere of the gift. There was equal reason to provide for the issue of the issue of *William* as for the first issue.(*a*)

(*a*) *King* v. *Melling*. See *Leither* v. *Tracy*, 3 *Atk.* 749. 788.

If *William* does not take an estate of inheritance, his remote issue could never take.

" Child or children" cannot at the same time be words of purchase and words of limitation. If they are words of purchase, then they could take only life estates; if of limitation, then the children would take *ad infinitum*. The 12th sect. of the 90th ch. of the statutes in the *Rev. Code* does not apply; because that section contemplates none but plain devises to " one" where the inheritance is not parcelled out to many; and because that act has influence where fee-simple estates *only* are to be created; which could not have been the intention here, without supposing the testator guilty of the folly of attempting a restraint on the alienation of his own living child, (in whom he had enough of confidence to make him an executor,) and yet to intend that his grandchildren, then unborn and unknown, should enjoy the estate with uncontrolled rights of alienation.

[2 *Wash.* 25 and 28.]

If, without construing it an estate tail in *William*, the remote issue of *William* could, in the event of his leaving children living at his death, take through those children,

* 252 *yet grandchildren of *William*, the devisee, could not take

immediately, or otherwise, in case of the death of *William's* children before the death of *William*.

Thus, suppose *William* the devisee had a son *A.* who had a child *B.*;—then *A.* had died. *B.* the child of *A.* could not take the estate devised to *William*, the grandfather of *B.* without claiming the inheritance through that grandfather; because, if "child or children" was to designate the person to take, the grandchild would not come within the designation.

In the case last supposed, it might happen that the estate of the testator might go out of his blood, and out of the *Chapman* family, while each of his three children had numerous suffering posterity; unless *William* could be construed to take an estate tail.

Thus, suppose *Betsey* and *John* to have died, and left each a grandchild alive. Upon the death of *William*, leaving himself a grandchild, but no child, the grandchildren of *John* and *Betsey* could not take the estate; but it would go to the children of the *Chapmans;* and if they had been placed, by births and deaths, in the same predicament, the testator's estate, upon the death of his son, would be undisposed of; or, if it vested in the *Chapman* family it would go, in perpetual succession, to them; to the utter exclusion of the posterity of the testator.

Again, if *William* does not take an estate of inheritance, it would be subject to run perpetually in the branches of his posterity.

Thus, suppose *William* to have two children, *A.* and *B.* both of whom have issue; *A.* dies in the life-time of *William;* then *William* dies; and then *B.* his son dies. Now, if the issue of *A.* cannot claim as heir to the grandfather *William*, he cannot claim at all; since he is not the "child "or children" of *William;* and the estate, having vested in *B.* on the death of *William*, would go to *B.*'s issue in exclusion of the issue of his eldest brother *A.:* and the same might happen to *John's* and *Betsey's* posterity.

See the curious case described by the Court of Appeals, 2 *Wash.* p. 33.

But we may go further.

If *William* did not take an estate tail, his immediate issue could not take.

They could not take, because they were not *in esse* at the time of the devise, for the estate to vest in them.(*a*) And the doctrine of executory devises would not aid the case; for here the particular estate was sufficient to support the *contingent remainder; and, where that is the case, the dis-

(*a*) 2 *Wash.* p. 31.

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position shall never be construed an executory devise.(a) It cannot be supported as a contingent remainder, because (without going further into the rules and policy of the feudal law) it depended upon a double contingency; 1st. Upon that of *William's* having children; 2dly. Upon that of those children surviving *William*.

The limitation to *Betsey* and *John* is after an indefinite failure of issue in *William*, and void.(b) So that the object of the testator, so far as it relates to the preservation of the estate for them, is opposed by the rules of law.

Thus, from a review and comparison of all the cases upon this subject, it is clear, that to secure the estate to the remote as well as immediate issue of *William*, (the great intent of the testator,) his own means, from their total unfitness, must be sacrificed.

But, after this general review, the promised comparison of the case of *Roe*, on demise of *Dodson*, v. *Grew*, with the present case is to be taken up.

Roe, &c. v. *Grew*.	The present case.
1st. The devise is to *G. G.* for and during the term of his natural life.	1st. The devise is to *William* during his natural life.

There is no material difference between these members of the two devises.

2d. And from and after his decease,	2d. After his decease,

The sense is the same in both instances.

3d. To the use of the issue male of his body, lawfully to be begotten; and to the heirs male of such issue.	3d. To his child or children.

In the case from *Wilson*, now under comparison, the differences between the last mentioned member of the devise and the corresponding member of the present case are as follow:

1st. To the *use*, which is not in the present case.—

2d. The limitation is to the issue male of his body lawfully begotten, instead of "child or children."

3d. And to the heirs male of such issue; and,

1st. It being to the use of *G. G.* instead of being devised at once to *G. G.* makes no difference; for trusts are to be governed by the same law, and are within the same reason as legal estates, and this is a maxim that has obtained universally.(c)

*2d. The entail in the issue male is the same thing to this purpose as a general entail.—Most of the cases cited in this argument were cases of general entail; and no dis-

(a) 1 Lord *Ray*. 208. 3 *Wils*. 244. 246. *Doug*. 267. *Saund*. 380.

(b) 1 *Wash*. 71. 1 *Call*, 344. 2 *Call*, 316, 317.

Brown's cases in 1786. p. 33, 34. and 127. Note the difference between the devise to *Wm*. and to *John* and *Betsey*.

(c) *Eq. Ca. Abr*. 2 vol. p. 738.

tinction to this purpose was ever taken by counsel between a general and special tail. " Issue," I have shewn, is the same as " child" or " children."

3d. When words of limitation are added to " issue," to give effect to the words of limitation so added, " issue" should be made a word of *purchase*. Yet the Courts, in *Shelley's* case; *Lyle* v. *Gray*; *Attorney General* v. *Sutton*; *Goodright* v. *Pullen*; and *Langley* v. *Baldwin*, have rejected those words of express limitation, rather than submit to the frustration of the intent, resulting (under the rules of law) from making issue a word of purchase, so as to prevent the first taker from having a fee.—*But, if the words of limitation added to issue cannot make the issue take as purchasers, surely the act of Assembly* (*Rev. Code*, c. 90. s. 12.) *cannot do more than the express words of the testator to the same effect.*

4th. And for want of such issue to *Dodson*.

4th. If none, (i. e. no child or children,) to *Betsey Tebbs*, &c.

And again,

" If all my children should die without issue, then over," &c.—

It would surely be difficult to maintain, that these implicative branches of the devise, in the present case, were not as strong as, " for want of such issue, to *D.*" &c.

The estate could never go to the *Chapman* family but " for want of issue in *William*;" nor could it go to *John Carr* or *Betsey Tebbs* but " for want of such issue:" otherwise, if it went to *Betsey*, or *John*, before the extinction of *William's* issue, it must return to *William's* issue, upon the extinction of *John's* or *Betsey's*, before it could go to the *Chapman* family; and if this is not the case, the estate would go to the *Chapman* family, without " want of issue " of *William*," contrary to the express words of the will. Now, that the estate should go from *William's* issue, before their extinction, to *Betsey* and *John*, and then return to *William's* issue, under the will, in any event, is too absurd to be the presumed intent of the testator; much less could it comport with rules of law: so that it is true that under the words, " If all my children die without issue, the estate " is to go over," &c. the estate can never go to *John* or *Betsey*, or to the *Chapman* family, " but for want of issue " of *William*."

Vide *Wilmot's* reasoning, ante.

*The implicative branch of the devise in *Roe* v. *Grew*, (" but for want of such issue,") was sufficient to turn the express estate for life into an estate tail, without the ex-

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press limitation to the issue of *G. G.* And *Lyle* v. *Gray*; *Attorney General* v. *Sutton*; *Langley* v. *Baldwin*; *Blackborne* v. *Edgley*; *Pinbury* v. *Elkin*; *Bernard* v. *Fenton*; *Allason* v. *Clitheron*; *Roy* v. *Garnett*; *Robinson* v. *Robinson*; and *Goodright* v. *Pullen*, were all cases in which express estates for life were turned into estates by implication.(*a*)

If I am correct in the foregoing conclusions, *William Carr* the younger was seised of a fee conditional at the common law, which, when operated upon by the statute *de donis*, and by the acts of 1776 and 1785, docking entails, turned it into a fee-simple estate, of which the widow is dowable.

(*a*) If this be correct, is it not of consequence to consider whether "child or "children" be the same as "issue" or not?

Wickham, for the appellees. In this case the claim of dower is merely incidental, and depends upon the previous question, whether *William Carr* the younger took an estate for life, or in fee. The will is plain, and shews the intention of the testator to give an estate for life only. This is the plain and obvious construction, and the only one which it will bear, unless artificial rules be interposed.

There are two rules to be observed in construing wills. The first is a rule of general policy, which prevents perpetuities. The utmost limit allowed by law, (except that, in *England*, an estate tail, which is a peculiar species of perpetuity, is expressly authorised by statute,) is an estate for a life or lives in being, and twenty-one years afterwards.—This rule is not infringed by the testator in the present instance: for the devise is to *William Carr for life*, and, after his decease, to his *child or children: if none*, (that is, no children,) remainder over. Nor is the residuary clause in the codicil too remote; because it is limited to the children of the testator dying without issue, *living his wife*. So that he intended the estate to be final on the death of his son and wife, both of whom were then in being.

The second rule is, that, in following the intention of the testator, the *general intent* is to be regarded in preference to the *particular intent*, *if they interfere*; but *not otherwise*. For example; an estate to *A.* and his heirs; and, if he die without issue, remainder over; this is an estate tail. So to him for life, and his issue afterwards; and, if he die without issue, remainder over. The particular intent of an estate for life gives way to the general

* 256 *intent to provide for his issue;—otherwise the issue would only take a life estate.

But if the particular intent and general intent be consistent, both shall stand. Such as an estate for life, and remainder to the issue and the heirs of the issue; both shall stand together.

I will lay down another rule; that wills in both countries should be construed according to the existing laws, unless the contrary appears to have been the intention of the testator. Thus, in *England*, estates tail being allowed by statute, the Courts will presume that the testator meant to create such an estate; if such general intention can be collected. In this country, they are not allowed; and you will not presume that the testator meant such an estate, unless the words plainly import it, or it be necessary to effectuate his general intent. *There*, if an estate be to *A.* for life, remainder to his issue, without words of inheritance; the issue will take only *for life*, if they take as purchasers. In order, therefore, to carry into effect the general intent, the Courts will construe it into an estate tail. *Here*, words of inheritance are not necessary, by express act of Assembly; and the general intent may be answered without presuming an estate tail. The act of Assembly may properly be referred to on a question of intention. Estates tail are presumed in *England*, because allowed by act of Parliament:—estates in fee-simple are presumed in this State, because allowed and *directed* by act of Assembly. This does not interfere with cases where it is apparent an estate tail was intended; because, in such a case, the act of Assembly turns it into a fee-simple. In the case before us, it is apparent that an estate for life only was intended.

We come now to the question, whether "child or chil-"dren" operate as words of limitation or of purchase. If they operate as words of limitation, they carry a fee; if as words of purchase, an estate for life only, and the widow is not entitled to dower.

But it is supposed by Mr. *Botts*, that he has found a case apposite to this—*Roe*, on the demise of *Dodson*, v. *Grew*.(*a*) I have taken a very different view of it. In this case, it was intended by the testator, that all the children should take together. In that case, they took in *succession*, and not *together*. The case turned altogether upon this point. So, in *Roy* v. *Garnett*,(*b*) in the very luminous argument delivered by Mr. *Campbell*, the same distinction is taken. But it is said, that, in this country, *all the children take together, and not in succession; and, therefore, though it would not be an estate tail in *England*, it would be here; because the children take by descent. Admitting this to be so, it does not vary the intention of the testator: and, if the argument prove any thing, it only proves that the *English* cases are not applicable. But this position is not correct. It is understood to be a settled

(*a*) 2 *Wilson*, 322.

(*b*) 2 *Wash.* 22.

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rule of law, that, if a man devise lands to all his children, in this country, they take by devise; but, if he have but one child, he takes by descent, because the better title. So, in *England*, it is laid down as a general rule, that, though the ancestor *devise* the estate to his heir, yet if he take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seised by descent: but, if the devise be to coparceners, they take by purchase.(*a*)

(*a*) See 1 *Salk.* 242. *Reading* v. *Royston.*

The next, and one of the principal cases relied upon by the counsel on the other side, is *Robinson* v. *Robinson.*(*b*) It appears, from the certificate of the Judges in that case, that the general intention of the testator could not have been carried into effect, without construing the devise into an estate tail. There were no words of inheritance in the devise to the son. Consequently, in *England*, he would only take a life estate, but here, a fee. In *Doe*, on the demise of *Cook*, v. *Cooper*,(*c*) the issue took intermediate estates for life, and not an immediate estate tail, as seems to be taken for granted by Mr. *Botts*. A limitation over, on a general failure of issue, would have been necessary to make it an estate tail. There were no cross remainders, as in the case now before the Court.

(*b*) 1 *Burr.* 38.

(*c*) 1 *East*, 229.

But it is argued, that if our construction should prevail, the grandchildren might be excluded. The testator might never have thought of providing for the children of children dying in his life-time. This frequently happens; and there never was a question but that the children of such were excluded. The case of *Roy* v. *Garnett*(*d*) is next relied on. It may be sufficient to say, that no opinion of the Court was given upon any point in that cause, which bears upon this. Judge *Pendleton* (in page 34.) gives only his own opinion. [Here Mr. *Wickham* referred to the argument of Mr. *Campbell*, in that case, and went into a minute comparison of the two cases, to shew that they were quite dissimilar.]

(*d*) 2 *Wash.* 9.

The devise being to the children of *William Carr* the younger *generally*, and not restricted to one or more *living at his death*, the moment a child was born it took a vested *interest. It may be urged, that it was uncertain whether any child would be born, or whether more than one. That does not vary the rule of law. A child may take a vested interest, though the proportion be not ascertained. The interest is vested at the moment of the birth of the first child; but the proportion may be varied by after-born children. If there be but one child, it takes the whole.

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It may be laid down as a rule of law, that an estate may be vested in *interest* in remainder, though the *proportion* be uncertain. Like the common case of an estate to *A.* for life, remainder to *B.* for life. Here the estate to *B.* is *vested*, though he may die in the life-time of *A.* But if it be to *A.* for life, remainder to the heirs of *B.* it is *contingent*, because it is uncertain who is the heir of *B.*

If an estate be given to *A.* for life, remainder to all his children and heirs, all the children take, and the representatives come in. *Attorney General* v. *Crispin.*(*a*) *Doe* v. *Perrin.*(*b*) This last is the very case before the Court, if we throw out the words of inheritance. There the children taking by purchase, the moment one was born, it took in remainder. In this case, if none were ever born, the life estate of the father supported our remainder, and we take. The act of Assembly makes it necessary for the Court to construe an estate to "children" in the same manner as if the word "heirs" had been added.(*c*) The Court must, therefore, presume that the testator meant a fee to the children of *William Carr* the younger. The word *heirs* is not necessary to carry a fee, because the law is so; and the Court will intend that the parties meant to conform to the law. But, it is said, the act of Assembly speaks of a conveyance to *one*. The answer is, that *many* includes *one*.

(*a*) 1 *Bro. Chan.* 386.
(*b*) 3 *Term Rep.* 484.
(*c*) See *Rev. Code, Pleas.* ed. c. 90. sect. 12. p. 159.

Mr. *Botts* argues on the supposition that the estate was conveyed to the children in *succession*, and, therefore, the act of Assembly turned it into an express estate in fee in *William*. But in this country the children do not take in succession, but altogether.

He then proceeds to notice the import of the various words, *issue*, *children*, and *heirs*; and states that "issue" is equivalent to "heirs" and "children" to "issue."—In the case of *Roe*, on the demise of *Dodson*, v. *Grew*,(*d*) *Wilmot* and *Clive*, Justices, in delivering their opinions, expressly lay it down, that *issue* is either a word of limitation or of purchase, and must always be applied so as best to effectuate the intention of the person who uses it. In 3 *Term Rep.* 493. Judge *Buller* says that *children* do *not mean *heirs*. The same doctrine may be found in *Robinson* v. *Robinson.*(*e*) In *Morris* v. *Owen*,(*f*) it was determined, that a power of appointment to *children* did not include *grandchildren*; but that the word *issue* would have been sufficiently comprehensive; so that if *children* had been equivalent to *heirs*, the *grandchildren* might have taken. But in all the cases where those words have been used, their application has depended upon the *intention* of the person using them.

(*d*) 2 *Wilson*, 322.

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(*e*) 1 *Burr.* 38.
(*f*) 2 *Call*, 520.

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In this case there was a contingency with a double aspect, and a life estate to support it:—as to *A.* for life, remainder to the heirs of *B.* but if *B.* be living at *A.'s* death, to the heirs of *C.* But if the life estate shall be extended to a fee, it is an executory devise of a fee after a fee: and, if the limitation be not too remote, they take one way or the other. It is, therefore, a mere question of names. In the present case, it was not too remote; for in another member of the devise, the testator says, if "all my dear "children die, *living my wife*," &c. so that it is to take effect during a life in being.

But the true construction of this will is, an estate to *William* for life, remainder over. It is objected, however, that in this country all the children take by descent, and, therefore, a descent must be intended. This is a mere question of intention. Did he mean to give an estate for life to his children, or an estate of inheritance? Unless we resort to artificial rules, there can be no doubt of his intention to give a life estate only. But these rules are never resorted to, except when the general intent and particular intent conflict. Here the general and particular intent agree. An estate was meant for life; after the death of the devisee, his children take as purchasers; but as the testator contemplated that he might have none, he gave it to others in remainder. What rule of law or of policy is violated by this disposition?

Love, on the same side. The only question now to be considered is, whether *William Carr* the younger took an estate for life, under the will of *William Carr* the elder; or whether, by implication of law, he took a fee-simple.

The clause in the will of *William Carr* the elder, which is the subject of discussion, is in these words: "I give "and bequeath to my son *William Carr*, during his natural "life, the lands," &c. (going on to describe them, and concluding this clause by the words,) "I say, I give the "aforesaid lands and negroes to my dear son *William Carr*,
* 260 "*during his natural life; and, after his decease, to his "child or children; if none, to my son *John Carr* and "my daughter *Betsey Tebbs* for life; and then to be "equally divided among their children."

I shall here notice the further disposition which seems to have been made of the property specified in this clause, by the words in the second codicil to the said will, which are, "should all my dear children die without issue of their "bodies, my dear wife living, one half the life estate to "go to my dear wife during her life, the other half to

" *Thomas Chapman*, *Simon* and *Robert Lutteral*, and *Tho-*
" *mas Chapman's* children, namely, *Carr Chapman*, *Charles*
" *Chapman*, and *Jenney Chapman*, during their lives, then
" to their children, if any, after the death of my dear
" wife, the whole of what she has for life, in the last
" clause, to *Thomas Chapman*, in trust for the foremen-
" tioned children, and my trusty boys *Daniel* and *Arch*,
" equally to be divided between them."

The will and the two codicils are dated the 23d day of *January*, in the year 1790, the testator departed this life in *November* in the same year, and on the 8th of *February*, 1791, the will and codicils (being proved to have been *all in the hand-writing of the testator*) were admitted to record in *Prince William* County Court.

All Courts have agreed, that the intention of a testator is to be the leading rule of construction in wills; and that such intention is to be collected from the words of the will, in the first place.

I therefore take the position as correct, that if the intention is plain from the words, they will give effect to the will in their common import, unless they are shewn to be in a state of hostility to some fixed and incontrovertible principle of law in the limitation of property; as in *Shelley's* case, and in *Hill* v. *Burrow*, 3 *Call*, 353. &c.

When, in the same clause of the will of *William Carr*, we find him twice expressing his devise to his son *William* to be for life, it would seem that such words could not have been produced by accident; but that such a disposition of the property was not only intended, but formed a leading feature in the wishes of the testator.—This intention is admitted to be clear, and is called his particular intention by the counsel for the appellants, in contradistinction to his general intent.

And here I am willing to admit that, if the particular and general intents are found to clash with each other, the former must give way; but I do not admit that the general *intent is to be confirmed, so as to defeat the remainders at all events. * 261

At the same time I claim, if the particular and general intent can both be answered and stand together, that they shall do so; for the whole intention must be answered, if the rules of law will admit of it;(a) and it is a maxim, that all parts of an instrument shall have effect, if possible.

I shall, in order to shew that both the particular and general intent attributable to *William Carr* in his will may take effect, (thereby giving to his son *William* an estate

(a) 1 *Burr.* 51. 2 *Wash.* 9. *Roy* v. *Garnett*, 2 *Fonb.* 60.

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for life, of which his widow could not be endowed, and to his child or children a *contingent remainder*,) take two distinct views of this case.

1st. I will endeavour to shew that,

Under the principles of decision which have obtained in cases of this kind, in the Courts of *England*, this devise *may* be adjudged to give to *Wm. Carr* the younger, an estate for life; and that such a construction does not conflict with the settled rules of the common law;

2d. That, under the principles which necessarily flow from the unavoidable interpretation of our own laws, to give effect to the testator's general intent, the estate *must* be construed to be for life only in *Wm. Carr* the younger.

As to the first view;

I shall endeavour to select such cases as come nearest in words and principles to the case pending: for I am aware, from the researches I have been able to make on the subject of construing wills, of the truth of Justice *Wilmot's observation* adopted by the President of the Court of Appeals, "that cases on the construction of wills rather "serve to embarrass than elucidate;"(*a*) "that cases in "the books on wills have no great weight, unless they are "exactly on the very point.(*b*)

(*a*) 1 *Wash.* 266. *Shermer* v. *Shermer's* Ex'r.

(*b*) 2 *Willes*, 324.

The few cases which I think may be fairly argued from, in forming a decision on the present one, I will arrange as follows.

(*c*) 1 *Co. Rep.* 64.

Archer's case,(*c*) was a devise to *Robert Archer* during his natural life; and, after his death, to his right and next *heir*, and to the heirs of his body, &c.

It was agreed by the whole Court, that *Robert* was only tenant for life.

(*d*) 6 *Co. Rep.* 16.

Wild's case.(*d*)

This case, I shall endeavour to shew, is a very direct authority in favour of the defendants, on common law principles.—It was in remainder to *Rowland Wild* and his wife, and after their decease, to their children.—*Rowland* and *his wife were adjudged to take an estate for life, and their children also an estate for life only. Three rules in the limitation of estates were in this case agreed, which seem to have been no where contradicted; but the one applicable to the case pending, seems to have been recognized as authoritative, as I shall shew.

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1st. If *A.* devise his lands to *B.* and his children, or issue, (*without limiting the time* when the estate in the children is to take effect,) and *B.* has no children at the time, the same is an estate tail.

2d. If *A.* devise his lands in like manner to *B.* and *B.* hath children at the time, they shall be a joint estate for life.

3d. "If a man devise land to husband and wife, and, "*after their decease*, to their children, or the remainder "to their children; in this case, although they have not "any child at the time, yet every child, which they shall "have after, may take by way of remainder, according to "the rule of law; for his intent appears that their chil- "dren should not take immediately, but after the decease "of *Rowland* and his wife."

Wild's case is referred to in *Ginger* v. *White*,(*a*) where it is said the reason of the 3d rule arises from the words "*after his decease*," because it is thereby shewn, that the devise to the children was intended as a remainder. So in the pending case, the estate in remainder is expressly limited to take effect, after the decease of *Wm. Carr, the devisee.*

(*a*) *Willes' Rep.* 353.

That the words used in the devise to *William* are to have the same effect and construction as those used in the devise to *John* and *Elizabeth*, is proved by the common meaning annexed to the words used in these different clauses, and is also plainly to be deduced from one of the main general intents of the devisor.

It is proved by the words. For I hold the words "*after* "*his decease*," which are found in the devise to *William*, and not in the devises to the others, to be tantamount to the words "*living at his* (or her) *death*," found in the devise to *John* and *Betsey*, and not in that to *William*; and those used in the devise to *William*, as competent to fix the time of a failure of children, and when the remainder should take effect, as those used in the devises to *John* and *Betsey*. It is also deducible from one of the main general intents of the testator, which evidently was to divide his estate equally among his three children, and to make them take in the same manner. He has measured out their estates by the same rule in point of duration; has *established, in each, cross-remainders in express terms;—and finally, has expressly declared in the first codicil, that it is his will and desire that all his dear children should have equal shares of his estate. It cannot be presumed that these devises of his property to his children, could have been intended to be governed by different rules.

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The case of *Ginger*, on the demise of *White*, v. *White*,(*b*) decided in the Common Pleas in 1742, I consider as strong *British* authority in our favour.—The case was, *John White* the elder, grandfather of the lessor of the plaintiff,

(*b*) *Willes' Rep.* 348.

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having two sons, *Henry* and *John*, and one daughter, *Sarah*, devises a part of his house to his wife for life; and, after her decease, that part, with the rest of the premises, to *John* for his life, and to *Sarah* for life, in case she live unmarried, in common, between them; but in case *Sarah* marry or die before *John*, then in either of the said cases, the said *John* shall have the whole use of the house for his life, and, after his decease, to the male children of the said *John*, successively, and one after another, as they are in priority of age, and to their heirs, and in default of such male children, to the female children of *John*, and if *John* die without issue, he wills the premises to his grandson, *John White* and his heirs.

John, the son, had no issue at the time the will was made, or since. On the death of the testator, *John* and *Sarah* entered. *Sarah* died, and *John* survived her; and *John* entered on the whole premises, suffered a common recovery, and declared the uses to himself and his heirs, and afterwards settled the premises on the defendant *Elizabeth* and her heirs. *John* the son died, afterwards, without issue, *Henry* the eldest son still living; and *John* (the grandson and devisee) was the lessor of the plaintiff.

The question was, whether *John* the son took an estate tail, and so had power to suffer a recovery and bar the remainder to *John* the grandson, or whether he was only tenant for life.

Lord Chief Justice *Willes*. This is the general question; but it will depend on two points.

1st. Whether *John* the son took an immediate estate tail by the devise to his male and female children.

2d. If he did not, whether these words, "In case the "said *John* should die without issue," did not give him an estate tail by implication in remainder, after the limitation to his children; for, in either case, the recovery would bar *John* the lessor, because he claims by the subsequent devise, "in case *John* his uncle die without issue." In

* 264 *this case the Chief Justice gave an opinion very much at length. He reviewed the cases of *King* v. *Melling*, *Langley* v. *Baldwin*, *Shaw* v. *Weigh*, *Popham* v. *Bamfield*, *The Attorney General* v. *Sutton*, *Lodington* v. *Kime*, and *Law* v. *Davis*, which were the most important cases at that time decided, and some of which are now relied on in the argument of the counsel for the appellants.

The Chief Justice delivered it as the opinion of the Court, that *John* the son took only an estate for life.

The words "after his decease," and the word "children," used by the testator in the case of *Ginger* v. *White*, and

also in the pending case, are very important, and may be argued from in the same manner in both cases.

The devise to the children of *John* and their heirs, successively according to priority of age, confined the disposition as closely to the law of descents in *England*, as the devise to *William's* children does to the law in this country, on the supposition, that if *William* had had children, they would have taken a fee-simple, under the operation of the act of Assembly of 1785, which dispenses with the use of words of perpetuity. There is certainly as strong an analogy between the two cases, as could be expected to be found between words and the ideas correspondent to them, which, at different times, were used by different men, neither of whom intended to use, or were capable of using technical expressions, in developing their minds.

The Chief Justice, in explaining what are considered as express words to enlarge an estate for life into an estate tail, says, " such words as *ex vi termini* create estates tail, " are admitted to have that effect," because of the rule, I presume, in *Shelley's* case.

This distinction will be found important, in reply to the cases cited by the counsel for the complainants.—For, in most of them, either an express estate tail is limited to the issue, or such words are used as in themselves import an estate tail, and are taken to convey such an estate.

The case of *Fell* v. *Fell*(*a*) was a devise " To *Solomon* " *Fell* for life, and after his death, to his son *Thomas*, and " his heirs male forever, the elder to be preferred before " the younger, and, if no male issue left behind, then the " estate to devolve to the females, and, if no females, the " estate to devolve to the said *Solomon*, to dispose of as he " thought proper." The defendant, *Solomon*, had, at the time of the testator's death, *Thomas*, his eldest son, and the plaintiff, his only daughter, and no other children. *Thomas Fell*, the son, died soon after the testator, and the plaintiff, the daughter of *Solomon*, was his only surviving *child. By her a bill was filed to restrain the defendant, *Solomon*, from committing waste; and a case being sent to the Court of Common Pleas, for their opinion as to what estate the defendant took under the will, the Judges certified, " that they were all of opinion, that *Solomon Fell*, " the defendant, took an estate for life, and, his son *Tho-* " *mas* dying without issue, his daughter took an estate tail." This case is similar to *Archer's* case, mentioned before. I consider it as important, because it shews, that the express intention to limit a remainder shall have effect, although it might, by possibility, destroy a general intent;

(*a*) 3 *Wilson*, 399.

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which in this case was, that so long as there was issue of *Thomas*, the estate should not go over; which general intent, it is said, could only be effected by construing these intermediate express devises for life into estates tail, by implication.

Although there are many other cases among the more modern reporters, which might be adduced to shew that, even on common law principles, the life estate and inheritance did not unite in *William Carr* the younger, under the devise by his father, I think the argument may be shortened, and the case placed in a more intelligible point of view, by noticing here some of the authorities adduced by the counsel for the complainants.

Shelley's case is first relied on.

By which an estate tail in the heirs male of the body of *Edward Shelley* is created, by *express terms* after an estate for life to *Edward Shelley;* and for default of such issue, remainder over, &c. and it was adjudged that *Edward Shelley* took an estate tail—there are many reasons against the influence of that case on the present; for I admit *Shelley's* case to be still an unbroken pillar of the feudal system, which cannot be demolished and thrown with the rubbish of the dark ages; but, 1st. I must shew that it does not lie in our way, and that it is not necessary for us to encounter it.

This was a conveyance made by *Edward Shelley*, by way of covenant, to stand seised to the use of himself for life, &c. and was an attempt to evade the common law principle derived from the nature of feudal tenures, which was as old as the system itself; "that a man shall not, by any "means, make his heirs take from him by purchase."

2d. It was a principle altogether unconnected with the right of devising; and, if that right did exist at common law, (which some suppose,) was in opposition to it; perhaps in suppression of it.

* 266 *3d. It is a principle, which has in a great measure lost its effect in *England*, by the stat. of 32 *Hen.* VIII. permitting devises, &c. and the rules which have been adopted in the construction of devises by the *British* Courts.

In 2 *Burr.* 1107. Lord *Mansfield* says, "The reason of "this maxim has long ceased, yet, having become a rule "of property, it is adhered to in all cases *literally* within "it."

It is unnecessary to remark the material difference between the words of the instrument in *Shelley's* case, and those in the devise before us. *Christian*, in his notes on

2d book of *B. Com.* p. 20. lays down the rule in these words: "When the ancestor, by any gift or conveyance, "takes an estate of freehold, and in the same gift or con- "veyance an estate is limited mediately or immediately to "his *heirs* in fee or in tail, always, in such cases, *heirs* is "a word of limitation, and not of purchase."

So subservient, however, has this common law rule become to the intention in wills, where plainly expressed, that the smallest literal deviation will destroy its influence. The word *heir* in the singular number, used instead of the word *heirs*, will take it out of the common law rule; *Archer's* case,(*a*) and 2 *Burr.* 1110. although the rational interpretation of the two words is certainly the same, as was said by one of your honours, in *Hill* v. *Burrow*.(*b*)

(*a*) 1 *Co. Rep.* 66.

(*b*) 3 *Call*, 342.

In a devise of *gavelkind land*, the word heirs is not a word of limitation. (2 *Burr.* 1110.)

In the case of *Long* v. *Laming*, from which the last citations are made, Lord *Mansfield*, p. 1109. says, "There "is no such fixed and invariable rule, as has been sup- "posed, that words of limitation shall never, in any case, "be construed as words of purchase." And in p. 1111. "There is no rule of law that prevents *heirs* taking as "purchasers, when the intention of the testator requires "that they should do so."

Justice *Dennison* (*ibid.*) said, "It is not inconsistent "with the rules of law, that heirs of the body should, in "some cases, be construed as *designatis personæ*, &c. "therefore, the heirs of the body of *A. C.* must take by "purchase."

Justice *Wilmot* cited a case of *Baker* v. *Snowe*, which was a conveyance to *E. E.* for life; remainder to his first son and the heirs male of his body; and so to his six sons; remainder to the right heirs of *E. E.* it was holden to be only a contingent estate, and not an estate tail in *E. E. because it was limited to particular persons.* "The words "*heirs*, *heirs male*, or *heirs of the body*, are not to be "*construed as words of limitation, either in a will or "deed, where the manifest intention of the testator or the "parties is declared to be, or clearly appears to be, that "they shall not be so construed." *ibid.* 1112, 13.

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By these respectable law opinions and decisions, the rule in *Shelley's* case, which was a particular object of discussion, seems to be subdued to the more rational one of intention; or to be so narrowed in its operation as not to embrace our case.

In *Perrin* v. *Blake*,(*c*) the rule in *Shelley's* case is also made the subject of discussion; the reason of it explained

(*c*) 4 *Burr.* 2579.

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on common law principles, and that reason said to have ceased to exist: The limitation was within the rule in *Shelley's* case. Lord *Mansfield*, Justice *Ashton*, and Justice *Willes*, held the ancestor to take an estate for life; Mr. Justice *Yates*, *contra*. A writ of error was brought in the exchequer chamber, and Mr. Justice *Blackstone*, who was of opinion for the plaintiffs, notwithstanding laid down the doctrine in these words: "If the intent of the testator "manifestly and certainly appeared, by plain expression, "or *necessary implication from other parts of the will*, that "the heirs of the body of *A.* should take by purchase and "not by descent, then a devise to *A.* for life, and after his "decease to the heirs of his body, not only *might* but *must* "be construed an estate in strict settlement." This is a strong case for us.

After the *British* Courts have thus restrained the operation and weakened the force of the rule in *Shelley's* case, I can scarcely presume that its influence will be reestablished in this country, as the artificial ground upon which it stood there never did exist here.

The case of the *Attorney General* v. *Sutton*, is not, I presume, intended for the single purpose of supporting the authority of the rule in *Shelley's* case; but is cited as an authority generally favouring the plaintiff's claim. If that be the intention of the citation, it certainly can have no application to the case before the Court.

The words in the cited case, *ex vi termini*, created an estate tail. In *Ginger* v. *White*, before cited, it was clear that all the sons of *Thomas* were intended to take; nay, all his issue, although only a part are provided for in express terms. But in the case at bar, all the children being by express terms provided for, nothing is left for implication; and the words of the will may be adopted in its construction without doing violence to any supposed intention. This distinction is fully illustrated by all the cases, where

* 268 *the limitation has been to all the males, and then the females, in succession, after the estate for life in the ancestor; as was the case in *Fell* v. *Fell*.(a)

(a) See *Cha. Ca.* 173. *Backhouse* v. *Wells*, *Gilb.* Cases, 20. 129.

The principle of decision in the *Attorney General* v. *Sutton*, is likewise adopted in *Langley* v. *Baldwin*, where the words were the same, except that in the latter case the limitation extended to the sixth son, but not to all; for which reason, and because it was declared that if the devisee for life should die without issue, the estate should go over, in order to provide for a seventh or other son, the devisee was held to take an estate tail.

And, again, when the provision was general for the issue or children by the same words, or words of the like import, as they respected the devisee, he was held to take an estate for life.(a) A numerous train of ancient authorities might be cited in support of this distinction, and to *this* I therefore hold the distinction between a general limitation to all the children, and a limitation to the 1st, 2d, 3d, sons, &c. to be important to apply to this case; *Archer's* case also applies. And to take us out of the authority of *Roy* v. *Garnett*, the cases of *Goodright* v. *Pullen*, and *Bale* v. *Coleman* may be considered together. The limitations in both are expressed in such a manner as to create *ex vi termini* estates tail. *Willes' Rep.* as before cited.

(a) *Doe* v. *L. Mulgrave*, 5 *Term Rep.* 320. *Lowe* v. *Davies*, 2 *Ld. Raymond*, 1561. *Lodington* v. *Kime*, 1 *Ld. Raymond*, 203.

As to that part of the adjudication relied on by the counsel for the appellant where it is said "a devise to *A.* "for life and after his decease to his issue, without more, "will carry an estate tail to *A.*;" it is merely a repetition of the 1st rule in *Wild's* case, before cited, and of the old rule in *Shelley's* case.

In the case of *Trevor* v. *Trevor*, the words *heirs male* are used. This case, therefore, may be replied to as the former.—It may be added, that in it we find another rule in destruction of the principle in *Shelley's* case, to wit, that principle is departed from in settlements in consideration of marriage. Why this distinction in favour of intention, as it is laid down in *Fearne's Cont. Rem.* p. 124. should have effect in cases of marriage-settlements and not in wills, both of which in a legal view are made on consideration and supposed to be for value, I have not been able to trace any satisfactory reason. That the rule in *Shelley's* case (although so arbitrary as to govern without any existing reason for it) is weakened by this acknowledged principle, of construing marriage conveyances in strict settlement, I strongly contend; because there was nothing originally in the rule in *Shelley's* case, when it was supported *by a semblance of reason, which would necessarily, when marriage-settlements became legalized, make them an exception to the operation of that rule, more than devises would be made.—But devises were at first construed differently, for reasons which never existed here.

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As to *Lewis Bowle's* case,(b) it was a limitation to their 1st, 2d, and 3d sons, and not to their other children in succession; it is therefore similar to the case of the *Attorney General* v. *Sutton*, *Roy* v. *Garnett*, &c. and may be answered in the same way.

(b) 11 *Co.* 79.

Garth v. *Baldwin*,(c) was the limitation of a trust estate, to *E.* for life and to the heirs of his body, therefore Lord

(c) 2 *Vezey*, 464.

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Hardwicke decreed an estate tail to *E.* for he laid down the ground of his decision in these words: "He was not, in a "Court of Equity, to overrule the *legal construction* of the "limitation, unless the intent of the testator or author of "the trust appears, by declaration, plain; that is, by *plain* "*expression* or *necessary implication.*" It was therefore, I presume, that Lord *Mansfield*, in *Long* v. *Laming* cited this case, and to shew how far a Court was authorised to carry intention even in opposition to the rule of law. This authority is therefore relied on in the answer to that of *Goodright* v. *Pullen*, as well as to the case of *Langley* v. *Baldwin.*

(a) *Willes' Rep.* 595.

Lord Chief Justice *Willes*, in the year 1745,(a) makes the following observation on the last mentioned case. "The case of *Langley* v. *Baldwin*, 1 *Eq. Ca. Abr.* 185. *is* "*like no other case*, and therefore it is no authority."

Doe v. *Reason*, or *Bernard* and *Fenton* v. *Reason*, is a case mentioned by counsel only, in 3 *Wils.* 242. where it appeared that the words were *issue of the body;* therefore within the principle of the cases before replied to. So was *Coulson* v. *Coulson*, No. 10. in the arrangement of cases made by the counsel for the appellants; and No. 11. *King* v. *Burchell*, as mentioned, in *Long* v. *Laming*, by counsel. No. 12. *Allason* v. *Clitheron* was also held an estate tail by implication, by reason of the words *issue of his body.* No. 13. *King* v. *Melling*, the words are *issue of his body lawfully begotten.*

From the case of *Robinson* v. *Robinson* little light is produced on the subject. The certificate of the Judges in itself furnishes no rule for the determination made. It was said it was necessary to construe the estate given to *L. H.* an estate tail, and to this construction the words were not opposed, because they were proper to create an estate tail. They were, "*lawfully to be begotten.*" The

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*words of a will are to be construed in their legal import, unless that will do violence to the manifest intent; but here the intent was favoured by it, and it seems to me that the obvious reason of the Court's opinion was, that the devise over was void, the limitation being of a contingency on a contingency, which could not be allowed. The only way then by which *the issue* of *L. H.* could take the estate, and the manifest general intention be preserved, was by giving *L. H.* an estate tail.

The case of *Dodson* v. *Grew.* The words of the limitation in this case were, "*to the issue male of his body lawfully begotten.*" The most proper words which could be used to create an estate tail.

The whole of the reasoning employed in discussing the former cases cited by the opposite counsel is brought fully to operate upon this case.—It is an estate tail *ex vi termini*, and the words will have their legal import and effect, unless there is a plain and apparent intention to the contrary: but here, as in the case of *Robinson* v. *Robinson*, the intention favoured the legal construction.

The supposed analogy then does not exist in the operative words, but in the unimportant circumstance of an equal number of persons.

When the counsel for the appellants comes to class and marshal his cases, we find there is not one referred to, where the limitation has been in the words of the devise before us, "to *the children* of the devisee for life;" but all the cases contain words indicative of an estate tail. The argument of an estate for life by implication from the words, "without impeachment for waste," &c. cannot go further than the express limitation of an estate for life, and therefore need not be remarked on, where cases have been answered in which express estates for life were created.

It is then contended by the counsel, that *Wm. Carr* the devisee took a fee conditional at common law. I believe it might be safely admitted that a conditional fee was executed in *William*. For if the condition never happened in the life of *William*, he could not be said to have been seised of an estate of inheritance; and of none other could his widow at *common law* be endowed.

Next it is argued, "that the word 'children' was intended to designate the inheritance, rather than any particular person to take, because the testator has added no "words of perpetuity." The testator was a merchant of eminence, he had been at great pains to acquire an estate; *was very conversant in all the forms of conveyancing, and versed in the land titles of this country; he was a magistrate, and was said to be an able and learned one. He has, in his own hand, written a testament, which for legal accuracy of expression, may perhaps defy the criticisms of the ablest lawyer; and yet, it is suggested, that he did not know of the existence of one of the most important laws in the transmission of property ever made in the Commonwealth in which he lived; although that law was in force for several years before his death. But that when he words his testament in unison with the established principles of that law, (which does not require a perpetuity to be created in express terms,) he does not know of, or mean to introduce the influence of that law, but is in search of some new and unheard of mode to give a perpetuity,

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by the introduction of the word *children;* and thus (by an evasion, if effectual, almost too subtle for the distinguishing sense of a lawyer) to create an estate tail, in spite of a positive law of the Commonwealth, and in contradiction to all the rules of construction which have been adopted by *British* Jurists in creating estates of that kind. —This is, indeed, putting the will of the testator to the torture.

But it is said a conditional fee at common law is created, "because the testator has not used words of restriction to "confine the estate for life, as he would have done, if he "had intended it."

Surely, after he has given the estate in express terms for life, and further declared what was to become of it after the death of the tenant for life, we cannot doubt about his intention as to the certainty of a life estate, or that to have said more, would have been at least tautologous and unnecessary.

If the counsel, in one of his reasons for the supposition that a fee conditional at common law is created, means to say that the testator meant to vest an inheritance in the children of *William Carr*, I concur with him; but contend that those children would take by purchase:—they would take an estate of inheritance, without the addition of what were called words of perpetuity, which were then dispensed with by act of Assembly. As to the peculiarity of the words in the devise to *William* and his children, I can entertain no doubt but they would receive the same construction with the devise to *John* or *Betsey*, which, in express terms, refers to the children only which shall be living at the time of the death of the devisee for life.

* 272 *After having in this cursory manner noticed the various reasoning of the counsel on the operation of the words of the will, I come now to reply to that which is more important: the inquiry into the intention which is manifested by the will:—and it is said, that unless *William Carr* the younger be construed to take an estate tail, it may happen, that the remainder may go over to those to whom it may be devised, although *William Carr* might still have remote issue of his body. This principle I know has been argued from in *England*, and in this country, in the case of *Roy* v. *Garnett*. If the position be true, that "children" is a word of doubtful import, and may, to effectuate the intention of the testator, be construed to extend to remote descendants, there is no difficulty; for, according to the argument of the counsel himself, although the immediate descendant of *William Carr* the devisee

might die in his life-time, and leave a child or children, the grandchild would be denominated by the term child or children, and would take the remainder immediately on the death of their ancestor, the tenant for life, yet it would seem sufficient to oppose the supposition of the counsel of this remote chance of inconvenience, and this violence to the testator's intention, by the immediate and unavoidable inconveniences that would result from construing the will in such manner as to vest an estate tail in *William Carr* the devisee; which *eo instanti our law* converts into a fee-simple, and thus, at once, destroys the testator's intention.

On the supposition that the testator knew that there was such a law in existence as would convert estates tail into fee-simple estates, we cannot suppose he intended to create a fee-tail; because it would be no more than giving to his son a fee-simple, which he might immediately dispose of, and so destroy the remainders, both to his children and the other children of his testator.

To suppose a fee-simple in *William Carr*, the devise must be construed to be an executory devise: but if a limitation of an estate can be construed to be a contingent remainder, it never shall be construed an executory devise.

As to what constitutes a contingent remainder, and to shew that this case comes precisely within the description, I refer to 2 *Bl. Comm.* p. 169. where it is said, "If *A.* be "tenant for life, with remainder to *B.'s* eldest son, then "unborn, this is a contingent remainder; for it is uncer- "tain whether *B.* will have a son or no." The *British* authorities say nothing of the general intent, as to the vesting *of the remainder, because, to construe a devise * 273
to be an estate tail, the remainder-men are provided for; but it is different here; for after a fee-simple created by the operation of our act, there would be no remainder.

On the supposition, then, that there are two main intents manifested in opposition to each other; the one to vest an estate in *William Carr's* remote descendants, in case of a non-surviving son or daughter of *William;* the other to vest a remainder in the testator's other two children, and both these cannot stand together, let us adopt the rule of decision mentioned; and suppose the testator had been told, that by a possible event a grandchild of *William* might be disinherited, unless the estate of *William* was made a fee-simple. It is at least problematic, whether he would not have risked that possible contingency, rather than have left the estate open to the disposal of his son,

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thereby risking, in another way, the chance of his grandchild ever enjoying the estate: and also of a remainder, or an inheritance from *William* vesting in *John* and *Elizabeth*, or their children, according to his express intent. In the case of *William's* alienation, the testator's grandchild would lose the estate, or, if he had no grandchild, his own children. To grant, then, that a fee-simple would be created by implication, would produce the destruction of the main intent contended for; as we have no estates tail. But, in case of the possible event of a non-surviving child of *William*, his great-grandchild only could lose the estate, according to the argument of the counsel, still submitting to the risk of an immediate alienation of his ancestor. Yet I am content to remove every obstacle arising from this possible event; to take for true the counsel's own doctrine, that in the limitation of estates, *child* or *children* will be construed to mean the same as *issue*, and we shall presently see what must necessarily, under our laws, be the construction of this will. I shall, therefore, now consider this case under the second view proposed to be taken of it, to wit: "under the principles which are "established and must necessarily flow from a rational in-"terpretation of our laws, altering the system of *British* "law in the disposition and limitation of property."

I have examined the artificial grounds on which some of the rules of limitation were built by the laws of *England;* it has appeared that those rules, by the modern adjudications in *England*, were shaken, and in effect destroyed, by the operation of the principle of intention in the construction of wills under the statute of *Hen.* VIII. It would
* 274 seem *strange, therefore, that, in this country, any of the rules of property which were merely incidental to the feudal system should be revived, when that system is totally abolished, and the deductions from it in every instance counteracted by our laws, where such deduction could be the object of positive law. I therefore think it rational at least, and I contend it is consistent with law, that in the interpretation of wills, the intention of the testator, should not be trammelled by obsolete rules of the common law, which, if introduced into operation, I shall endeavour to demonstrate, would defeat the spirit and meaning, and perhaps counteract the expressions of our municipal regulations.

I say that it is impossible that the rules of limitation established by the common law, can apply in the construction of wills under our act of Assembly. By our laws, an estate tail can in no case be created, which will not *ex*

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instanti become a fee-simple.(*a*) We cannot recognize any estate of an intermediate gradation between a life estate, and a fee-simple. All the constructions, then, which have been so much laboured, to shew that a Court will preserve the estate to the issue of the donor, according to his will, must fail, except the acknowledged rule that they may take in remainder as purchasers. If it is an estate of inheritance, it is now by the laws of this country free to alienation in common form, and although estates tail might be barred in *England*, yet, in contemplation of law, they were considered as conveying a limited interest, through a particular channel.

(*a*) 1 *Call*, 165.

We learn from the old books, that the reason why the Courts first established that kind of judicial estate in *England* called an estate tail by implication, was, to preserve the contingent remainders; namely, when a devise was to *A.* and his heirs, and if he die without issue, remainder over: here an estate tail is implied by the word issue, in order to preserve the remainder over: and there is a case stated, in 4 *Gwyllim's* ed. of *Bacon*, p. 258. where the Court construed an estate in fee-simple to be only a fee-tail, in order to preserve the remainders. For, if it was construed a fee-simple, the remainder was gone; it being a contingent remainder, and not an executory devise; the same therefore as our case. If, then, the Courts of *England* have adopted a rule of construction, by mere implication, for the purpose of preserving the contingent remainders, which has been always adhered to as reasonable, by creating a new kind of estate by implication, surely our Courts will be justified in adhering *to the letter and plain meaning of the devise, in effecting the same important object.

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For, without construing this a life estate in the first taker, the remainders must be totally destroyed; it being a life estate or a fee-simple; and the limitation being a contingent remainder, and not an executory devise; and it being decided that the Court will not construe that an executory devise which is a contingent remainder, for any purpose whatever.(*b*) The words used by the testator in limiting a life estate in express terms, and a reiteration of those expressions; his defining what was to become of the estate after the determination of the particular estate; his having branched his estate into three parts, and limited the remainders in the same way, shewing the forethought and steadiness of his purpose; his having created cross remainders in those three branches of his estate, in express terms; his having, in different parts of his will, and es-

(*b*) *Fearne*, 4th ed. 420, 421. 1 *Call*, *Carter* v. *Tyler*.

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pecially in that part where he makes a devise of a contingent remainder to his wife, in express terms distinguished between *the life estate* and the remainders; all these reasons, and more which might be here concentrated, from the *words* of the will, (the first rule of exposition, *Bale* v. *Coleman*, 1 *P. Wms.* 142.) serve, without doubt, to shew that his intention was not to give a fee-simple to *William* his son. But, under the grounds of decision, if his intention had been obscure, we might have resorted to implication, to preserve the remainders. Again: to shew to what lengths Courts of Justice have gone in preserving remainders, where they would be otherwise destroyed by operation of law, I might cite the cases of *The Attorney General* v. *Sutton*, *Langley* v. *Baldwin*, and many others; and in our own country, *Roy* v. *Garnett*, where estates tail have been created, in order to secure a remainder to a 6th, 7th, or 8th son. I might, therefore, presume, a Court might adhere to the words, when that adherence will have a better influence in preserving the remainders under the *Virginian* system of laws. It is said, where it appears to be the intention of the testator that there should be a succession in tail, it would defeat that intention, if *all were to vest in the first taker;* per Lord *Mansfield*, in 2 *Burr.* 1111.

Finally,

There was no possible way by which the testator could, according to the laws of this State, secure, at the same time, the enjoyment of the estate to his children for their lives, and a remainder to their descendants, but by giving to his children a life estate in the property devised: for estates tail are done away.

* 276 *The cases and adjudications before mentioned, shew that Courts of Justice have always considered the preservation of remainders express or implied, as essential to the main intent of the devisor; and I do not understand that this general intent has ever been considered in a point of view subordinate to the intent which is supposed to exist to confine the estate to the issue of the first taker; but that being now rendered impossible, by our act docking entails further than to that life which shall be named and be in existence immediately at the determination of the first life estate, the Court will preserve the other general intent in favour of a remainder-man. For by the argument of the counsel it is conceded, that, if *William* is construed to take more than a life estate, the remainders are gone; and the estate must pass in a course of descent.

Having stated my opinion of the probable operation of our law of 1776, for docking entails, I will see with what force the case of *Roy*, &c. v. *Garnett*,(a) relied on by the counsel for the appellants, applies in contradiction to the principles I have laid down.

In the first place, let it be remarked, the testator in the case of *Roy*, &c. v. *Garnett*, made his will in 1765, and, from the information the case affords, died soon after; so that, on the principle that wills are to be construed according to circumstances at the time they were made, the rules of limitation in *England*, strictly applied in Courts in this country on the subject of that will. Secondly, according to the law of *England*, *an express* estate tail is created in the first and every other son of *James*;—which differs it in two important points from the case pending; 1st. As the estate is only contended to be an entail by implication, contrary to the express estate for life; 2d. As there is no succession in tail contended for, in the present case, and the child or children of *William*, if any had survived, would have taken in parcenary, or as tenants in common in fee-simple; as would also the children of *John* and *Betsey per capita*, and not in a course of descents, under our act of Assembly, as the sons of *James* would in *Roy* v. *Garnett*, by the construction of the statute *de donis*. Under this second distinction, the case of *Roy*, &c. v. *Garnett*, is expressly a decision in our favour, for (in p. 32.) the President says "the parties have rightly agreed, "that the devise to the surviving sons did not enlarge the "estate for life in *James*, since the surviving sons not "only might, but must take as purchasers, being to take, "not in *succession*, but as tenants in common."

(a) 2 *Wash.* 9.

*Thirdly, although the doctrines of limitation are only commented on as existing in *England*, yet no adjudication was made, by which a rule of property might be considered as established; and it was said that the Court doubted as to the effect of that devise. I am willing here to admit that it was impossible the Court could doubt as to the operation of the rules laid down in the construction of estates tail, whereon a remainder may be limited; I have no where denied the doctrines as laid down by the president. If the doubts of the Court had been explained, they might have been found to be derived from the alteration in our system, which at the time of the adjudication was effected by the abolition of estates tail; and in this opinion I am confirmed by the concluding words of the adjudication, denying the operation of the act of 1776, and thereby taking the case entirely out of its influence. This case cannot then

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be ruled by the opinion delivered in that; the two cases being in circumstances totally dissimilar. The case of *Hill* v. *Burrow*, does not stand in our way, because, there, the words are said by the court to be *appropriate and emphatical to create an estate tail*—and no words were used designating the termination of the life estate. So, in the case of *Tate* v. *Tally*, the words *heirs of his body* were used.

Botts, in reply.—The counsel for the appellees contend that the devisee *William Carr* took only an estate for life; and that to his child or children a *contingent remainder* was devised.

To support the effect given by the appellees to the will, the counsel reason, 1st. From the *English* cases, and 2dly. From the laws of *Virginia*, which they suppose have altered the law of *England* as to the subject in question.

Wild's case is cited. The first rule there stated puts "children" and "issue" upon the same footing. If children and issue be the same, it is clear from a large class of concurring cases that, even where the devise is expressly for life, with remainder to the children or issue after the decease of the devisee for life, the latter will take an estate tail.(*a*) The words of limitation to the issue *after the death of the devisees for life* are of no importance in the present question; for, as was properly decided in *Ginger* v. *White*, those words only proved that the devise to the children or issue was intended as a remainder. Now, in the principal case, it is admitted that the express devise to *William Carr* for life, as well as the words "after his decease," *shew an intention to give his child or children a remainder; but then the question is whether there is not in the same will a general intent incompatible with, and overruling that particular intent.

(*a*) See 15 cases cited in *Botts's* first argument collected in class the 3d.

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The counsel for the appellees take it for granted that the testator meant to devise to *William*, in the same words and to the same effect that he used and designed in the devises to his other two children, though the words employed in the several devises are substantially different. *William* was the eldest son of the testator; and that circumstance, according to the common prejudice of fathers, may account for the difference made by the testator between the devise to him and the devise to *John* and *Betsey*. It is sufficient that the testator has used different words, and of dissimilar legal import. It is admitted that, in every other respect, he may have intended similitude in the devises to his children; but, because a testator makes but a small difference

in the mode of limiting his property to his children, it is not to be inferred, against plain words, that no difference was intended. This reasoning does not conflict with the intention in the codicil to give equal shares of his estate to his children; because that equality had relation to nothing but the quantity of the estate to be given to each without reference to the direction in what manner it was to be preserved in the families of his children, after their deaths. He surely did not intend the house and lot in *Dumfries* given to *Betsey Tebbs* and her heirs, in a separate clause of the will, to vest in her nothing but a life estate; and yet this would be the effect of Mr. *Love's* exposition of the codicil.

If the three devises are to be likened to each other, those to *John* and *Betsey* might as well be moulded to the shape of the one to *William*, as to make the latter accommodate itself to the former. The Courts more frequently reject words in a testament than make them for testators.

However, this point is not considered of importance; since, if the devises were the same, the general intent must prevail over the particular intent.

The case most relied on by Mr. *Love* is *Ginger* v. *White*.(a)

(a) *Willes' Rep.* 348.

In that case the Court admits that the word children in a will sometimes creates an estate tail; and the Chief Justice expressly declares that there is a distinction between "heirs" and "issue," putting the latter word as meaning the same with children. Now, turn "child" or *"chil- "dren" into "issue," and the fifteen concurring cases in class the 3d. before cited, will make the present an estate tail.

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It is true that, in the case of *Ginger* v. *White*, the Court decides that the limitation over upon the death of the devisee *John*, *without issue*, did not turn *John's* estate into an estate tail; but the reason given by the Court is that an express estate for life cannot be enlarged by implication. Now, though this was contended for as a principle of law at that time by some of the Judges, the contrary has been finally settled by all the modern decisions upon the subject; and expressly by the case of *Roy* v. *Garnett* in the Court of Appeals.(b)

(b) See the 8th Class of Cases in *Botts's* first argument.

The word "heirs," *ex vi termini*, creates an estate in fee: the word "issue" has the same meaning when necessary to effectuate the general intent, and, upon the same reason, "children," *in this country*, must mean the same thing, and have the same effect.

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The case of *Fell* v. *Fell*, stated in Mr. *Love's* argument, has no bearing on the present case. *Thomas Fell* was there in being at the making of the will, and expressly named as a remainder-man; but there a limitation in remainder to "the females" created in the first female an estate tail. It is submitted whether "child" or "children" is not equivalent to "the females?"

In *Ginger* v. *White*, a case from *Moor*, 397. is cited, of a devise to *A.* for life, and, after his decease, to "the men "children of his body;" and adjudged that *A.* took an estate tail. The law of this case is no where denied, and it is submitted whether "child" or "children" are not words as strongly importing an inheritance as "*men children of* "*the body.*"

The counsel for the defendant cannot be successful in his attack upon the rule in *Shelley's* case. That rule has never been impugned in any case. If Mr. *Love's* quotations prove any thing, it is that there is no more legal virtue in the word "heirs" than there is in "issue;" for, if there be not a general intent to secure an inheritance, neither of those words will effect it; but, if there be such general intent, either of those terms, or the word "chil- "dren" will carry the inheritance.

(*a*) 5 *Term Rep.* 320.

The case of *Doe* v. Lord *Mulgrave*,(*a*) and the other authorities cited by Mr. *Love*, according to his exposition of them, prove too much;—viz. that, when the provision is general for the *issue* or children of the devisee, he is held

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*to take only an estate for life. If this be true, the fifteen cases in class the third, already noticed, are at once overruled.

In the argument of Mr. *Love*, he hints at a distinction between "children" and "issue;" and labours effectually to shew that "issue" is not a word of limitation, except where the general intent shall make it such; and, surely, he will not deny this qualified effect to the word "chil- "dren." He has not said that "children" are not "issue," or that "issue" means other than "child" or "children," either philologically or technically.

Among the notes to the case of *King* v. *Melling* is one that the words "and for want of such issue" make a phrase suitable to an estate tail. Now, in the case to be decided, there is a limitation over for the want of issue. When the testator says "and if all my children die without is- "sue" he furnishes that strong implication of an intention to provide for all the issue which has, in all the cases where this implication is found, carried an estate tail.

When Mr. *Love* comes to the case of *Dodson* v. *Grew*, he supposes the words " to the male issue of his body " lawfully begotten" to create an estate tail, *ex vi termini*. He then argues that " issue" is a word of *limitation* or of *purchase* according to the general intention; and the word " heirs" has been found a word of *purchase*, according to the general intent. The general intent, Mr. *Love* has effectually contended, must controul and subdue the strongest terms and phrases of limitation: now I cannot understand how it is, that the general intention of the testator in the case to be decided should be the same as that of the testator in *Dodson* v. *Grew*, as to the end of preserving the estate for the remote descendants of the first devisees, and that those intentions are to govern without producing the same result. In *Dodson* v. *Grew* the limitation was to the male issue; and, in the case to be decided, the intention was to provide for both male and female issue; and in that the cases differ. The words " lawfully begotten" in *Dodson* v. *Grew*, restricted the limitation to be legitimate issue; but the law would have interposed that restriction; so that those words were redundant. Legitimate issue in *England* was the only inheritable issue.—Here illegitimate issue may be capable of inheritance by adoption. But these are things that influence nothing but the course of the inheritance without affecting the *existence* of the inheritance. The case of *Cook* v. *Cooper* was to *R. C.* for the term of his natural life *only*, and, after his decease, *to his * 281
issue *as tenants in common*. In this case, *R. H.* could never have taken an estate tail, as he did, if terms excluding the female issue, restricting the issue to such as were of his body, or to those lawfully begotten, were necessary.

It is to be remarked, that the counsel for the defendants have not attempted, otherwise than in an oblique way, to answer my argument drawn from a comparison of the case now to be decided with the case of *Dodson* v. *Grew*.

It is still more remarkable that my argument upon the implicative branches of the devise, and upon the incompatibility of the particular with the general intent, on which I most relied, has been passed without any direct attack. I infer that the cases there cited, and the reasoning there taken from the books are admitted to apply, and cannot be resisted. If " child or children" will not carry the inheritance, we have the word " issue;" and the competency of that to carry an inheritance is admitted by Mr. *Love* himself.

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Mr. *Love* seems to admit, if his construction of the will should prevail, that it was incompetent to provide for all the descendants of the devisee *William*.—Indeed, he contends, "if *Wm. Carr* the devisee had died, leaving grand-"children, but no living child, that those grandchildren "could not have taken the estate." This is certainly true, if *William* did not take an inheritance; and therefore all the cases (including *Roy* v. *Garnett*) expressly declare that the first devisee shall have the inheritance as the only means of casting it on the grandchildren and remote issue.

It is said by Mr. *Love*, it might be safely admitted that *William Carr* took a fee conditional at the common law; for, said he, the condition did not happen, and therefore *Wm. Carr* never had a fee tail or absolute fee-simple. Mr. *Love* wholly forgot that the act of 1776, amended by the act of 1785 (see *Rev. Code*, vol. 1. page 158. sect. 9.) had expressly discharged these estates of the conditions, and declared them absolute fee-simple estates.

It is next contended, that although the estate might, in *England*, be construed an estate tail to effectuate the general intent, yet to construe it here an estate tail would not effectuate the general intent; because the act of Assembly immediately turns it into a fee-simple, which does not answer the general intent.

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It may be true that the operation of the act does thwart the general intent in some degree, but not altogether; *for the general intent is better fulfilled by leaving the estate to descend to the issue, in case the devisee does not alien, than by robbing the issue of it, at all events, as will be the case if the first devisee take only an estate for life. The issue might be barred in *England* too by alienation through "fine and recovery."

But this question so laboured by Mr. *Love* has been closed forever by as well the Legislature as the Court of Appeals.

First, the Legislature hath declared "that every estate in "lands which hath been limited, or hereafter shall be limit-"ed, so that, as the law *aforetime was*, such estate would "have been an estate tail, shall also be deemed to have "been, and to continue an estate in fee-simple." Act of 1776, amended by the act of 1785,(*a*) so that, if, *as the law aforetime was, this would have been an estate tail, the law is express that it shall now be a fee-simple.*

(*a*) *Rev. Code*, vol. 1. c. 90. s. 9. p. 158.

Mr. *Wickham* has urged the same matter that Mr. *Love* has, in two cases before the Court of Appeals,(*b*) with great zeal and ability, and in both instances he was expressly and unanimously overruled; the Court in each case declaring

(*b*) *Hill* v. *Burrow*, 3 *Call*, 342. and *Tate* v. *Tally*, 3 *Call*, 354.

that the act of Assembly was conclusive. Indeed, the law upon the subject had been settled in the general reasoning of the Court in the case of *Carter* v. *Tyler*.

In resuming the discussion of the case of *Roy* v. *Garnett*, Mr. *Love* says, all the children that *James* might have were not provided for, without giving an estate tail; and in the case to be decided the children *are* all provided for. Now, a provision for all the children is creative of an express estate tail; and, instead of weakening, strengthens the implication.

Again, Mr. *Love* says, the children of *William* would have been tenants in common under the limitation to the child or children. In *Cook* v. *Cooper* before cited, the limitation was to the issue of the tenant for life "as tenants "in common;" and yet the estate was adjudged to be a fee.

Mr. *Love* seems to admit that the issue of *William Carr* the devisee could not take by way of executory devise; and the case of *Carter* v. *Tyler*, in 1 *Call's Reports*, (without going further,) proves his correctness. Now, if they could not take by way of executory devise, they could not as contingent remainder-men, they not being *in esse*.

Williams, on the same side. It has been correctly stated, by counsel, that the single question is, whether *William Carr* the younger took an estate for life or a fee. If a fee, *then the decree of the Chancellor dismissing the bill must be reversed. * 283

In viewing this case, I will first consider it, as if it were now to be decided in *Westminster-Hall;* and secondly, I will inquire whether the acts of Assembly of *Virginia* have made any difference in the rules of construction.

The rules which have been adopted, in construing wills in *Westminster-Hall*, are:

1st. That the intention of the testator shall prevail, if it be not contrary to the rules of law.

2d. That where there is a general and particular intention manifested in a will, and they cannot be reconciled, the particular intention must yield to the general.

3d. That the intention must be gathered from the will itself.

4th. That no subsequent event can vary the construction of the will; but it must be the same in every event.

5th. That no exposition shall be given which will tend to a perpetuity.

Another rule was, indeed, added by Mr. *Wickham*, "that "wills shall be construed according to the existing laws of

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" the country, in which they are made." This I shall notice, when I come to consider the operation of our acts of Assembly.

Having premised thus much, I come to consider what estate *William Carr* the younger took under the will; whether an estate for life or in fee: if the former, the Chancellor's decree is right; if the latter, it is erroneous, and the complainant is entitled to dower. In doing this it will be important to examine the different clauses of the will which relate to the devise in question.

The testator first devises to his son *William Carr* the estate which is the subject of the present controversy, *during the natural life* of the devisee, and after his decease to his child or children; *if none*, remainder to his other son *John Carr*, &c. He then declares his intention to be, that all his children should have an equal share of his estate; and, finally, he provides, that, *should all his dear children die without issue of their bodies, his dear wife living*, one half the life estate should go to his dear wife, remainder over, &c. So that the testator has manifested his clear intention to make all his children equal, and that the estate should not go out of his family until there should be an indefinite failure of issue in all his children.

If this case had occurred in England, the words *child* or *children* would, upon the face of the whole will, be expounded
* 284 *to be synonymous with the word *issue*. On this point I shall refer to one of the authorities cited by Mr. *Wickham*; 3 *Term Rep.* 484. The page to which I wish to call the attention of the court, is 493. in which Judge *Buller* says, that *children* and *issue* have the same meaning. The same doctrine will be found in 2 *Fonblanque*, c. 3. sect. 3. and 2 Lord *Raym.* 1437. This is done to effectuate the plain and manifest intention of the testator.

If the words *children* and *issue* mean the same thing, and which is proved by the authorities above referred to, it remains to consider whether a devise to a man for life, remainder to his children, be not an estate tail. If so, it follows as a necessary consequence that *William Carr* took an estate of inheritance. The will should be read, as to *William Carr* for life; remainder to his children; and, if he die without issue, remainder over. Such a devise in *England* would be deemed a strong estate tail.

Shelley's case, in the 1 *Co.* 89. is a much stronger case in favour of a life estate, yet it was determined not to be a life estate in *Edward Shelley*; even though it was limited to him for life; remainder to his heirs male of his body, and to the heirs male of such heirs.

The case of *Goodright* v. *Pullen*(*a*) is also a stronger case. The Judges, in giving their opinion, were unanimous that the devisee took an estate tail. It was moreover said, that *issue* was sometimes a word of limitation, sometimes of purchase; according to the penning of the will. If my position first laid down, that *issue* and *children* are the same, be correct, then it follows, that *William Carr* the younger took a fee tail.

The case of *Coulson* v. *Coulson*,(*b*) *Robinson* v. *Robinson*,(*c*) *Cook* v. *Cooper*,(*d*) *Roy* v. *Garnett*,(*e*) and *Dodson* v. *Grew*,(*f*) are all stronger than the case at bar. In every one of those cases the testator meant to provide for the remotest issue. In the case at bar, *William Carr* the elder intended that his children should be equal, and manifestly intended that *William Carr's* family, as long as he had a child or issue, and they had children or issue, should be provided for, in exclusion of every other person.

(*a*) 2 Ld. *Raym.* 1437.
(*b*) 2 *Stra.* 1125.
(*c*) 1 *Burr.* 38.
(*d*) 1 *East*, 229
(*e*) 2 *Wash.* 9.
(*f*) 2 *Wils.* 322.

The Court is first to consider what estate *William* would have taken before the act of Assembly. If he would have taken a fee tail, then by the operation of the act it is converted into a fee-simple. It is unimportant with us in which light it is considered. According to Mr. *Wickham's* argument the estate for life to *William* merged in the fee until a child should be born; there being no intervening *trust estate to prevent it. Let it be admitted, then, that *William* took an estate tail, to be divested only by the birth of a child. In this case the testator evidently meant to provide for the issue of *William*, as long as any descendant of his should be alive. We ought therefore to adopt that construction which will best effectuate that object.

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But let us suppose, for the sake of the argument, that *William* took only an estate for life. What would be the result? If he had had a child or children, they would have taken only an estate for life, (if the case had occurred in *England*,) because there are no words of inheritance. This would frustrate the general intention of the testator; because he declares that, should all his children die without issue, the estate should pass to others specially named: thereby manifesting a plain intention to provide for the case of an indefinite failure of issue; which has always been held to pass a fee tail.

It is said by Mr. *Wickham* that "children" is a word of purchase in this case, because the testator intended they should all take together. The testator uses both the words "*issue*" and "*child*:" and his intention was, that the estate should go to the child or children, or to the issue and

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the heirs of that issue. Yet that would make it an estate tail.

The case relied upon from 3 *Term Rep.* to shew that *child* is a word of purchase, has no application. In that case the testator evidently shewed his intention to be, that the children should take as purchasers. There the estate was to go, in remainder, to the children of a woman by a particular husband, as tenants in common; and words of inheritance were superadded, which is not the case here.

If this case had been before a Court in *England*, and Mr. *Wickham* be right, the children of *William Carr* would only take an estate for life; but, if I am right, they would succeed to an estate tail.

But it is said, that in *England*, this would be an estate tail in *William*, to be divested on the birth of a child. If so, he had an estate for life; remainder to his children for life; remainder to himself in fee tail; or, in this country, in fee. Admitted: for, according to Mr. *Wickham's* argument, the life estate merged in the fee, until a child should be born. As that event never happened, he died seised in fee, and consequently the appellant is entitled to recover.

In *England* this will would be so expounded, that none of the family of *William Carr* should be disinherited. Yet,

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*according to Mr. *Wickham*, if *William Carr* the younger had had a child, and that child had had issue, and died in the life-time of *William*, that issue could not take; because the description must be completely answered to enable the devisee to take as a purchaser.

If then in *England*, *William Carr* the younger, would have taken an estate tail, let us examine whether the acts of Assembly have made any change in the rules for expounding wills. The first act to which I shall call the attention of the Court is the act of 1785.(*a*) This act declares that every estate limited, so that, *as the law aforetime was*, it would have been a fee tail, shall be deemed a fee-simple. What would this estate have been *aforetime;* that is, prior to the acts of 1776 and 1785? If I am right, it would have been an estate tail in *William;* which by this act is converted into a fee-simple. This mode of construction the Court is understood to have adopted in *Tate* v. *Tally*,(*b*) and to have decided upon the act of 1785, as if that of 1776 had never been made. In that case Mr. *Wickham* contended that a new rule should be adopted; but the Court thought otherwise, and considered the act of 1785 as a correct exposition of the act of 1776.

(*a*) *Rev. Code*, c. 90. sect. 9. p. 158.

(*b*) 3 *Call*, 354.

But take the case upon the act which declares that words of inheritance need not be superadded.(a) Still *Wm. Carr* took a fee. A devise to *A.* for life, remainder to his heirs, would, in *England*, be a fee in *A.*; upon the universal rule that where a freehold is given to the ancestor, remainder to his heirs, in the same instrument, the ancestor takes a fee.(1) Here the testator gives the estate to *William Carr* for life, remainder to his children. The law of descents declares that the children by that name shall be his heirs: for, in this country, "children" is a more apt word to create an estate in fee-simple than "heirs" or "issue;" the law of descents using the term *children* throughout. A devise, in *England*, to *A.* for life; remainder to his *heirs;* would give a fee; the word *heirs* being an apt word of limitation; and, according to the rule of law, the two estates would be merged. In this case the devise is to *William* for life, remainder to his *children*. If the word *children*, in this country, is as apt as the word *heirs* in *England*, then the Court will give them the same construction.

(a) See *Rev. Code*, c. 90. sect. 12. p. 159.

The rule that title by descent is the more worthy, equally applies in this country. Thus, if a person devise *to his *children* generally, they would take by descent, because we cannot change the law. The case in *Salkeld*,(b) cited by Mr. *Wickham*, to shew that parceners in a devise take by purchase and not by descent, will not bear him out. In that case there were two parceners, and a devise of the whole estate to one; it was adjudged that he took by purchase. He could not take as heir: 1st. Because the two make an heir, and not one; 2dly. If a moiety had descended to the parcener who was the devisee, the other parcener would have been entitled. This case shews that if the devise had been to the parceners, in the same plight as they would have taken by descent, they shall take in that way.

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(b) See 1 *Salk.* 242.

But it is contended, that the Court must change the rules of constructions in wills because of the act of Assembly docking entails. This is answered more ably by the opinions of the Judges in *Tate* v. *Tally*,(c) than by any argument which I could urge. There they affirm the doctrine that the rules of construction are to be the same as before the act. Mr. *Wickham*, sensible of this, stated another position: he admitted that *William* took an estate tail, subject to be divested by the birth of a child. What does this prove, but that he took a fee-simple, under the operation of the acts of 1776 and 1785? And, no child having been

(c) 3 *Call*; 354.

(1) See 1 *Day's Cases in Error*, 299. *Bishop* v. *Selleck*.

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born, he died seised of a fee, and his widow was dowable of the estate.

It is said by Mr. *Wickham* that the Court will reject all artificial rules of construction, and look only to the intention of the testator; and that the will should be so expounded as to effectuate that intention; not to defeat it. This is bringing the argument in a different shape to the former position, that the Court will adopt a new rule of construction. In the cases of *Tate* v. *Tally*, and *Hill* v. *Burrow*, the same effort was made; but the decision of the Court, it was presumed, had forever put the question to rest.

Having endeavoured to shew, upon *English* authorities, that *William Carr* would have taken a fee tail; and that our acts of Assembly do not change the rule, I will beg leave to inquire what was the intention of the testator upon the face of the will itself. The object of the testator was not merely to provide an estate for *William* during his life, but for his most remote issue. This could not be effected, unless my rule of construction should be adopted: for, to take as a purchaser, the person must answer the description in
* 288 all its parts; *grandchildren* not answering *the description in the will, the estate would have gone out of the family.

If then I have shewn that, in *England*, *children* would have been considered a word of limitation, in order to effectuate the general intent; in this country, the rule should be the same, according to my view of the acts of Assembly. 1st. Because, prior to 1776, this would have been adjudged a fee tail in *William*. 2dly. Because, by expounding the will so as to make the children take as purchasers, the grandchildren would have been excluded, if any. 3dly. The testator, if he had been asked, would certainly have declared that such was not his intention.

(*a*) 1 *Call*, 212.
(*b*) 2 *Call*, 72.

The cases of *Brewer* v. *Opie*,(*a*) and *Selden* v. *King*,(*b*) do not apply. In the former, there was no estate whatever vested in the ancestor, and the word *children* was, according to a well known rule of law, considered a word of purchase. The difference between a devise to a *stranger*, and to the *ancestor* with remainder over has been long settled. In *Selden* v. *King*, there was a clear intention in the testator to give an estate to his wife for life; remainder in tail to the child; whether a son or a daughter. The child could not take by descent, but must take by purchase. The rule is well settled that, where the estate is given to a different person from the one who would be the heir, the devisee takes by purchase.

By adopting my rule of construing the will, the testator's general intention would be effectuated by providing for the remotest issue of his son, and every part of the will would stand together. I should read the will thus: I give to my son *William Carr* (certain lands) for and during the term of his natural life; and, after his death, remainder to his issue: but, if he die without issue, then to *John Carr* and *Betsey Tebbs*, &c. But if all my dear children die without issue, remainder over. My will and intention is, that all my dear children shall have an equal share of my estate. To read the will thus, would effectuate the manifest object of the testator: and this is the only mode by which all parts can be reconciled.

But, if I am mistaken, and the exposition of Mr. *Wickham* be adopted, that *William* took an estate in fee tail subject to be divested upon his having a child, as that event never happened, he necessarily died seised of such an estate, whereof his wife could be endowed; and therefore the decree of the Chancellor must be reversed.

Curia advisare vult.

**Saturday, June* 20. The Judges delivered their opinions. * 289

Judge TUCKER. The question which the Court is now called upon to decide, is upon the construction of the will of *Wm. Carr* the elder; wherein the testator, by express words, devises an estate for life to each of his three children, with remainder to the children of each, and in case of the death of either without children, remainders over to the survivor or survivors of his own children.—The particular clauses relative to his son *Wm. Carr*, jun. are thus stated:

He gives to *William Carr* sundry tracts of land, and among others, one recovered of *T. Mason's* executors; and, after the death of the testator's widow, *Aga*, and her children, *during the natural life* of the *devisee:* and, *after his* decease, to his *child* or *children;* if *none*, to his son *John Carr*, and his daughter *Betsey Tebbs* for *life;* and then to be equally divided between their children. And by a codicil he declares, that should all his dear children die *without issue* of *their bodies*, his wife still living, one half of the *life estate* to go to his wife during her natural life, with remainder over, &c.

The cause has been ably and elaborately argued by the counsel on both sides. On the part of the plaintiff, it is

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contended that *William Carr*, jun. took an estate of inheritance, of which his widow, one of the plaintiffs, might be endowed, by virtue of the above devise; according to the rule in *Shelley's* case, that whensoever the ancestor, by any gift or conveyance, takes an estate for life, (though limited by any restrictive words whatsoever,) and, after, in the same gift or conveyance, a limitation is made to his *heirs*, in fee, or in tail, the heirs shall not be purchasers;(*a*) and it makes no difference where the law creates the estate for life, or the party; or where there is an intervening estate; especially, if not of freehold;(*b*) and this rule we are told has never been shaken.(*c*)

(*a*) 1 *Co.* 99.

(*b*) 2 *Fonb.* 70, 71.

(*c*) 1 *Bro. Ch. Cas.* 215, 216. *Jones* v. *Morgan.*

To establish the application of this rule to the present case, the counsel for the plaintiff have adduced a number of cases where the limitation over has been made to *issue* of the first taker; in which he has been adjudged to take an estate tail, according to the rule in *Shelley's* case: and then, reasoning by analogy, they contend that, as the words "*issue*" and "*children*" both mean the same thing, in a

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natural sense, they are to be taken as meaning the *same thing also in a *technical* sense; and hence infer, that whenever an ancestor takes an estate of freehold, and, in the same will, there is a limitation over to his *children*, the children shall not take as *purchasers*. In other words, the estate so limited shall be construed to vest an inheritance in the first devisee, whatever words the testator may have used to shew he meant to give an estate for *life only*. That the words "*heirs*," "*issue*" and "*children*" are not synonymous, must be known to every man the least conversant with legal distinction. By the common law a conveyance to a man and his *heirs*, gives him an estate in fee-simple, the highest estate in lands that a subject could have: one to him and *his issue* would only create an estate for life; to him and his *children*, if he had any at the time, would have created a joint-tenancy with them for life only.(*d*) Again, the word "*heirs*" is a mere term of art to designate the persons to whom an estate in lands should, either immediately, or remotely, descend; and, as it respects real estate, must, when not explained by other words, or by the context, always be understood in a technical sense and no other. The word *issue* in a will is either a word of purchase or of limitation, as will best effectuate the intention of the testator; it is sometimes singular, sometimes plural, sometimes a word of limitation, sometimes of purchase; but must always be construed according to the intention of the will or deed wherein it is used; and it is said to be a rule, that, where an ancestor takes an estate of

(*d*) 2 *Bl. Com.* 115. 6 *Co.* 17.

freehold, if the word "*issue*" in a will comes after, it is a word of limitation;(*a*) and then it always means *heirs of the body;* that is, the first, second, third, fourth, or tenth *son in succession*, one after another, or the first, second, third, and tenth *daughter collectively*. The word children is not a word of art; it has a *natural* sense, in which it is most generally used; when applied to the remote descendants of any person, it is altogether a figurative expression; thus we read of the children of *Seth;* the children of *Ham;* and the children of *Israel*. In the latter instance it is used to designate a whole nation. But, when not used in this figurative sense, it means the immediate offspring of a man or woman; it has indeed, in a few cases, been construed, to mean *grandchildren*,(*b*) and even *great-grandchildren*.(*c*) But this construction is to be admitted only where *no other* construction can be made.(*d*) I have met with no case where, in a devise by way of remainder, the word **children* hath had the same sense affixed to it, as *heirs of the body;* that is designating them as takers of an estate of *inheritance* in *succession*. Here the analogy between the words "*issue*" aud "*children*" seems to fail. The former, according to *Gould*, Justice,(*e*) is used in the statute *de donis* promiscuously with the word *heirs;* a strong reason for the technical sense which it has obtained; it comprehends, according to the same Judge, the whole generation, as well as the word *heirs;* and, in his judgment, it is more properly, in its natural signification, a word of *limitation*, than of purchase. The same has certainly never been said of the word children. On the contrary, where a devise was to *John White*, for life, (he then having no children,) and from and after his decease, or other determination of his estate, to the male children of the said *John successively*, one after another, as they are in priority of age, and to their heirs, and, in default of such male children, to the female children of the said *John*, and their heirs; and, in case the said *John* should die *without issue*, remainder over to the testator's grandson in fee-simple; the Court of Common Pleas decided, after five several arguments, that *John White* took only an estate *for life*, and not an estate tail.(*f*) Much has been said as to the rules of construction in the case of wills; There is one general rule, equally for Courts of Equity and for Courts of Law, applicable to all wills; which the Courts are bound to apply, however they may condemn the object. The intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to its *natural* and *common* import; and,

(*a*) 2 *Wilson*, 324.

(*b*) 1 *Ves.* 196.
(*c*) *Ambler*, 555. S C.
(*d*) 4 *Ves.* jun. 698.

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(*e*) 2 *Wilson*, 324.

(*f*) *Ginger* v. *White*, *Willes' Rep.* C. P. 348

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if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain that the testator did not so intend ;(*a*) and by the late President of this Court, in the case of *Kennon* v. *M'Robert*, it was said, " if the testator use legal phrases, his intention " should be construed by *legal* rules ; if he use those that " are common, his intention according to the common un- " derstanding of the words shall be the rule."(*b*) The same enlightened Judge hath told us, " that the intention " of the testator is to give the rule of construction, is de- " clared by all Judges both ancient and modern ; and Lord " *Holt* and some others more modern, emphatically call " that intention the polar star which is to guide our de- " cisions."(*c*) Adopting the testator's intention in the present case, *as the cardinal point by which we are to be guided, can we fail to discover that his primary and general intention, which pervades his whole will, and is confirmed by the context in every part of it, was to give to each of his children a *life estate only*, in the property respectively bequeathed, or devised to them ; with contingent cross remainders to each other ; in the event that either of them should die without children. There is not in the whole will a single technical word that I can discover ; of course, the construction is to be made according to the common understanding of the words he has used. The word " children" is therefore to be construed in its natural sense, and not strained to mean *heirs*, as the counsel for the appellants would have it ; which would go to defeat the obvious intention of the testator, by giving an estate in fee-simple to each of his children, instead of an estate *for life*, according to the express words of his will eight times repeated. The amphibious word *issue* indeed occurs once in the codicil ; but, in such a manner as to shew that the testator did not mean to use it as a word of limitation, and is well explained by the context to mean *children living at the death of the testator's* children respectively. " Should " all my dear children die without *issue* of their bodies, my " dear wife living, one half of the life estate to go to my " dear wife during *her life*, the other half to *Thomas Chap-* " *man*," &c. The contingency thus intended to be provided against, is clearly described, and must happen, if at all, within a few years after the testator's death, and during the life of his widow ; leaving no doubt of the sense in which the word is used.

(*a*) 4 *Ves.* jun. 329.
(*b*) 1 *Wash.* 100.
(*c*) 1 *Wash.* 102.
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I shall now cite a few cases which appear to me to support the opinion I have given.

In *Wild's* case(*a*) there was a devise to "*Rowland* "*Wild* and his wife; and, after their decease, to their "children." They then having children, it was adjudged they took an estate for life only; and, though it was admitted, if *A.* devises his lands to *B.* and *his children*, or *issue*, and he hath *not any* at the time of the devise; that the same is an *estate tail;* (for that the intent of the devisor is manifest and certain that his children or issue should take; and as *immediate* devisees they cannot, because they are not in *rerum natura;* and, by way of remainder, they cannot, for that was not his *intent;*) yet it was resolved, that, if a man, as in the case at bar, devise land to husband and wife, *and, after their decease*, to their children, or the remainder to their children; in that case, although *they have *no child* at the time, yet every child which they shall have after, may take by way of *remainder*, according to the rule of law; for the intent appears that the children should not take immediately, but after the decease of *Rowland* and his wife. The most sharpsighted legal casuist could not discover any other difference between the case thus put, and that upon which we are to decide, except that, in the former, the devise is supposed to be made to a husband and wife; in the other, to *William* alone; unless that, in the case before us, the testator has superadded the words *during his natural life*, which, without altering the sense, serve to shew the intention of the testator in a stronger light than in the case supposed.—But, as it was said in *Peacock* v. *Spooner*,(*b*) that *Wild's* case was not allowed to be law, it may not be amiss to observe, that the question in that case arose upon the words "*heirs of the body*," and not upon the word "*children*." And that the resolution in that case was afterwards overruled in *Webb* v. *Webb*, in the House of Lords.(*c*) In the case of *Warman* v. *Seaman* and *Pratt*,(*d*) Judge *Rainsford*, arguing upon the distinction between issue and children, said, "The word 'issue,' *ex vi termini* is *nomen collecti-* "*vum*, and takes in all issues to the utmost extent of the "family; as far as the words *heirs of the body would do:*" and observed, that "it was resolved in *Wild's* case, that a "devise being to father and mother, and after their deaths "to the children, the word children shall be a name of "purchase and not of limitation, and they shall have but "an estate for life: but had it been to their *issues*, (as in "the case before him,) that the word issues should have "been construed a word of limitation, and not of pur- "chase;" and so it was lately resolved in the Exchequer

(*a*) 6 *Co.* 17.

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(*b*) 2 *Vern.* 196.

(*c*) *Ibid.* 668.

(*d*) *Finch's Rep.* 282.

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Chamber; and a judgment, given in the King's Bench to the *contrary*, was *reversed* upon the *authority of Wild's* case. This passage is cited and approved by *Grose*, Justice ;(*a*) and in the same case of *Warman* v. *Seaman*, the Lord Chancellor declared that he had considered the opinion of Judge *Rainsford*, and the reasons thereof, and was satisfied with it: for the resolution in *Wild's* case, on which he grounded his former opinion, would not hold, if, instead of "*children*" the word "*issue*" had been in that case, and that, when the Judges of the King's Bench had *lately held otherwise*, and fallen into the like error, their judgment was, for that very cause, reversed in the Exchequer Chamber.(*b*) This book has, indeed, been denounced as one *of no authority ;(*c*) whether for want of the *imprimatur* of the Lord Chancellor and Judges, formerly prefixed to books of reports, I cannot tell. But the name of Sir *Heneage Finch*, the author, who is mentioned by Judge *Blackstone*(*d*) as a person of the *greatest abilities*, and most uncorrupted integrity, endued with a pervading genius, which enabled him to discover and pursue the true spirit of justice, may weigh against the opinion even of Lord *Hardwicke ;* especially where this book is cited and relied on by other Judges. Be this as it may, Lord *Hardwicke* himself decided the case of *Ives* v. *Legge* precisely upon the same principles. There the devise was to *Marthana Legge*, to hold to her own use during her natural life ; and, after her decease, to the *children* of her body begotten, and their heirs ; and, in default thereof, to *Wm. Legge*. Lord *Hardwicke* decided, that here was a vested remainder in *Wm. Legge*, and that *Marthana* took only an estate for life.(*e*) And we have a similar decision by the same Judge in *Godwin* v. *Godwin*,(*f*) where the devise was to *Joan*, the wife of Sir *Peter Seaman*, for and during her life ; and afterwards to her children, to be equally divided between them, share and share alike : and, for want of such children, to the testator's right heirs. Lady *Seaman* had two children *then* born, and one born *after ;* and the question was, what estate the after-born daughter had under that devise ? And Lord *Hardwicke* said, wherever there is a remainder to children by settlement or will, it is not material whether they are alive or not ; for it will vest in different parts and proportions, as they come *in esse :* and he held that they took as tenants in common for life only ; and cited *Wild's* case as being to the same effect. In the case of *Doe* v. *Perryn*,(*g*) the devise was to *Dorothy Comberback* for life ; remainder to trustees to preserve contingent remainders ; remainder to

(*a*) 4 *T. R.* 88, 89.

(*b*) *Finch's Rep.* 283.

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(*c*) 3 *Atk.* 334.

(*d*) 3 *Com.* 55.

(*e*) Cited 3 *T. R.* 488. note.

(*f*) 1 *Vez.* 326.

(*g*) 3 *T. R.* 484.

all and every the *children* of *D. C.* begotten by her husband, and their heirs forever, equally to be divided between them; remainder over: and it was held that *D. C.* took an estate for *life only*, with remainder to her *children* in fee-simple. And *Ashhurst*, Justice, said, that the limitation to *Dorothy's* children was contingent until they were born; but it became vested on the birth of the first child, subject to be diminished in quality as other children of *Dorothy* should be born: and, on the birth of *Dorothy's* first child, the subsequent limitations were defeated.

In the case of *Carter* v. *Tyler*,(a) it was strongly contended, notwithstanding the clause in our act *of Assembly respecting estates tail, that estates might yet be limited to provide for contingencies in families; and Judge *Pendleton*, in delivering the opinion of the Court, said, "of this there is no doubt; a parent may guard against "an improvident child's wasting his provision, by limiting "his interest or power over it. He may give an estate "for life, and limit remainders over upon it." This is precisely what the testator evidently intended in the present case, and what I conceive he has done. As to the negroes, I see no reason to distinguish the operation of the will, as to them, from its operation on the real estate. The case of *Higginbotham* v. *Rucker*, which arose upon a verbal *gift* of a slave to the daughter and the heirs of her body, and, in case she died without *issue*, (that is, *children* of her body, as explained by the Jury in their special verdict,) to return to the donor, is certainly a stronger case than the present. And the *trust estate* being directed to go "*as the other estate devised*," I can make no distinction as to *that*; and am, therefore, of opinion, that the decree of the Chancellor ought to be affirmed.

(a) 1 *Call*, 185.

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Judge ROANE. I will consider this case in two points of view.

1st. Independently of the act of 1776 docking entails, and the act of 1785 dispensing with the necessity of words of inheritance to pass a fee: and 2dly. As affected by those acts.

As to the first point of view, it will be found that *Shelley's* case is the substratum of the whole edifice. In that case it was ruled, that wherever the ancestor takes an estate for life, and after, in the same conveyance, a remainder is limited, mediately or immediately, to his right heirs, or to the heirs male or heirs female of his body, that, in such case, his right heirs, or heirs male or female, shall not be considered as purchasers, but shall take by descent. The

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reason given for this is, that, as the heirs, or heirs male, &c. could not take as *purchasers*, not being *in esse*, and could only take through the ancestor, the estate for life was enlarged for their benefit. Another reason is given, from the parity and conformity that this limitation bears to a limitation to *A.* and his heirs, or to *A.* and his heirs male or female of his body: for as this gives an estate for life *by implication*, and more, so the other gives him the same in express words, and more; *et expressio eorum quæ tacite insunt nihil operatur.*(a)

(a) 5 *Bac. Abr. Gwil.* ed. 732. tit. *Remainder*, by the Lord Chief Baron *Gilbert.*

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*As it is generally said that estates tail are implied for the benefit of the issue in tail, so, under the first reason just stated, a fee-simple is also raised in favour of the heirs, on the same principle: but it is evident that the rule in *Shelley's* case does not apply to any case, where the persons in remainder can take, and were intended to take as *purchasers*.

The rule in *Shelley's* case being thus established, other expressions deemed equal in effect with the words *heirs of the body*, such as *issue of the body*, and *men children of the body*, were also construed to enlarge the estate for life into an estate tail. It is justly said, however, in *King* v. *Melling*,(b) *Ginger*, on the demise of *White* v. *White*,(c) &c. that these words are stronger than the term *children*; that they indicate that the testator had an eye to an estate tail; and that the word *issue* takes in the whole generation; is used synonymously with heirs in the statute *de donis*; and is more properly a word of limitation than of purchase. The expressions just stated, therefore, are much stronger to denote an estate tail, than the word "children" used in the case at bar, or in *Wild's* case, to be presently more particularly noticed. It is readily admitted that the word *issue* in a will, is either a word of purchase or limitation as will best effectuate the intention of the testator, *Roe*, on demise of *Dodson*, v. *Grew*.(d) In *Roy* v. *Garnett*,(e) it is said by the Court, (p. 32.) "that the surviving sons not only *might*, but must take as purchasers; "being to take, not in succession, but as tenants in common." This position applies to the case before us, as the children of *Wm. Carr* are to take as tenants in common, by the very provisions of the will. In this same case of *Roy* v. *Garnett* it is said by the President that "it has "been thought a circumstance of considerable weight, "that *issue* (not *children*) must be taken as a word of limitation, where no words of inheritance are superadded "in the devise, because, in such case, if the issue take "by purchase, they would only take an estate for life;

(b) 1 *Ventr.* 214.
(c) *Willes*, 348.
(d) 2 *Wils.* 322.
(e) 2 *Wash.* 9.

" and that hence a distinction has arisen, that where words " of inheritance have been superadded, in the devise to " the *issue*, the issue has been adjudged to take by *purchase*, " so as not to enlarge the estate of the ancestor; and this " was *Archer's* case, 1 *Co.* 66."

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In the case at bar, the term is not only *children*, (certainly much less a term of limitation than *issue*,) but words of *inheritance are, *in effect*, superadded in the will, by the operation of the act of 1785, which gives a fee, wherever a less estate is not limited by express words, or does not appear to have been granted, conveyed or devised, by construction or operation of law.

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In the same case of *Ginger* v. *White*, it is said that it is a mistake, that the terms *issue* or *children* in a will, where there are none *in esse* at the time, do as necessarily create an estate tail as the words " *heirs of the body*" do in a deed; and that they shall only be so construed, where that appears to be the intention of the testator. How the intention was in the case at bar, will presently more particularly appear.

In the case before us, the devise was to *Wm. Carr during his natural life*, and, *after his decease, to his child or children;* if none, to *John C. and Betsey Tebbs* for life; and, then, to be equally divided between their children.

This devise *for life* to *Wm. Carr*, and which is said by the Chancellor, in his decree, to be no less than eight times repeated in the will, as relative to the several devisees, is certainly as strong as the devise to *James* for life, in the case of *Roy* v. *Garnett;* and which, as is said by the President, denoted the intention of the testator in that case to be, " to devise an estate *for life*, as manifestly as if con- " firmed by one from the dead." (p. 31.)

The devise for life in our case is, perhaps, taking the whole will into consideration, not less strong than the vaunted devise " for life and *no longer*," in the case of *Robinson* v. *Robinson;*(*a*) which last words " no longer," it was argued by the counsel in that case, and I think with some force, were certainly tautologous, and had really no force in them at all, beyond the former words limiting the estate for life.

(*a*) 1 *Burr.* 41.

Thus stands the strength of the devise in our case, as relative to the devisee, *Wm. Carr:* let us now see how it stands in relation to the ulterior limitation—

As upon the will, (exclusively of the codicil,) the limitation is, *after the decease* of *Wm. Carr*, to his *child* or *children*. In *Wild's* case,(*b*) a devise of land to husband and wife; and, *after their decease*, to their *children;* al-

(*b*) 6 *Rep.* 16. 3d resol.

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though they have not any child at the time, yet every child, which they shall have after, may take by way of remainder; for his intent appears that the children should not take immediately, but after the decease of husband and wife. This case emphatically applies to the one at bar: for it was *there *so* held, notwithstanding the children would only take an estate for life in remainder; whereas the children in question, in this case, will take a fee, by virtue of the forementioned act of 1785.

The case of *Ginger* v. *White* not only *recognizes* the above case of *Wild*, but is, perhaps, still stronger, and is very similar to the case at bar: it would bear out the opinion I now entertain upon the case before us, even if the term children used in the will were, by virtue of the provision in the codicil, enlarged to mean *issue*, and so as to comprehend children *ad infinitum;* which, however, I shall presently attempt to shew, is not the case. In the case of *Ginger* v. *White*, a devise to *John* for life; and, *from and after his decease*, to his male children *successively, one after another, and to their heirs*, and in default of such, to the female, &c. and in case *John shall die without issue*, (that term not restricted, as in the codicil in the case before us,) was held to pass only an estate for life to *John*. These two cases strongly apply to the case at bar. *Wild's* case is expressly in point; admitting the case at bar to stand singly upon the word *children* mentioned in the will. The other case extends to our case as standing upon the will and codicil, and even admitting the term *children*, in the will, to be extended, by the codicil, to be commensurate with issue of the body collectively taken. But this is not the case. The provision of the codicil is, "should all "my dear *children* die without issue of their bodies, *my* "*dear wife* LIVING, one half of the life estate to go to my "dear wife, *during her life*, and the other half to go to "*Thomas Chapman*," &c. (persons *in esse*) "*during their* "*lives*," &c. This limitation over, in favour of persons then living, clearly shews that the testator used the term *issue*, in this case, as synonymous with *children*, and not as importing descendants *ad infinitum*. Nothing is more clear than that the word "*issue*" may be used in the one sense or the other, so as best to answer the intention of the testator. As, in this country, the term "children" now carries a fee, there is less reason to strain it into a word of limitation, than in *England*, as every purpose is already answered.

Notwithstanding what is now said, some strong cases have been cited to shew, that an express estate for life may

be enlarged into an estate tail, *to effectuate the manifest intention of the testator.* It was to effectuate such intention, that the devise in the case of *Robinson* v. *Robinson*, was decided to enlarge the life interest into an estate tail: *but there are some strong features in that case, which do not exist in the present. In that case, *L. H.* and his son, were to take the name of *Robinson*; and it was deemed improbable that the testator would impose and perpetuate the name upon him, and yet, that the estate, in consideration of which it was to be assumed, was to endure only for life. In that case, also, the "perpetuity" of his presentations was given to *L. H.* (subject, &c.) "in the "*same manner* and to the *same uses* as he had given his "estate;" thereby explaining the former devise by the latter.

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The case of *Roe*, on the demise of *Dodson*, v. *Grew*,(a) proves nothing as to the case before us; the limitation over being, after the decease of *G. G.* to the use of the *issue male of his body lawfully to be begotten*; words peculiarly importing an estate tail. Nor does the case of *Roy* v. *Garnett*, depending on a will made long before the revolution, (on whatever grounds decided by the Court,) prove any thing; the words in the limitation over being, "if my son *James* die without *issue male*," &c. not "without *children*."

(a) 3 *Wils.* 322.

In all those cases, therefore, there was a *general* intention *strongly appearing* in the will, (which does not exist in the case before us,) overruling the particular intention, and enlarging the life estate into an estate tail. This, however, can only be done (where the life estate is *express*) to effectuate the manifest intention of the testator.

In the case at bar, nothing is gained in favour of intention, (and, therefore, no such intention shall be admitted to have existed,) by construing the limitation to be an estate tail, for it is *eo instanti* converted into a fee-simple, by virtue of a general law, of which the testator could not have been ignorant. It is more agreeable to his intention that his *grandchildren*, (the children of *Wm. Carr*,) for whose interest he seems anxiously to have intended to provide, should succeed in *remainder*, and their posterity under them for ever, by virtue of the act of 1785, (although *possibly some of the* GRANDCHILDREN of *Wm. Carr*, *the son and devisee*, might not, in consequence of their father's dying in their life-time, come within the *descriptio personæ* stated in the will, and therefore might be excluded,) than that the fee-simple interest should at once vest in the first

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devisee, and he be thus enabled to disinherit all the testator's progeny descending through him: and the Chancellor is certainly very correct in saying, that the intention of *the testator to provide for his grandchildren, is the sole argument used on the part of the appellant's counsel, to authorise and produce a destruction of their interests!

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Such are my impressions upon the first point above stated: and, if upon the mere doctrines of *English* law upon this subject, an estate for life only would accrue to the devisee of *Wm. Carr*, this is much more the case, when we take into our consideration the two acts of 1776 and 1785.

The first cuts up by the roots the pretence of implying an estate tail for the *benefit* of the issue, and the second guaranties to a *son* or *child*, claiming in remainder as a *purchaser*, the absolute fee-simple property in the land. This last consideration has before been stated, as one which lessens the necessity for construing the term *issue* to be a word of limitation rather than of purchase. Nothing is more clear than that those acts, if they are to be taken into consideration in the present case, would make the appellant's case much weaker than it is, in so far as we are inferring an intention on the part of the testator to provide for the issue of the devisee.

But in the case of *Tate* v. *Tally*, this Court concurred in opinion with the Legislature, that, in construing what was or was not an estate tail, we should have reference to the *former* laws, and that, as to the construction to be made in relation to that point, we should inquire what the "law "*aforetime* (i. e. before 1776) was;" and one of the Judges in that case said, with great propriety, "that the intention "of the act of 1776 was not to *alter* the established rules "of construction." In a case, however, where the intention of the testator is alleged, under pretext of providing for his issue, but in reality to *infer* an estate which will defeat them, it would seem proper to *rebut* that allegation, by resorting to a posterior *general* law, without an ignorance of which, it is impossible that any such *intention* could have existed on the part of the testator.

In the case of *Tate* v. *Tally*, it was argued by one of the counsel, (who differed widely in opinion from the appellant's counsel in this case,) that as estates tail were implied for the *benefit* of the issue, and as, since 1776, entails are destroyed, and the benefit to the issue no longer exists, the reason of the rule ceasing, the rule ought also to cease.

The counsel alluded to in that case appears, for a moment, to have forgotten that the reasons (or some of them) in *Shelley's* case, have also ceased, and yet that the rule continues; that although the feudal reason of requiring *words of inheritance to carry a fee has also, perhaps, ceased, it was not for this Court, but for the Legislature, by the act of 1785, to alter the rule itself; that it is better, perhaps, to have some *established rules* of property, after * 301
the different reasons thereof have passed away, than to be in a perpetual state of uncertainty whether the reason of the rule exists or not; and that, so far from the Courts having power to abolish the rule in question *on this ground*, the Legislature have positively set up, *e contra*, the whole system of rules in relation to estates tail: although *eodem statu* it destroyed (as to many cases) the reason of the rule: and a similar power belonged to, and has since been exercised by, succeeding Legislatures.

On these grounds then, that, neither before nor since the act of 1776, a greater estate than one for life can be construed to have passed to *William Carr* by the will of his father, I am of opinion that the decree of the Chancellor is correct, and ought to be affirmed.

Judge FLEMING. This case has been so fully, and so ably investigated and elucidated by the Judges who have preceded me, that little remains for me to say; as it would be a waste of time again to travel over the same ground; and I shall only observe that it is a rule too well settled to need repeating here, that in the construction of a will, the intention of the testator is to govern in every case, where it does not contravene a well established rule of law: and it was well observed by the late venerable and enlightened President of this Court, "that adjudged cases have more "frequently been produced to disappoint, than to illustrate "the intention; and that where such intention is apparent, "cases must be strong, uniform, and apply pointedly, be-"fore they will prevail to frustrate that intention." And it appears strange to me that so much pains have been taken, and labour spent in the case now before us, in attempts to prove that the words used in the devise to *Wm. Carr*, gave him, by implication, an estate which is now (and at the time of making the will had long been) unknown to our laws; that it might be magically transmuted into an estate in fee; in order to frustrate and defeat the plain, manifest will and intention of the testator. The case appears to me so clear, that I shall only add my hearty concurrence in the opinion that the decree ought to be affirmed.

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*Judge LYONS. I shall make short work of all questions arising on the construction of wills made since the act of 1776: so far at least as it may be necessary to decide whether the testator meant to pass a fee tail or not. I will not *suppose*, after that act, that a man intended to convey an estate tail, (which the law has expressly abolished,) unless plain and unequivocal words are used, such as would of themselves create a fee tail, without resorting to implication; as a devise "to *A.* and the heirs of his body," or "to "*A.* and if he die without issue," &c. To fulfil the plain and manifest intention of the donor, the limitation must be equally plain and express; but not an implied limitation by mere construction to enlarge an express estate for life to an estate in fee or fee tail. For, if the donor did not mean an estate tail, but only used words which, by construction, might be so implied, in order to fulfil his intention; are they now, without necessity, and by implication only, to be construed into a fee tail to defeat that intention? The construction ought to be as near the apparent intention of the parties as possible, and as the law will permit. Where words are doubtful we should inquire into the *intention*; and, if that be clear, we should put such a construction on the words as will best carry the intention into effect, and reject that construction which manifestly tends to overthrow and destroy it, if such intention be not contrary to express rules of law. We are not to put words in a deed, or will, which are not there, nor construe them in direct opposition to the plain sense. But when the intention is plain and manifest, and the words doubtful and obscure, it is the duty of the Judge to be *astute* in endeavouring to find out such meaning in the words as will best answer the intention of the parties.(*a*) The construction contended for in this case by the appellant's counsel, shews what the wit of man can do, when it is employed in making objections.

(*a*) See *Willes' Rep.* 327. *Parkhurst* v. *Smith.*

An estate tail in the case of land, has been raised by implication to enlarge even an express estate for life and give an estate tail to favour the testator's intention: but ought not now to be made, by implication, to destroy that intention, when he meant only to give an estate for life: for the testator's intention shall make words either an estate for life or an estate of inheritance, as shall best promote that intention.(*b*)

(*b*) See 1 *P. Wms.* 431. *Target* v. *Gaunt.*

Apply the above rules of construction to the case before us; and the question is at once decided. The intention *of the testator to give an estate *for life only* to his son *William* is manifest from the whole context of his will. The widow of *William* is consequently not entitled to dower; and I concur in the opinion delivered by the other Judges, that the decree of the Chancellor be affirmed.

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