University of Richmond
UR Scholarship Repository

Law Faculty Publications | School of Law

2021

Reports of Cases by Lord Hardwicke

William Hamilton Bryson
University of Richmond - School of Law, hbryson@richmond.edu

Follow this and additional works at: https://scholarship.richmond.edu/law-faculty-publications

 Part of the Courts Commons, Jurisprudence Commons, and the Legal History Commons

Recommended Citation

Bryson, William Hamilton, "Reports of Cases by Lord Hardwicke" (2021). *Law Faculty Publications*. 1712.
https://scholarship.richmond.edu/law-faculty-publications/1712

This Book is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

REPORTS OF CASES

BY LORD HARDWICKE

Center for Law Reporting

General Editor:

W. Hamilton Bryson

Advisory Board:

Paul A. Brand

A. Mark Godfrey

Richard H. Helmholz

Janet S. Loengard

James C. Oldham

C. H. van Rhee

REPORTS OF CASES
BY LORD HARDWICKE
(1680-1741)

Edited by

W. H. BRYSON

RICHMOND, VIRGINIA

Center for Law Reporting

2021

© 2021 W. H. Bryson

Printed in the United States of America.

INTRODUCTION

Philip Yorke, earl of Hardwicke (1690-1764) was the Lord Chancellor of Great Britain from 1737 to 1756. He had a brilliant legal mind, and his memory is still celebrated today.[1]

These reports are taken from Lord Hardwicke's opinions in other cases. Thus, being statements by Lord Hardwicke of these cases, in that sense, they are his reports of these cases. The text published here has been massaged into the standard format for law reports. However, originally, it was Lord Hardwicke's treatment of these reports as legal precedents for other cases that were before him for decision, which precedents he followed or distinguished away factually or questioned as to the quality of the reports themselves. At Lord Hardwicke's time and before, there were no professional or official reporters.[2]

Most of these reports here are taken and restated from earlier reports that were in print at his time. Some of these cases are Lord Hardwicke's opinions as the judge in the case, *e.g*. Walmsley v. Booth (Ch. 1741), Case No. 46; note also Chapman v. Blisset (Ch. 1735), No. 38. Some are his observations as counsel in the case, *e.g*. Forth v. Chapman (Ch. 1719-1720), Case No. 14; Green v. Rodd (Ch. 1729), Case No. 29. Some are taken from earlier reports in manuscript, *e.g*. Thomas v. Whip (Ass. 1715), Case No. 12; Withers v. Algood (Ch. 1735), Case No. 40. Some are taken from the official Register's Books,[3] the decree and order entry books of the Court of

---

[1] P. D. G. Thomas, 'Yorke, Philip, first earl of Hardwicke (1690-1764)', *Oxford Dictionary of National Biography*, vol. 60, pp. 847-851.

[2] W. H. Bryson, comp., *Some English Law Reporters of Seventeenth Century Cases* (2020), 'Introduction'.

[3] Public Record Office, C.33.

Chancery, *e.g*. Withers v. Algood (Ch. 1735), Case No. 40. Lord Hardwicke sometimes compares a cited printed report with his own search of the official decrees, *e.g*. Lord Kilmurry v. Geery (Ch. 1713), Case No. 10; Papillon v. Voyce (Ch. 1728-1732), Case No. 28.

This is the way precedent was handled by the English bench and bar in the eighteenth century and earlier. The concept of binding precedent was then present, but this was difficult to enforce before the nineteenth century, when official law reporting came into existence. However, even today, precedents can be managed.[1]

[1] R. Cross and J. W. Harris, *Precedent in English Law* (1991).

TABLE OF CASES REPORTED

[These references are to case numbers, not page numbers.]

REPORTS OF CASES

BY LORD HARDWICKE

1

Holmes v. Meynell
(K.B. 1680)

In this case, the devise in issue was held to create cross-remainders.

West *tempore* Hardwicke 463, 25 E.R. 1033,
1 Atkyns 580, 26 E.R. 364

A great stress was laid upon the word 'they'; in case they happened to die, then he devised all the premises. Nor can there be any case cited where cross-remainders have been adjudged to arise merely upon these words, 'in default of such issue'.

And, therefore, his Lordship [PEMBERTON] declared, that the plaintiffs, Eleanor Davenport [and] John Davenport, and the defendant, Richard Owen, are entitled to the equity of redemption of a moiety of the premises on payment of a moiety of the principal and interest on the said mortgage and that, in case either of the plaintiffs or the defendant Richard Owen should redeem the said premises, then he decreed that a commission should issue to divide the premises into moieties, one moiety to go to the plaintiffs Eleanor and John Davenport and the defendant Owen, according to their interest therein, and the other moiety to the defendant Oldis, and, after such partition made, he directed proper conveyances to be executed by the several parties.

[Other reports of this case: T. Jones 172, 84 E.R. 1202, T. Raymond 452, 83 E.R. 236, Skinner 17, 90 E.R. 9, 2 Shower K.B. 136, 89 E.R. 842, Dodd 35, *sub nom*. Maynell v. Read (1677-1682), Pollexfen 425, 86 E.R. 599, 79 Selden Soc. 521, 740, 903.]

2

Brown v. Cutler
(K.B. 1681)

In this case, the devise in issue was held to create an estate tail.

3 Atkyns 284, 26 E.R. 966

The case was this. John Church being seised in fee, having four sons, Humphry, Robert, Anthony, and John, made his will, and thereby devised his estate to his wife for life, if she do not marry again, but, if she do, then that his son Humphry should presently after his mother's marriage enter and enjoy the premises to him and the heirs male of his body, remainder to the testator's other sons in like manner with remainders over. The testator died, the wife enters, and dies without being married, the plaintiff claimed as the right heir of the testator, being his granddaughter. The defendant claimed as heir male of the body of the testator. The question was whether, as the wife never married, a good estate tail was created by the will.

The court held it was a good entail, for that, by the whole scope of the will, it appeared that the testator intended an entail. And, rather than the intent of the testator should be defeated, the court construed the words in such a manner as to make it an entail.

[Lord Hardwicke:] Thus it is reported in Levinz. And Raymond seems to have reported his own argument, rather than that of the court.

[Other reports of this case: T. Raymond 427, 83 E.R. 223, 2 Shower K.B. 152, 89 E.R. 854, 1 Eq. Cas. Abr. 179, 21 E.R. 972, *sub nom*. Luxford v. Cheeke, 3 Levinz 125, 83 E.R, 611.]

3

Burdett v. Rockley
(Ch. 1683)

A sequestration for disobeying a personal order of a court abates upon the death of the contemnor.

1 Vesey Sen. 182, 27 E.R. 970

The bill set forth a suit against the late husband of the defendant and a decree in his life[time] and that, for not obeying, contempt issued against him and sequestration against the real and personal estate until satisfaction. And, he dying, the said commission was renewed by order of the court, and an injunction was ordered. The bill was in aid of the sequestration.

[There was a] demurrer thereto, for that, by the plaintiff's own showing, the defendant being dead, the sequestration abated, it not being for the lands in question or for any rent or encumbrance thereout, but for a personal duty in disobeying the decree and the rather for that, after his death, no subpoena in the nature of a *scire facias* yet issued against the defendant and heir, whereby they might come in and make a defence.

The demurrer was allowed, and the injunction for staying the defendant's proceedings at law was dissolved, so that a revivor was held necessary.

[Other reports of this case: 1 Vernon 58, 118, 23 E.R. 308, 356, 1 Eq. Cas. Abr. 218, 352, 21 E.R. 1001, 1096, Chancery Repts. *tempore* North 23.]

4

Whitmore v. Weld
(Ch. 1685-1686)

A devise over of vested personalty is void.

West *tempore* Hardwicke 283, 25 E.R. 938

William Whitmore, the father, made his will in these words, *viz*.

> The surplus of my personal estate, my debts, legacies, and funerals being paid, I give to the earl of Craven, for the use of my only son, William Whitmore, and the heirs lawfully descended of his body and for the use of the issue male and issue female descended from the bodies of my sisters Elizabeth Weld, Margaret Kemish, and Ann Robinson, in case my only son William Whitmore should decease in his minority, without having issue lawfully descended from his body. I nominate and appoint my only son, William Whitmore, executor of my last will and testament. I nominate and appoint the earl of Craven, during the minority of my son William, executor of my said will.

The testator died, William Whitmore, the son, being then of the age of thirteen years. The earl of Craven proved the will. The son married, and died without issue, being above the age of eighteen years and under twenty-one, not having proved his father's will, but the son had made a will and his wife executrix.

A bill was brought by the son's widow and executrix to have the benefit of the surplus of the father's personal estate. And the question at the hearing was whether she or the children of the father's sisters, who claimed by the devise over, were entitled.

The cause was first heard by Lord Keeper NORTH, who made a case of it for the opinion of the judges of the Common Pleas. But, after his death and before any certificate, the cause came to be reheard by LORD JEFFREYS, who was clear in his opinion for the executrix of

the son, and decreed accordingly. And he held, first, that the words, 'if the son should decease in his minority', being applied to personal estate, should be understood under the age of seventeen, when the minority as to disposing of personal estate determined, and the rather because the son was made executor, and then the executorship vested in him. And he held the minority in the devise over and the minority to suspend the executorship should be understood in the same sense.

Mr. Vernon makes him go further and say that the trust was vested in the son and the remainder over was void. But though that is loosely expressed, it must be understood of the case as the fact had happened, for it cannot be doubted, but the devise over on the contingency of the son's dying without issue in his minority was good in its creation.

Mr. Vernon reports Lord North (though he made a case) to have said that the question touching the minority was a considerable point.

[Other reports of this case: 1 Vernon 326, 347, 23 E.R. 499, 513, Lincoln's Inn MS. Misc. 498, p. 17, British Library MS. Add. 35978, f. 48, 2 Chancery Cases 167, 22 E.R. 897, 2 Chancery Reports 383, 21 E.R. 694, 2 Ventris 367, 86 E.R. 490, Chancery Repts. *tempore* North 453.]

[Reg. Lib. 1684 B, f. 455; Reg. Lib. 1685 B, f. 106.]

5

Grascomb v. Jeffreys
(Ex. 1687)

Tithes can be ordered to be paid in kind where an alleged modus *was void as too large.*

2 Vesey Sen. 515, 28 E.R. 329

17 November 1687.

This was a Kentish cause. And the plaintiff demanded tithe in kind for marshland. The defendant alleged a *modus* or custom time out of mind to pay 12d. per acre for all marshland within the parish in lieu of all tithes. Proof was made of this payment for forty or fifty

years. And, upon this and as there was no proof of payment of tithe in kind, a trial was prayed to be directed.

But the court denied the trial, and declared the pretended *modus* or custom to be void, as it was proved that the marshland was rented at so much per acre, that it was not possible nor could a reasonable intendment be made that the *modus* or custom time of mind could be. And, therefore, the court overruled the *modus*, and said that the court usually overruled a *modus* which seemed too great and which did not seem reasonable to the value.

[Lord Hardwicke:] But note this cause was reheard upon the defendant's motion, and the *modus* was sent to a trial at law by a Middlesex jury. But it does not appear what was done afterward.

[Other reports of this case: Eq. Cases Exch. 285.]

6

Greenway v. Earl of Kent
(Ex. 1706)

Tithes are not due for timber though it be used for firewood.

Ambler 134, 27 E.R. 86

There was a bill for tithes of wood and tops of pollards, all used for firing. It appeared in proof that all had been corded and used together.

And it was decreed that tithes should be paid of all trees of twenty years growth, as of underwood that was cut and corded.

The court was divided, and Chief Baron WARD differed with the other three barons, and delivered a very learned argument against the decree.

And I [Lord Hardwicke] think his the better opinion. I have informed myself of the ground on which the three barons went.

Baron PRICE said ancient statutes are to be construed according to the intent and meaning, that *gross bois* is not all sorts of wood above twenty years growth, but timber, and used for building; so that the ground whether tithable or not is the being used for building.

But this is not agreeable to the Statute[1] and the determinations upon it. He [Price] cites Stat. 35 Hen. VIII.[2] But that Statute only gave protection to wood of such dimensions, and does not say that other timber shall not be privileged. And it might as well be said, although the law says a man shall be at age at twenty-one, yet it shall be determined by his sense or stature. As there was no precedent before that case, so there has been none since.

[Other reports of this case: Bunbury 98, 145 E.R. 609, 1 Rayner 161, Eq. Cases Exch. 546, 644.]

[The order of 31 January 1706, Public Record Office E.126/18, f. 567v, is printed at 1 Wood 479, 1 Eagle & Younge 677.]

7

Bale v. Coleman
(Ch. 1708-1711)

In this case, the devise in issue created an estate tail and not a life estate.

Jodrell 688

26 July 1708; decreed by Lord Cowper, and, afterwards, on rehearing, by Lord Harcourt on 28 April 1711.

William Stawell, by will, on 2nd June 1702, devised to four trustees and their heirs all his manors and lands to the intent they should by sale or leasing pay his debts and the residue of the premises to the same four persons, their heirs, and assigns equally to be divided between them. By codicil of the same 10th June 1702, the testator declared his will to be, after his debts be paid and a dividend made of the remainder of the premises, that notwithstanding the express words of the will to 'Elizabeth Bale [one of the four trustees], her heirs, and assigns forever', his meaning was that such part as should fall to the

---

[1] Stat. 45 Edw. III, c. 3 (*SR*, I, 393).

[2] Stat. 35 Hen. VIII, c. 17 (*SR*, III, 977-980).

share of the said Elizabeth should be and remain to the said Elizabeth for her life with a power to make leases for 99 years determinable on three lives and, after her death, to the plaintiff, Christopher Bale, her son, for life, with like power to make leases, remainder 'to the heirs male of his body' lawfully to be begotten and, for default of such issue, to Coleman and Bogan and their heirs equally to be divided between them.

Christopher Bale, the son of Elizabeth, was plaintiff in the cause. And the defendant Coleman insisted that he ought only to have by the conveyance to be executed an estate for life limited to him with remainder to his first etc. sons and the heirs male of the body of such sons successively, with remainder to the defendants, Coleman and Bogan, and their heirs.

Upon the hearing of the cause by my LORD COWPER in 1708, he was of that opinion, and decreed that there should be a partition of the residue of the estate and that the shares should be conveyed in this manner, *viz*. one-fourth to the defendant Coleman, two-fourths to Bogan, and the remaining fourth to Elizabeth Bale, the plaintiff's mother, that this last fourth part should be settled to the use of Elizabeth Bale for life with the power of leasing and, after her decease, to the plaintiff, Christopher, her son, for life with like power of leasing and, after his decease, to the first and every other son of his body and the heirs male of the body of every such son successively and, for default of such issue, to the defendants Coleman and Bogan and their heirs as tenants in common.

If it had rested here, the decree had been a clear authority for the defendant in this cause. But Bale v. Coleman was reheard by LORD HARCOURT in April 1711, who was of a different opinion and ordered that Lord Cowper's decree, so far as it directed a conveyance of the last fourth part to the first and every other son of Christopher Bale, should be reversed and instead thereof it should be conveyed after the death of Christopher to the use of the 'heirs male of the body' of the said Christopher and, for default of such issue, to the use of Coleman and Bogan and their heirs as tenants in common. In this decree, my LORD HARCOURT has caused his reasons to be very minutely entered, and, from these, the plaintiff's counsel have argued more than from the judgment itself. The declarations are these.

> His Lordship declared that this case arising upon the words of a will was much different from the several

cases decreed in this court upon marriage articles, that such articles are always intended to be carried into a farther and more perfect execution, that the parties to such articles are to be considered as purchasers, and, in a court of equity, ought to have their contracts executed according to the intent and the nature and course of marriage articles and settlements, in making whereof the issue male of the marriage are particularly regarded and generally taken as purchasers, that, when, by the careless penning of marriage articles, the contract is expressed in consideration of an intended marriage and portion to settle the husband's estate to the use of him and his intended wife and the heirs male of their bodies or the like, that generally limitation has been restrained in this court when an execution of the marriage articles and agreement has been decreed to an estate to the [*blank*] for life, with a remainder to his first and other sons in tail male, for that it could not reasonably be supposed a valuable consideration was agreed to be given to have an estate so settled, that the husband might destroy or bar the settlement as soon as he should make it, but that no one case had been cited where the like decree had been made upon the words of a will under which the devisees claimed voluntarily, that, in this case, the question arose upon the words of a codicil, and that all wills ought to be construed according to the intent of the testator, so as such intent appears with certainty and be consistent with the rules of law, but such intent could be no otherwise considered in a court of equity than in the courts of law, and that the same words of limitation in a will ought to receive the same construction in a court of equity as they have at law, that the same words in a will which at law would create a legal entail ought to be so construed by this court when they fall under a trust and are to be carried into farther execution, as in the present case, by the words of the codicil, according to the known rule of construction of law, the testator has given the plaintiff an estate tail in Elizabeth Bale's share, after her decease and subject to her power of leasing, and that, in this case, it could not be inferred with any certainty from the

> power of leasing given by the Statute 30 Hen. VIII[1] to tenants in tail, and, it being admitted that the debts and legacies are paid, therefore, the same construction ought to be made as if no trust had been, and, then, in construction of law, it will be an estate tail executed.

[Lord Hardwicke:] The first part of this declaration relating to the distinction between the construction of marriage articles for valuable consideration and wills is certainly right, but it has nothing to do with the present case. And it is remarkable that the case there put is of articles limiting the estate 'to the husband and wife and the heirs male of their bodies', which, in this case, would be decreed to be executed in strict settlement. And then, it follows that no case had been cited where the like decree had been made upon the words of a will.

This is very true. There never was such a decree, nor never will be where there is no more in a will than is there stated, for, in the case put, there is no insertion of trustees to preserve contingent remainders nor anything else to indicate an intention in the testator different from the legal force of the words.

The next clause of the declaration seems to be applied to devises of legal estates in wills about which there is no question but they must receive the same construction in courts of equity as in courts of law.

The next words relate directly to the devises of trusts. And I [Lord Hardwicke] own they go a great way that the same words in a will which, at law, would create an estate tail ought to be construed by this court when they fall under trust and are to be carried into further execution, as in this present case, so as to carry an equitable entail.

Now, I must observe that this proposition includes all trusts as well what have been called trusts executory as trusts executed, for the words are 'which are to be carried into further execution'. I fear His Lordship, for whose abilities I have the greatest deference, had not, in that case been fully informed of the precedents, for almost every one of the authorities of this court which I have cited under my

---

[1] Stat. 32 Hen. VIII, c. 28 (*SR*, III, 784-786).

second head are direct contradictions to this proposition, and, having already been stated, I now only refer to them.

At the conclusion of the general arguments in this declaration, there is a very remarkable clause, 'that it being admitted that the debts and legacies are paid, therefore, the same construction ought to be made as if no trust had been'. His Lordship has thought fit to call in this reason in aid of his opinion. But I own I cannot conceive how that subsequent fact could vary or operate at all in the exposition of the will.

After this noble lord was out of his office, I have more than once heard him express himself very strongly and very wisely against declaring general reasonings in decrees of this court which possibly affect other cases not then in judgment and which consequently could not have been fully considered nor foreseen. I could have wished that His Lordship had not departed from that cautious rule in this instance.

But to add force to this precedent, it was said at the bar that the cause was reheard again before Lord Cowper when he came to the great seal a second time and that he was convinced by Lord Harcourt's reasons and affirmed the latter decree made for the reversal of his own. But that was a mistake, for it never was reheard again by Lord Cowper, and, indeed, second rehearings are contrary to the general rules of this court. And, therefore, if Lord Cowper ever did throw out anything to my Lord Harcourt's reasons in that decree, it must have been only *obiter* upon the occasional mention of it in some other cause. And after all, Lord Harcourt's reversal of Lord Cowper's decree does not stand in need of that detail of general reasons to support it.

[Other reports of this case: 2 Vernon 670, 23 E.R. 1036, 1 Peere Williams 142, 24 E.R. 330, 2 Eq. Cas. Abr. 309, 472, 717, 22 E.R. 261, 402, 603, Chancery Cases *tempore* Anne 141.]

[Lib. Reg. 1710 A, f. 309.]

8

Sir John Hobart v. Earl of Stamford
(Ch. 1709)

A court of equity can amend the strict words of a will by adding trustees to preserve contingent remainders in order to effectuate the clear intent of the testator.

Jodrell 683

19 December 1709; decreed by Lord Cowper, and affirmed in the House of Lords.

Mr. Serjeant Maynard,[1] by his will, devised his estate to trustees and their heirs to the use of them and their heirs upon several trusts, *viz*. that the trustees, after the death of his wife, should convey part thereof to the use of, or in trust for, Sir Henry Hobart and Elizabeth, his wife, the testator's granddaughter, for their lives and the life of the survivor, the remainder to the first son of the said Elizabeth for ninety-nine years if he should so long live, remainder to the heirs male of the body of such first son, remainder to all and every the sons of Elizabeth for 99 years if they respectively so long should live, remainder to the heirs male of every of them to take not jointly but successively, the son and sons to take the term of ninety-nine years in the immediate remainder to his and their said heirs male, remainder to Mary Maynard, his other granddaughter, afterwards countess of Stamford, for her life with remainders to all and every her sons for such like term of ninety-nine years with remainders to the heirs male of the body of every such son. He farther willed that the other part of his estate should (by the advice of counsel) be conveyed to, or to the use of, Mary Maynard for life without impeachment of waste, remainder to all and every her son and sons for 99 years if such son or sons should so long live with several remainders to the heirs male of the body of every such son, they and all the heirs male of their bodies to take successively, each son to take the said term with

[1] P. D. Halliday, 'Maynard, Sir John (1604-1690)', *Oxford Dictionary of National Biography*, vol. 37, pp. 598-602.

remainder ‘immediately’ to his said heirs male and, after the determination of the said estates and failure of such heirs male of their respective bodies, the remainder thereof to his other granddaughter, the Lady Hobart, and her sons with the like terms and remainders, the remainder of all the estate to trustees and their heirs during the life and lives of Sir Henry Hobart and Dame Elizabeth, his wife, and of the countess of Stamford to preserve contingent estates ‘and to no other use or purpose’.

Mr. Serjeant Maynard died. Several suits arose about his will, and, in 1694, a private Act of Parliament[1] was made directing that his real estate should go to and be enjoyed by such persons for such estates and under such limitations as were mentioned in the will. This Act was not otherwise material than as it let in two terms of 99 years for the benefit of the earl of Stamford and Sir Henry Hobart if they should so long live (in case they should survive their wives) in the respective parts of the estate. Sir Henry Hobart and his lady died leaving Sir John Hobart, now earl of Buckingham, their only son, an infant, who brought his bill to have a conveyance executed by the trustees pursuant to the will and Act of Parliament.

LORD COWPER, on 24th January 1707, decreed the trustees should execute conveyances according to the will and the words of the Act of Parliament, and referred it to a Master to settle the conveyances.

The Master made his report whereby he allowed the draught of a conveyance in general words referring to the will and Act of Parliament thus ‘to convey the premises to Clayton and Carter and their heirs *habendum* to them and their heirs to the several uses, intents, and purposes in the plaintiff’s will and Act limited, expressed, and declared.’ To this report and draught, Sir John Hobart excepted that the premises ought at least to have been limited to the use of Carter and Clayton and their heirs only, in trust for such person and persons, and for such estate and estates as are in and by the said will and Act of Parliament limited whereby the legal estate might be vested in the said trustees for the better preservation of the contingent estates and limitations which, otherwise, as the draught was prepared, were liable to be destroyed and the testator’s intention plainly defeated.

---

[1] Stat. 29 Car. II (*SR*, V, 851) (not printed).

The matter of this exception was argued on 19th December 1709 before LORD COWPER who declared that, in matters executory, as in the case of articles or a will, directing a conveyance, where the words of the articles or will are improper or informal, the court will not direct the conveyance according to the improper or informal expressions of the will or articles, but will order the conveyance or settlement to be made in a proper and legal manner so as may best answer the intent of the parties. He conceived the intent of the will to be that the estates should be secured as far as the rules of law would admit to the issue male of the respective devisees before the cross-remainders should take place and that it was designed to be as strict a settlement as possible by law. His Lordship did, therefore, order that, in the said conveyance, where any part of the estate was limited in use to the plaintiff, Sir John Hobart, for ninety-nine years if he should so long live, there should be a limitation over to trustees and their heirs during his life to preserve the contingent uses in remainder and, then, to the first and other sons of the said Sir John Hobart in tail male successively, and, where any part of the estate was limited to the countess of Stamford for life, and then to the earl of Stamford for 99 years if he should so long live, that there should be a limitation also to trustees and their heirs during the lives of the said earl and countess and the survivor of them to preserve the contingent uses in remainder and, then, to the first and every other son of the said countess of Stamford and the heirs male of the body of such first and every other son and, then, to the right heirs of Sir John Maynard which right heirs were the countess of Stamford and Sir John Hobart. This was the order which was affirmed by the House of Lords.

It may be worth while to stop a little and observe upon this case.

First, both this court and the House of Lords construed the words ‘heirs male of the body of the first son of Lady Hobart’ in the sense of the first and every other son of such first son.

Secondly, taking the limitation as it stood in the will and reducing the words or even the strict legal operation of those words in a conveyance by a deed, the limitation ‘to the heirs male of the body of such first son’ was void in law, for the estate limited to such first son was for 99 years only and was not a freehold, and,

consequently, it could not within the doctrine of Shelley's Case[1] unite with the limitation 'to the heirs male of his body'. And by way of a contingent remainder, it could not be good, because there was no estate of freehold to support it. Hence, it followed necessarily that, had those words been inserted in a conveyance, the freehold and inheritance must at law have vested in the co-heirs of Sir John Maynard and yet the court made good the whole by inserting an estate to trustees to preserve contingent remainders.

Thirdly, the private Act of Parliament did not direct any limitation to trustees to preserve contingent remainders after the estate to the earl of Stamford for 99 years if he should so long live, and yet that was also directed.

Fourthly, Mr. Serjeant Maynard had inserted an express clause in his will directing trustees to support contingent remainders after the devises for life to Sir Henry Hobart, Lady Hobart, and the countess of Stamford and, therefore, it might have been argued, and undoubtedly was so, that, where the testator intended such an estate to preserve contingent remainders, he had inserted it, and, consequently, where he had omitted it, he did not intend it should be done. Farther, the will concluded with negative words 'and to no other use or purpose whatsoever'.

1 Atkyns 593, 26 E.R. 373

Serjeant Maynard devised his estate to trustees and their heirs, and declared, after his wife's death, they should convey the estate to the use of, and in trust for, Sir Henry Hobart for life, remainder to the first son for 99 years, if he so long live, remainder to the heirs male of such first son, remainder to the countess of Stamford for life, remainder etc. A conveyance was directed according to the will. Exceptions were taken to the draught of the conveyance.

LORD COWPER declared that, where articles or a will were improper or informal, the court was not to direct a conveyance according to such improper directions but in a proper and legal manner which might best answer the intention of the parties. And he

---

[1] *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, 3 Dyer 373, 73 E.R. 838, 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176.

conceived the intention to be that the estate should be secured so far as the rules of law would admit before cross-remainders should take place. And, therefore, he ordered accordingly.

Upon an appeal to the House of Lords, alleging that this was making a different settlement, the order was affirmed upon this principle, that a trust estate being in its nature executory, it is incumbent on the court to follow the intention of the parties as far as the rules of law will admit.

1 Vesey Sen. 149, 27 ER 948

[Lord Hardwicke:] The words of this were ‘with immediate remainder’. There followed negative words ‘and to no other use or purpose’. It is first to be observed that both this court and the House of Lords construed ‘heirs male of the body’ in the sense of first and every other son. Secondly, taking the words as in a conveyance by deed, the limitation to the heirs male of the body of such first son was void in law, the limitation to the first son being for ninety-nine years only, not a freehold. Consequently, it could not unite with the limitation to the heirs male of the body within the rule of Shelley’s Case. And, by contingent remainder, it could not be good, because there was no freehold to support it. And yet the court made good the whole by inserting trustees to preserve contingent remainders, although the private act of Parliament had not inserted it. Thirdly, the testator had expressly inserted in the will a clause to preserve remainders after the limitation for life to [*blank*], and, therefore, it might be argued that, where he (as able a lawyer as perhaps Westminster Hall has seen) had omitted it, he did not intend it, the will concluding also negatively, yet it did not prevail against the intent to make a strict settlement.

[Other reports of this case: Hobart v. Countess of Suffolk (1709), 2 Vernon 644, 23 E.R. 1020, 1 Eq. Cas. Abr. 272, 21 E.R. 1040, *sub nom*. Earl of Stamford v. Hobart (1710), 3 Brown P.C. 31, 1 E.R. 1157, Chancery Cases *tempore* Anne 207, note also *In re* Maynard’s Will (1691), Dodd 101.]

9

Wastneys v. Chappell
(H.L. 1712)

A fee determinable upon lives is entirely in the power of the first taker in tail.

West *tempore* Hardwicke 206, 25 E.R. 897,
1 Atkyns 525, 26 E.R. 331

It was determined that, in respect to estates thus granted in fee determinable on lives, a person may take by way of remainder, as a special occupant, but that, as such an estate tail is not within the Statute *de Donis*[1] nor barrable properly by a recovery as an estate tail, any limitations depending thereupon are entirely in the power of the first taker in tail, and may be destroyed by any conveyance or even articles in equity.

[Other reports of this case: 3 Brown P.C. 50, 1 E.R. 1170.]

10

Lord Kilmurry v. Geery
(Ch. 1713)

An infant cannot execute a power of attorney.

3 Atkyns 713, 26 E.R. 1209

Lord Kilmurry v. Dr. Grey.

By the settlement, a power was reserved of charging divers of the lands at any time during his life with £3000. A person borrowed this sum of the Doctor [Grey]. And, having executed his power while an infant, he died soon after he came of age. The plaintiff, his son, brought his bill to redeem on payment of the principal sum borrowed.

---

[1] Stat. 13 Edw. I, Westminster II, c. 1 (*SR*, I, 71).

But the court decreed it on the common terms, because here was a power given him by an act of Parliament to raise the money and immediately to give security, which was actually done.

I [Lord Hardwicke] sent for the register book of this case, Easter term 1712, and, there, it looks as if it was a general power executed by virtue of a private act of Parliament. I then sent for the record of the act of Parliament, and there is an express clause to make all acts relating to the settlement or in pursuance of any power therein good, and that, notwithstanding his minority, they shall be as valid as if he had attained the age of twenty-one. Therefore, when Lord Kilmurray made a settlement with such reservation with the approbation of his trustees, the act of Parliament operated upon it. Taking it therefore in general, I am of opinion an infant cannot execute such a power.

[Other reports of this case: 2 Salkeld 538, 91 E.R. 456, 1 Eq. Cas. Abr. 341, 21 E.R. 1089, 2 Eq. Cas. Abr. 665, 22 E.R. 559, Chancery Repts. *tempore* Anne 584.]

11

Demainbray v Metcalf
(Ch. 1715)

Where a pawnee pawns the pawner's goods, even though the original pawner had no notice of the second pawn, the first pawner cannot redeem unless the creditors of the second pawner have been satisfied.

1 Atkyns 236, 26 E.R. 152

A sum was borrowed first on the pawn of jewels, and, afterwards, three more several sums were borrowed, for each of which the pawner gave his note, without taking notice of the jewels.

It was determined that the executor of the borrower should not redeem the jewels without paying the money due on the notes.

[Lord Hardwicke:] There, it must have been presumed the ground and foundation of the pawnee's lending the money was his having a pledge in his hands, and there is no pretence to say it would have been a lien if the money had been lent before the delivery of the

goods. And it therefore turned upon its being a subsequent transaction.

[Other reports of this case: 2 Vernon 691, 698, 23 E.R. 1048, 1052, Gilbert Rep. 104, 25 E.R. 72, Precedents in Chancery 419, 24 E.R. 188, 1 Eq. Cas. Abr. 324, 21 E.R. 1077, Chancery Repts. *tempore* Geo. I, 148.]

12

Thomas v. Whip
(Ass. 1715)

For an embezzlement from a decedent's estate, the administrator can sue an action of assumpsit *for goods had and received, trover, or trespass* de bonis asportatis.

1 Vesey Sen. 329, 27 E.R. 1062

I [Lord Hardwicke] have a manuscript case at the Guildhall, the sittings after Trinity Term, 4 Geo. I [1718].

It was an [action of] *assumpsit* by an administrator for money had and received etc., and *non assumpsit* was pleaded. The case was [thus]. The defendant was a nurse to the intestate during his sickness. And, being alone in the house when he died, she conveyed away money and everything portable. The defendant objected that the action would not lie, there being no color of contract, but a wrongful taking or conversion, for which [an action of] trover lay.

But Chief Justice PARKER held the action maintainable, because, though the taking was wrongful, yet the plaintiff might agree afterward and make it right and the bringing this action was an implied agreement and that there were only two cases wherein an action for money had and received etc. could not be brought, *viz*. for money won at play and money paid after a bankruptcy. In both cases, unless you insist on the tort, the tort is waived. He went upon this, that you cannot affirm part and disaffirm part, so that the plaintiff there might bring trover or trespass for the tort or an action for money had etc., which the court laid down clear and without doubt, admitting two cases in which that action could not be brought for

wrongful taking. In the case of money won at play, the action must be on the tort, not for money had etc. that admitting the contract at play.

[Other reports of this case: F. Buller, *Nisi Prius*, 130.]

13

Radcliffe's Case
(Del. 1719)

The suffering of a common recovery is not such a conveyance as to incur the disabilities of Roman Catholics to receive real property.

1 Atkyns 9, 26 E.R. 6

The question was whether a papist, tenant in tail, suffering a recovery and declaring the uses to himself in fee, gained a new estate within the [Statute] 11 & 12 of Will. III[1] or was in of the old use.

And it was held the 5th of Geo. I [1719], by four judges out of five appointed delegates to determine appeals from the Commissioners of Forfeited Estates that he was in of the old use.

And I [Lord Hardwicke] take it for law, that a tenant in tail suffering a recovery is in of the old use and that the estate is discharged of the Statute *de Donis*.[2]

[Other reports of this case: 9 Modern 172, 88 E.R. 382, 1 Strange 267, 93 E.R. 514, Misc. Delegates Repts. 136.]

---

[1] Stat. 11 Will. III, c. 4, s. 4 (*SR*, VII, 587).

[2] Stat. 13 Edw. I, Westminster II, c. 1 (*SR*, I, 71).

14

Forth v. Chapman
(Ch. 1719-1720)

In this case, the devise over in issue was a valid executory devise.

2 Atkyns 313, 26 E.R. 591

As to Forth and Chapman, I [*Lord Hardwicke*] was counsel in it myself, and, by the note I took upon the back of my brief, it appears that LORD MACCLESFIELD laid a good deal of weight upon the particular penning of this will, if either of his nephews William or Walter should depart this life, and leave no issue of their respective bodies. These words, he said, must relate to the time of their deaths, and it would be a forced construction to have extended it to a dying without issue generally.

3 Atkyns 288, 26 E.R. 968

Walter Gore, by will, devises all the residue of his estate, real and personal, to John Chapman in trust for the use of his nephews, William Gore and Walter Gore, during the term of a lease. And, as to the remainder of the estate, as well as his freehold house, with all the rest of his goods and chattels whatsoever, he gave it to his nephew, William Gore. And, if either of his nephews, William Gore or Walter Gore, should die, and leave no issue of their respective bodies, then, he gave the leasehold premises to the daughter of his brother, William Gore, and the children of his sister, Sidney Price. The question was whether the limitation over was good or too remote.

SIR JOSEPH JEKYLL was of opinion it was too remote.

But LORD MACCLESFIELD decreed this limitation good, upon the words ‘leave issue’.

[Lord Hardwicke:] Mr. [Peere] Williams seems mistaken in the second note on this case, where he says, by the will, the limitation over was expressly restrained to the leasehold, for, upon looking into the case, it appears that both freehold and leasehold were devised by the same words, but, probably, the limitation of the real [estate] was overlooked, and so omitted by the Register.

2 Vesey Sen. 616, 28 E.R. 392

[Lord Hardwicke:] The greatest difficulty in the way of LORD MACCLESFIELD was that the freehold and leasehold were devised by the same words. And yet he held those words were to receive a construction according to the subject matter.

This case is in 1 Williams 664, the editor of which books has been very careful and adds in a note there that the limitation was confined to the leasehold estate. But I [Lord Hardwicke] think that is a mistake in the Register's book, for I have brought with me the brief I had in the cause, and it is there as Lord Macclesfield took it. And that was a difficulty Lord Macclesfield started himself, which he never would have created against his own opinion if it had not been so in the will. That, therefore, shows strongly that the same words may in the same sentence have different constructions applied to different matter. But, abstracted from that, there are other words afterward in the latter clause, upon which, laying the authority of Lord Macclesfield's opinion out of the case, it is impossible to confine the construction of the 'issue' there to issue at the time of her death, but, then, whenever there was a default of issue, Judge Hutton's remainder should take place. 'Default of issue' means failure of issue.

[Other reports of this case: 1 Peere Williams 663, 24 E.R. 559, 2 Eq. Cas. Abr. 292, 359, 22 E.R. 245, 306, Chancery Repts. *tempore* Geo. I 660.]

15

Clifton v. Burt
(Ch. 1720)

In the administration of a decedent's estate, general pecuniary legatees are to be preferred to heirs at law, and legatees do not stand in the place of the bond creditors to charge the land.

2 Atkyns 437, 26 E.R. 663

One died indebted by bond, who, by his will, had given a legacy of £500 and devised his freehold lands to B. in fee, leaving a personal estate sufficient only to pay the bond.

[It was held] the legatee shall not stand in the place of the bond creditor to charge the land, in regard the land is specifically devised. Otherwise [it is] if the land had descended to the heir.

[Lord Hardwicke:] This case proves that even general pecuniary legatees are to be preferred to an heir at law, much more a specific devisee of land. And this too is analogous to the rule of law, for every devisee is in the nature of a purchaser. And it is so laid down in Harbert's Case, 3 Co. 12b,[1] that the heir shall not have contribution against any purchaser, although *in rei veritate* the purchaser came to the land without any valuable consideration, for the consideration of the purchase is not material in such a case.

Ridgeway *tempore* Hardwicke 319, 27 E.R. 842

One died indebted by bond, who, by a will, had bequeathed a legacy of £500 and devised his lands to J.S. in fee, leaving a personal estate sufficient only to pay the bond.

[It was] held that the legatee should not stand in the place of the bond creditors to charge the land in regard it was specially devised; otherwise, if it had descended to the heir.

---

[1] *Harbert's Case* (Ex. 1584), 3 Coke Rep. 11, 76 E.R. 647, also Moore K.B. 169, 72 E.R. 510.

[Lord Hardwicke:] [This] case proves that, as pecuniary legatees are preferred to heirs at law, much more is a devisee of lands. The great ground is that the fund given shall not be exhausted so as nothing shall be given. And this is agreeable to the rule of law, for every devisee is in the nature of a purchaser and is in the *post*.

[Other reports of this case: 1 Peere Williams 678, 24 E.R. 566, Precedents in Chancery 540, 24 E.R. 242, 2 Eq. Cas. Abr. 556, 22 E.R. 467, Chancery Repts. *tempore* Geo. I 732.]

16

Cocks v. Goodfellow
(Ch. 1722)

Trust assets are not liable for the debts of the trustee.

West *tempore* Hardwicke 648, 25 E.R. 1130

Before Lord Macclesfield.

A widow, in 1720, being then very near a bankruptcy and who became so very soon after, transferred great quantities of stock, and also assigned several debts to secure portions given by her husband to her children. No legal interest, but only an equitable one, passed by this assignment, yet the children, on a bill brought here, were, on great consideration, decreed to have the benefit of this assignment.

[Other reports of this case: 10 Modern 489, 88 E.R. 822, 2 Eq. Cas. Abr. 100, 448, 22 E.R. 85, 382, Chancery Repts. *tempore* Geo. I 869.]

17

Sidney v. Sidney
(Ch. 1723-1734)

Evidence that is scandalous and impertinent is inadmissible, but scandalous matter that is pertinent to the issue is admissible.

2 Atkyns 338, 26 E.R. 605

7 February 1722[/23]; at the Rolls.

A bill was brought for the performance of articles entered into before marriage by the wife against the husband.

SIR JOSEPH JEKYLL dismissed the bill, and was of opinion that the deposition in that case to prove her an adulteress ought not to be read, because the answer of the husband had not put the charge of adultery in issue, for the words were 'she had misbehaved herself', which does not imply adultery, for you must certainly make a general charge of it.

Jodrell 242

Argued in 1729, but the Master of the Rolls [JEKYLL] did not give his opinion in it until the year 1732.

There, the bill was brought by the wife for a specific performance of articles. The defendant, in his answer, charged that she had much misbehaved herself and that he had been forced to leave her.

And the Master of the Rolls [JEKYLL] was of opinion that depositions charging her with adultery ought not to be read, but his reason was because the answer had not put the charge of adultery in issue, and, certainly, it had not, for she might misbehave herself many ways beside that, as by gaming or extravagance.

[Other reports of this case: 3 Peere Williams 269, 24 E.R. 1060, 2 Eq. Cas. Abr. 29, 158, 728, 22 E.R. 25, 135, 613.]

18

Lord Forbes v. Dennison
(H.L. 1723)

A land recording act does not protect a person who had notice of a prior land title.

Jodrell 617

23 February 1722[/23]; in the House of Lords.

A case which arose in Ireland, where there is a general Registry Act.[1]

Lord Granard, the father, was tenant for life, remainder to his first and other sons in tail, with a power of making leases for three lives or twenty-one years in possession, reserving etc. In 1715, some tenants surrendered, and took new leases for three lives, but these leases were not registered. Lord Granard, afterwards becoming greatly indebted, came to an agreement with his son, the Lord Forbes, for delivering up the estate upon payment of an annuity. This agreement was transacted by Mr. Steward, who had notice of the leases. The conveyance, which was to Lord Forbes' trustees for the life of Lord Granard, was registered.

The trustees brought actions of ejectment against the tenants, who, thereupon, brought a bill in the Court of Chancery in Ireland, who declared a perpetual injunction from time to time.

Upon an appeal to the House of Lords, it was ordered that the said decree be reversed and that all proceedings at law to avoid or impeach the leases except for the breach of the conditions therein contained during the life of Lord Granard should be restrained, but, after his death, the appellants should be permitted to try their title. The decree was not reversed because the Chancellor had proceeded upon a wrong principle, but because he had made a wrong inference, for Lord Forbes, in his answer, insisted the leases were not pursuant to the power and, therefore, he ought not to have been enjoined from contesting that point after his father's death. The Lords, therefore,

---

[1] Irish Stat. 8 Geo. I, c. 15, s. 2.

relieved the tenant against the defect in his lease on the foundation of the Registry Act, but left it open to Lord Forbes to dispute the leases after Lord Granard's death, at which time the question upon the Registry Act was out of the case.

[Other reports of this case: *sub nom*. Lord Forbes v. Deniston (1722), 4 Brown P.C. 189, 2 E.R. 129, 2 Eq. Cas. Abr. 482, 22 E.R. 409.]

19

Carrick v. Errington
(Ch. 1723-1726)

There may be a resulting trust under a trust to support contingent remainders for the heir at law in the same manner as under an executory devise.

1 Atkyns 597, 26 E.R. 375

Edward Errington had made two settlements of his estate, one by fine in the lifetime of his ancestor, which (if at all) could only operate by estoppel. He, afterwards, made another settlement to trustees to the use of himself for life etc., remainder etc. And, by a conveyance executed another day, they to whom the fee was limited executed a declaration of trust for Thomas Errington for life without impeachment of waste, remainder to trustees to preserve contingent remainders during the life of Thomas Errington. In the conveyance were unnecessarily made trustees to preserve contingent remainders, it being a trust estate. Edward Errington died without issue. And the whole legal estate was admitted to be in the trustees. In the second deed, they were only trustees of the beneficial interest, and Thomas, who was to take the first estate in the trust, was a Papist, and disabled by the Statute[1] to take any beneficial interest. And it was insisted that, by the Statute, both the trust and legal estate were void, and, therefore, the estate was to go over by that conveyance to the next remainderman who should be a Protestant and capable of taking.

---

[1] Stat. 11 Will. III, c. 4, s. 4 (*SR*, VII, 587).

The first question was whether the deed was obtained by fraud. The second question was whether the legal estate in the trustees, who were only trustees under the first deed, was void, because this remainderman was a Papist and incapable of taking.

LORD KING, and, afterwards, the House of Lords, held that the trust being not only to receive rents etc. but also to preserve contingent remainders and, possibly, a person capable of taking might come *in esse*, that that was a further trust, which the Statute did not make void. It had indeed avoided that for life, but, as there was another trust upon the legal estate, which might, by possibility, be capable of being enjoyed, the estate should remain in the trustees to support the contingent remainders. And, as to the profits in the meantime (for the remainderman could not take them, nor the trustees, they being only mere instruments), the heir at law should have them until some person came *in esse* capable of taking under the contingent remainders.

[Lord Hardwicke:] This, therefore, is a very clear authority that there may be a resulting trust under a trust to support contingent remainders for the heir at law in the same manner as under an executory devise. Indeed, it was insisted in that case that the estate should in the meantime go over. But the court held otherwise, for then it would have vested by purchase, and could never have come back again.

[Other reports of this case: 2 Peere Williams 361, 24 E.R. 766, Mosely 9, 25 E.R. 239, 9 Modern 33, 88 E.R. 297, 2 Eq. Cas. Abr. 161, 623, 625, 22 E.R. 137, 523, 524, 525, 5 Brown P.C. 390, 2 E.R. 751.]

20

Morgan v. Dillon
(Ch. 1724)

As to voluntary gifts, a court of equity will give relief to children, but not to other relations.

Jodrell 116

An aunt made a settlement in favor of her nephew, which she kept by her, and the nephew clandestinely got a copy of. But she afterwards cancelled that settlement and, by a will, gave the estate to another relation.

And this Court [of Chancery in Ireland] refused to relieve him, for that was a mere voluntary settlement and such a one as this court would never have aided if it had been in being and any way defective. But this is such a settlement as, if defective, this court would have made good, being made as a provision for children whom this court looks upon as having a natural right to a provision from the parent.

[Other reports of this case: 9 Modern 135, 88 E.R. 361, 2 Eq. Cas. Abr. 487, 22 E.R. 414, 4 Brown P.C. 306, 2 E.R. 207.]

21

Cheval v. Nichols
(Ex. 1725)

The land recording statute does not protect a purchaser for value who has notice of prior unrecorded liens and encumbrances.

Jodrell 618

10 December 1725; in the Exchequer.

[This case] is an authority for giving relief against the Registry Act,[1] and, there, being actual fraud there, it is not necessary to state the particular circumstances of the case.

Jodrell 620

In 1717, the defendant took a mortgage from one Hall for £400. In 1718, he lent £200 on the same estate, both of which were registered. In 1720, he lent him £200 more upon a bond. In May following, Hall granted an annuity for £40 *per annum* to the plaintiff, which was not registered, but the plaintiff gave the defendant notice of it and desired him to lend no more to Hall. The defendant promised he would not and, if he did, he would take care of him, yet, after that, he lent Hall many more sums and at last purchased the equity of redemption, which he registered.

Yet the court held that the plaintiff's title to the annuity [was] good against the equity of redemption.

[Other reports of this case: 1 Strange 664, 93 E.R. 768, Exchequer Cases *tempore* Geo. I, vol. 2, p. 827.]

22

Hockmore's Case
(Ch. 1725 x 1733)

A suit in an equity court lies to try an issue of a forged deed, even after a verdict at common law.

2 Vesey Sen. 554, 28 E.R. 353

In Lord King's time.

[There was] a case relating to a rent charge, granted out of the estate of Mr. Hockmore in Devonshire. It had been twice or thrice tried at common law, tried upon a distress taken on the rent charge and an avowry, and the question was, singly, whether it was a forgery or not. And, upon all those trials, verdicts were found for the deed.

---

[1] Stat. 7 Ann., c. 20 (*SR*, IX, 89-93).

A bill was, notwithstanding, brought here to set it aside for forgery. And LORD KING sent it to a trial under an issue directed by the court. And, I [Lord Hardwicke] believe, there was a new trial after that. And, notwithstanding all those verdicts, LORD KING made a decree to have it brought into court and cancelled here, the former trials not being to the satisfaction of the court.

23

Wilson v. Boulter
(K.B. 1727)

An assignee of a bankrupt's estate cannot affirm in part and disaffirm in part.

1 Vesey Sen. 330, 27 E.R. 1063

Hilary Term 13 Geo. I [1727].

[An action of] trover for money was brought by an assignee. Not guilty was pleaded. It was tried by LORD RAYMOND at the Guildhall, who, doubting, made a case of it, *viz*. Boulter, in May 1724, became bankrupt; in August following, a commission issued against him, under which the plaintiff was assignee; in the June between the bankruptcy and the commission, the bankrupt's wife delivered money to the defendant to buy South Sea and East India bonds. The defendant, then knowing of the bankruptcy and that the money was part of the bankrupt's effects, bought thirty bonds, and delivered them to the wife. In September, the plaintiff, the assignee, seized twenty-two of these bonds, and took them for the benefit of the creditors as part of the bankrupt's estate. And he brought [an action of] trover for the money laid out in the remaining eight bonds. The question was whether the defendant was liable in this action for the money.

And the whole court was clear that the assignee's seizing part of the bonds was an affirmance of the defendant's act in laying out the money and that part could not be affirmed and the other part disaffirmed. And this is, in some measure, allowing the act of the bankrupt on the foot of the contract and yet disallowing it on the other side.

24

Blades v. Blades
(Ch. 1727)

A land recording act does not protect a person who had notice of a prior land title.

Jodrell 618

2 May 1727; heard before Lord King.

William Blades, the plaintiff's husband, being seised of an estate in fee in Hull, mortgaged it for £500, and, afterwards, by a will, devised it to his wife and made her executrix. And she, after his death, made a lease of the premises to Joseph Blades, her husband's heir at law, who, being thus got into possession, made a mortgage to Garrett for £500. The mortgage was registered, but the will was not.

Upon this, she brought a bill to be let into possession upon payment of the first mortgage only, charging that Garrett had notice of the will. He, in his answer, denied notice, and insisted on the Registry Act.[1]

But Joseph Blades having notice, LORD KING declared the mortgage to Garrett to be fraudulent and not to be set up against the will, yet the bill charged no actual fraud, but only notice.

3 Atkyns 654, 26 E.R. 1176

2 May 1727, before Lord Chancellor King.

William Blades, in 1716, devised certain lands to his wife for her life, and, after her death, to his nine children. The wife enters, but does not register the will. The heir at law mortgages the estate, and the mortgagee has it registered.

And, upon a bill brought against him, he denies notice of the will. But it was proved in evidence that he had notice.

And the court said that having notice of the first purchase, though it was not registered, bound him and that his getting his own purchase first registered was a fraud. The design of those acts being

---

[1] Stat. 7 Ann., c. 20 (*SR*, IX, 89-93).

only to give parties notice, who might otherwise without such registry be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of when they have any notice thereof in any manner, though not by the registry, and that they would never suffer an act of Parliament made to prevent fraud to be a protection to fraud. And, therefore, it was decreed for the plaintiff, looking upon the transaction between the heir at law and the mortgagee to be collusive.

I [Lord Hardwicke] mention this not only as a material authority, but as determined by Lord Chancellor KING, whom we all know was as willing to adhere to the common law as any judge that ever sat here.

[Other reports of this case: 1 Eq. Cas. Abr. 358, 21 E.R. 1100.]

25

Thomas v. Cole
(Ch. 1728)

A legacy 'equally to be divided' among the testator's relations goes to the persons as defined in the Statute of Distributions, but to those persons per capita.

Jodrell 152

April 1728; at the Rolls.

A personal estate was left equally to be divided among the testator's relations. The Master of the Rolls [JEKYLL] held that the Statute of Distribution[1] should be observed in the description of the persons who were to take under the will but not in the quantity to be distributed, for all who come in under the description are to take equally though they are brought in by representation and the whole shall be divided *per capita*, though, by the Statute, some would take only *per stirpes*.

[1] Stat. 22 & 23 Car. II, c. 10 (*SR*, V, 719-720).

26

Page v. Page
(Ch. 1728)

In this case, the executors were held to be trustees for the next of kin.

West *tempore* Hardwicke 596, 25 E.R. 1103

Before Lord Chancellor King.

The testator, after several particular legacies, gave the residue to six persons, equally to be divided, and appointed them all executors. One died in the lifetime of the testator.

And it was held that his sixth part should not survive to the other residuary legatees and that they were not entitled as executors, because the testator did not intend that they should have any benefit as executors, the whole being given to the residuary legatees. It was therefore determined that the executors were trustees thereof for the next of kin.

And it is well known that Lord King gave but little favor to the notion of making executors trustees for the next of kin.

[Other reports of this case: 2 Peere Williams 489, 24 E.R. 828, Mosely 42, 25 E.R. 259, 2 Strange 820, 93 E.R. 871.]

27

Irons v. Kidwell
(Ch. 1728)

In this case, there were insufficient facts to prove a lis pendens.

Jodrell 620

29 October 1728.

The bill was to set aside a purchase made subsequent to the plaintiff's title of lands in Middlesex not registered upon pretense of notice. And the proof of it was a bill filed many years before, but which had been neglected and only some few proceedings taken upon

it from time to time. And this it was said to be considered as *lis pendens*.

But LORD KING held that it was not such a constructive notice as would prevent the defendant from taking advantage of the Act of Parliament.[1]

28

Papillon v. Voyce
(Ch. 1728-1732)

An estate to one for life with a remainder to the heirs of his body is an estate tail.

However, the intention of the testator in this case was to create an estate for life with a remainder in the life tenant's son.

Jodrell 681

This case establishes the distinction between a legal estate and a trust in the same cause and upon the same will. It was first decreed at the Rolls by Sir Joseph Jekyll, 11th December 1728, afterwards affirmed by Lord King, 5 February 1731, and is now reported in 2 Williams 471.

Samuel Papillon devised £10,000 to trustees to be laid out in land and settled on his son John Papillon for life without impeachment of waste and, from and after the determination of that estate, to trustees and their heirs during the life of John Papillon to preserve contingent remainders, remainder 'to heirs of the body of John' with remainders over and a power to John to make a jointure. By the same will, the testator devised lands in possession in Essex to John for life without impeachment of waste and, from and after the determination of that estate, to trustees and their heirs during the life of John to preserve contingent remainders and, from and after his decease, 'to the heirs of the body' of John with remainders over.

Upon the will, it was decreed by the Master of the Rolls [JEKYLL] that, as to the devise of the lands in possession, an estate for life only passed to John Papillon with remainder to the heirs of his

[1] Stat. 7 Ann., c. 20 (*SR*, IX, 89-93).

body by purchase and that the deeds and writings relating to the lands should not be delivered to John but brought into court for the benefit of all persons interested and that, as to the money to be laid out in land and settled to the same uses, the court had most evidently a power over that and, therefore, it should be settled so as to make John tenant for life and that his sons should take in tail male successively as purchasers according to the intent of the testator.

The cause coming afterwards upon an appeal to LORD KING, he reversed so much of the decree as related to the deeds and writings of the lands in possession and ordered them to be delivered to the plaintiff, John Papillon, but affirmed that part of the decree which related to the money to be laid out in the purchase of the land.

[Lord Hardwicke:] Upon this precedent, several things are to be observed of weight in the present case:

First, that both the judges who heard and determined that cause concurred and were clear in their opinion that the testator's intention was plain to give an 'estate for life' only to John Papillon with contingent remainders of the inheritance to his sons and daughters and this was founded principally on the clause appointing 'trustees to preserve contingent remainders' and that, as to the trust estate to be purchased and settled, this court was bound to conform to that intention notwithstanding the technical force of the words 'heirs of the body' and to direct the settlement to be made accordingly;

Secondly, that Sir Joseph Jekyll, who took much time to consider of the case and made his decree upon great deliberation, was of the same opinion as to the legal estate devised in the lands in possession and held that the same intention would govern in both. As to this point, indeed, Lord King differed from him and declared his opinion that, as to the legal estate devised in the lands in possession, it was at law an estate tail by force of the words 'heirs of the body'. But it must be observed that it was not at all necessary for Lord King to give an opinion upon this point and it was in manner extrajudicial because the plaintiff's father's marriage articles, whereupon a supplemental bill was brought after the first decree, were admitted and read in the cause and, by them, he was clearly entitled in equity to an estate tail in the lands in possession, so that it was not in the testator's power to devise and his will did not operate upon them. However, I admit he declared that opinion. But, upon this part of the case, there is something remarkable, which I perfectly remember and appears by the notes I then took in court upon the back of my brief.

The cause was heard upon the appeal and supplemental bill on a Saturday, the regular day for appeals. Then, Lord King declared the opinion I have mentioned, and said he would not then pronounce his decree but consider of it until Monday. On Monday, he said he had looked into the Case of Lisle v. Gray[1] and that it was indeed very strong, and he seemed to be less clear in his opinion as to the point of law on the limitation of the legal estate than he was the day before, but, as the supplemental bill had brought a new title for the plaintiff in the cause, he did not stay to give it any further consideration, but affirmed the decree as to the settlement of the trust estate. And, as to the deeds and writings concerning the title of the lands in possession, he reversed that part of the decree at the Rolls, and ordered them to be delivered to the plaintiff.

But it is very observable that he took care to express in this decree that this direction was founded on the supplemental bill, and so it appears by the Register's book. This looks as if he had a mind to avoid any decision of this point upon the will, and the record of the decree makes it no decision.

Jodrell 694

Lord King, who was very favorable to the strict rules of law, neither founded himself upon nor made any such distinction, for according to 2 Williams 478, which agrees with my memory, he says 'the diversity is where a will passes a legal estate and where it is only executory and the party must come to this court in order to have the benefit of the will', that, in the latter case, the intention shall take place and not the rules of law. Here, he explains what he means by the word 'executory' *i.e.* 'where the party must come to this court to have the benefit of the will'. And that is the case of all trusts which must be executed by subpoena.

1 Vesey Sen. 148, 27 E.R. 948

---

[1] *Lisle v. Gray* (1680), Pollexfen 582, 86 E.R. 653, T. Jones 114, 84 E.R. 1174, 2 Levinz 223, 83 E.R. 529, 1 Freeman 462, 89 E.R. 345, 2 Shower K.B. 6, 89 E.R. 758, T. Raymond 278, 302, 315, 83 E.R. 143, 156, 163, Dodd 34.

By Sir Joseph Jekyll, with whom Lord King concurred.

The intent was plain to give an estate for life only, with contingent remainders of the inheritance, upon the clause appointing trustees to preserve contingent remainders.

But it was held it was an estate tail by force of the technical words 'heirs of the body' as to the devise of the lands, though he [LORD KING] agreed, as to the money to be laid out in lands, with SIR JOSEPH JEKYLL, who held that the intent governed in both cases.

[Lord Hardwicke:] But it is observable that it was not necessary for Lord King to give that opinion, it being extrajudicial, because, by the supplemental bill, the marriage articles were admitted into the cause, by which it appeared the plaintiff was clearly entitled to an estate tail in the lands and that it was not in his father's power to devise it. But, upon this, there is something remarkable, that the cause being heard on Saturday, Lord King did not pronounce his decree until Monday, when he said, he had looked into Lisle v. Gray, which was very strong, and he seemed to be less clear in his opinion. But, as the supplemental bill had brought a new title for the plaintiff, he did not give it further consideration. And it is observable, that he took care to express that the direction for reversing that part of Sir Joseph Jekyll's decree, relating to the writings, was founded on the supplemental bill, which looks as if he wanted to avoid that point.

[Other reports of this case: 2 Peere Williams 471, 24 E.R. 819, Lincoln's Inn MS. Misc. 384, pp. 343, 346, 362, W. Kelynge 27, 25 E.R. 478, Fitz-Gibbons 38, 94 E.R. 643, 1 Eq. Cas. Abr. 185, 21 E.R. 977, Forrester 15.]

29

Green v. Rodd
(Ch. 1729)

In this case, the devise in issue created a contingent remainder that was void for remoteness.

Jodrell 211

21 June 1729; before Lord Chancellor King.

The testator there, by his will, directed his whole personal estate should be turned into money and placed out at interest, in the first place, to the use of his sister Mary and, in case his sister died without issue, then 'my will and meaning is that the money directed to be put out to interest shall be divided between my two other sisters, Teresa and Frances, after the death of my sister Mary aforesaid'.

SIR JOSEPH JEKYLL [Master of the Rolls] held the bequest over to be too remote and, therefore, a void limitation.

Jodrell 214,
2 Atkyns 314, 26 E.R. 591

I [*Lord Hardwicke*] was counsel in it, and took notes upon my brief of what the court said there.

Lord Chancellor KING delivered his opinion that the main question in the cause was whether there were words in the will to tie up the meaning to a dying without issue living at the time of her death, which shows very plainly that he thought there could be no foundation for such a restriction unless it was warranted by the words of the will.

[Other reports of this case: Mosely 182, 25 E.R. 338, Fitz-Gibbons 68, 94 E.R. 656, 2 Eq. Cas. Abr. 325, 346, 22 E.R. 277, 295.]

30

***Ex parte* Clare**
(Ch. 1729)

Where a merchant buys specific goods on credit and then becomes a bankrupt, those specific goods should be sold and those sellers should be paid before the bankrupt merchant's estate is settled by the assignee in favor of the general creditors.

Jodrell 410

31 July 1729; before Lord King.

The master of a ship covenanted with Hammond and Smithers to sail from London to Lisbon and there take in salt to be put on board by their factors and carry it to Newfoundland and deliver it there and

to buy as much codfish as the ship could stow, half for the account of Hammond and the other half for Smithers, with which he should proceed to such place in the Straights as he should be ordered by their factors and deliver the codfish to their factors and receive on board a cargo of fruit for the equal amount of the freighters, in consideration whereof Hammond and Smithers were to furnish him with a letter of credit sufficient for the purchase of the cargo and pay all such bills as he should draw upon them for their respective shares. The master drew bills from Newfoundland upon Hammond and Smithers for their respective shares of the fish, which he carried to Alicant and delivered to their factors there, who, selling part, invested it in fruit for Hammond and Smithers and shipped it on board the vessel consigned to Hammond. The master delivered the cargo to Hammond according to the bills of lading, but, before his arrival here, Smithers had become a bankrupt, and the bills drawn on him by the master had been protested. Consequently, the drawer was liable.

It was ordered by LORD KING that Smithers' moiety of the fruit in the hands of Hammond and also his moiety of the codfish in the hands of the factors at Alicant should be severally disposed of by Hammond and the factors and the produce thereof applied in the first place to the payment of the bills of exchange drawn by the master on the letter of credit given by Smithers and the residue to go to the assignees under the commission against Smithers.

[Other reports of this case: *Ex parte* Clare (1739), W. Cooke, *The Bankrupt Laws*, vol. 1, p. 405 (1799).]

31

Wilson v. Spencer
(Ch. 1733)

A legacy vests upon the death of the testator, even though the legatee dies before the final administration of the testator's estate.

1 Vesey Sen. 48, 27 E.R. 882

31 January 1732[/33].

The testator devised the payment of his debts and legacies by and out of such part of the personal estate as should not afterward be

specially devised and, if that proved deficient, then out of the real estate and that his executor should within twelve months after his death levy and raise sufficient [money] to pay £1000 to the younger son, to be paid to him immediately when raised, charging all his real estate if the personal estate not specifically devised proved deficient. The younger son died before the expiration of the year.

His executors bring a bill for it against the eldest son, the devisee for life of the real estate with a remainder to his sons. The defendant admitted it was intended for his brother's advancement. But he insisted that, he dying unmarried before, it was extinguished, and not to be raised. The personal estate was admitted to be deficient, and it was, therefore, chargeable on the real estate, and to take the fate of a legacy out of real estate, as it has been decreed.

The court held it should be raised. Which is an authority that the year for raising was not sufficient to prevent the legacy's vesting, and it was the single ground of that determination.

[Other reports of this case: 3 Peere Williams 172, 24 E.R. 1017, 2 Eq. Cas. Abr. 547, 22 E.R. 461.]

32

Lord Glenorchy v. Bosville
(Ch. 1734)

The question in this case was whether the devise in issue created a life estate or an entail.

Jodrell 687

Hilary Term 1733[/34]; decreed by Lord Talbot.

The principal question at the hearing was whether, by virtue of Sir Thomas Pershall's will, Lady Glenorchy was entitled to be tenant in tail or for life only. The case came on first before LORD KING, who took time to advise and to have the opinion of the judges. It, afterwards, came on before LORD TALBOT, who, after long argument and deliberate consideration, held that she was entitled only to an estate for life with remainder to her husband for life, remainder to trustees to preserve contingent remainders, with remainder to her first and other sons in tail, remainder to her daughters in tail, with other

remainders over. And he decreed a settlement accordingly. Notwithstanding this, he held that, according to King v. Melling's Case,[1] the words 'issue of the body' were as proper words oflimitation in a will as the words 'heirs of the body' and that, if this had been a devise of a legal estate, Lady Glenorchy would have been tenant in tail, but that it being the case of a trust, circumstanced as that was, he was at liberty to make a different construction to comply more strictly with the testator's intention.

I [Lord Hardwicke] cite this case at present merely as another authority in general that the word 'issue', though admitted to have the same sense of the words 'heirs of the body', was construed as a word of purchase to comply with the testator's intention. And I shall reserve to my next head that part of Lord Talbot's reasoning which turns upon the distinction between trusts executed and trusts executory, which has been so much insisted upon for the plaintiff.

But before I [Lord Hardwicke] quit this precedent, I must observe that there were considerable arguments arising upon the penning of Sir Thomas Pershall's will to rebut the supposed intention to make Lady Glenorchy only tenant for life in case she married according to the direction of the will, which she had done, for, in the other event of her not marrying according to that direction, he had directed one moiety of the estate to be conveyed to her for life, with remainder to trustees to preserve contingent remainders, remainder to the first and every other son, being a Protestant, in tail, whereas, in the other case, it was barely limited to her for life, then to her husband for life, and then 'to the issue of her body' generally. Hence, it appears that the maker of this will knew the difference between a general limitation in tail and a strict settlement and knew also how and in what place properly to insert trustees to preserve contingent remainders when he intended it.

---

[1] *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

Jodrell 693

[Lord Hardwicke:] What my LORD TALBOT said in his argument in that cause relative to that point is stated to me thus:

> There is another question, *viz*. how far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words. I repeat it, I think, in cases of trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same, for, there, the testator does not suppose any other conveyance will be made. But, in executory trusts, he leaves somewhat to be done, the trusts to be executed in a more careful and accurate manner. The case of Leonard v. Earl of Sussex;[1] had it been by act executed, it would have been an estate tail, and the restraint had been void. But, being an executory trust, the court decreed according to the intent, as it was found expressed in the will, which must now govern the construction. And though all parties claiming under this will are volunteers, yet are they entitled to the aid of this court to direct their trustees. I have already said what I should incline to if this was an immediate devise. But as it is executory and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in King v. Melling's Case and that the testator's intent is plain, the issue should take the conveyance by being in common form, *viz*. to Lady Glenorchy for life, remainder to her husband, lord Glenorchy, for life, remainder to the first and every other son with a remainder to the daughters which will best serve the testator's intent.

---

[1] *Leonard v. Earl of Sussex* (1705), 2 Vernon 526, 23 E.R. 940, 1 Eq. Cas. Abr. 12, 184, 21 E.R. 836, 975.

Nobody can possibly have a greater deference for my Lord Talbot's opinion than I have. But I think his decree so right in that case that it did not want the aid of the distinction there made.

Consider then how far it amounts to a positive opinion, even to conclude himself. The first words indeed as stated are these, 'I think, in cases of trusts executed or immediate devises, the construction of courts of law and equity ought to be the same, for, there, the testator does not suppose any other conveyance to be made.' But I think I have proved that the testator is in most cases presumed to know that, at some time or other, a further conveyance must be made. Immediately after, His Lordship mentions the case of Leonard v. Earl of Sussex and says 'Had that been by act executed, it would have been an estate tail and the restraint had been void.'

If by 'act executed' is meant a deed in the testator's lifetime, which is the proper sense of the words, it is certainly right, for all such restraints of alienation are void at common law. But, if it be meant only a devise to trustees upon an immediate trust without expressly directing a conveyance, I beg leave to doubt of it, and, whether, if such a clause of restraint had been in a devise of a trust executed (as it is called), the court, when it had decreed a conveyance, would not have been bound to decree it in strict settlement, as Lord Cowper did. In that case, he adds further, 'and though all parties claiming under this will are volunteers, yet they are entitled to the aid of this court to direct their trustees'. But can this differ the case of what has been called an executory trust from an immediate devise in trust? On both cases, the parties are equally entitled to the aid of this court to direct their trustees in making a conveyance. But towards the end, it appeared that His Lordship had not found any fixed opinion to bind himself upon this point, for he says, 'I have already said what I should incline to if this was an immediate devise.' This shows it was only the present inclination of his thoughts without having absolutely determined his judgment upon that particular point.

1 Vesey Sen. 150, 27 E.R. 949

LORD TALBOT held that the plaintiff took only an estate for life, with a remainder over. But, notwithstanding, he held that, according to King v. Melling, 'issue' was as proper a word of limitation as 'heirs of the body' and that, if it had been a devise of a legal estate, the plaintiff would be a tenant in tail. But, being a trust, he was at

liberty to make a more liberal construction to comply with the intent. And the argument that the testator knew the difference and where it was proper to insert trustees to preserve contingent remainders furnishes a stronger objection than is drawn here from the limitation of the other moiety to the after-born sons of Mrs. Spencer. And yet it did not prevail to support the legal construction of the words of the will against the intention.

[Other reports of this case: Cases *tempore* Talbot 3, 10, 25 E.R. 628, 630, Lincoln's Inn MS. Misc. 52, p. 49, 2 Eq. Cas. Abr. 718, 743, 747, 758, 22 E.R. 604, 630, 634, 643, Forrester 64.]

33

Limbery v. Mason
(Del. 1734)

In this case, the devise in issue created a life estate with a remainder over.

Jodrell 63

Trinity Term 1734.

Samuel Mason devised £2000 to his brother, Robert Mason, and desired him, at his death, to give it among his children and the children of his late daughter as he should think fit. Robert died in the life of the testator. The question was whether the children were entitled.

LORD TALBOT construed the words to be a devise for life to Robert with a remainder to the children and decreed the same with interest from the death of the testator. [He said] that, if it be only an estate for life in the wife with a power, it was not a well executed devise, being for payment of her debts and in a very unequal proportion between the children, which this court will not allow.

[Other reports of this case: 2 Comyns 451, 92 E.R. 1155, Misc. Delegates Repts. 244.]

34

Harewood v. Child
(Ch. 1734)

Where a testator devises lands to trustees to be sold to pay his debts, his personal estate is still first liable to pay his debts, and, if necessary, then, the land will be sold.

Jodrell 460

13-18 August 1734; Haslewood v. Child.

There was a devise of lands to trustees that they should raise money sufficient to pay all his debts and the interest thereof and, after the payment of his said debts, he gave his lands to and for such persons and for such uses as his manor of A. was before settled, and he adds, 'if any money remained after payment of my debts and the charges of the trustees, then it should be paid' to his daughter Catherine or to such persons as should be then entitled to the manor before given, and, afterwards, he gave all his personal estate of what nature soever to his daughter Catherine, and he made her executrix.

And it was held by LORD TALBOT that the personal estate was not exempted.

[Lord Hardwicke:] That was a very strong case because there was an express charge on one fund and a bequest of the whole personal estate, and not of the residue.

[Other reports of this case: Cases *tempore* Talbot 204, 25 E.R. 738, 2 Eq. Cas. Abr. 372, 22 E.R. 318.]

35

Ashton v. Ashton
(Ch. 1734-1735)

In this case, the devise in issue created a life estate and not an estate tail.

Where there was a slight misdescription in a will, the devise will be construed to give what the testator had at his death.

Jodrell 685

14 November 1734; before Sir Joseph Jekyll.

Joseph Ashton, by his will, gave £1200 in money and £6000 South Sea [Company] annuities to trustees in trust, as soon as conveniently might be after his death, to sell the same and lay out the money in a purchase of lands of inheritance to be conveyed to George Joseph Ashton for life and, after his death, 'to the issue of his body' lawfully begotten, and for want of such issue, to his nephew Henry Ashton in fee.

George Joseph Ashton brought his bill for a performance of this trust. And, at the hearing of the cause, one question was what estate the plaintiff ought to take in the lands to be purchased, whether for life only or in tail, it being insisted on his part that, this being a devise of the lands, he would clearly have been tenant in tail and the trust ought to receive the same construction.

But the court held that he ought to be made tenant for life only of the lands to be purchased, and decreed that they should be conveyed to the plaintiff for life with remainder to trustees to preserve contingent remainders with remainder to his first and other sons in tail general with remainder to his daughters in tail as tenants in common and not as joint tenants with cross-remainders between them, remainder in fee to the defendant, Robert Ashton.

This decree has stood without being appealed from.

But here, I [Lord Hardwicke] must take notice that the words of the limitation are 'issue of his body' and not 'heirs of his body'. But it has been established ever since the case of King v. Melling[1] that, in a will, the words 'issue of the body' are as strict, proper words of limitation as the words 'heirs of the body' and equally give an estate tail in lands legally devised.

And so, it undoubtedly would have been in the Case of Ashton v. Ashton had it been a devise of the lands. What changed the

---

[1] *King v. Melling* (1672), 1 Ventris 214, 225, 86 E.R. 144, 151, 2 Levinz 58, 83 E.R. 448, 3 Keble 42, 52, 95, 84 E.R. 584, 589, 614, Pollexfen 101, 86 E.R. 526, 3 Salkeld 296, 91 E.R. 835, 1 Eq. Cas. Abr. 181, 21 E.R. 973.

construction in the case of Backhouse v. Wells[1] was the word 'only' which imported a negative.

1 Vesey Sen. 149, 27 ER 948

14 November 1734; on a rehearing before Sir Joseph Jekyll.

Joseph Ashton devised £6000 South Sea stock and £12,000 to trustees to sell and lay out in the purchase of lands to convey to George Joseph Ashton for life and, afterward, to the issue of his body; in default of such issue, then over.

George Joseph Ashton brought a bill for performance. The question was whether he had an estate for life or in tail. It was insisted for him that, had it been a devise of land, he would be a tenant in tail and there should be the same construction.

But the court held it an estate for life only of the lands to be purchased, which determination stands unappealed from. The words of the limitation there were 'issue of the body', not 'heirs'. But that was held to be as strict as the other, and, equally, gave an estate tail in lands legally devised.

West *tempore* Hardwicke 488, 25 E.R. 1046

24 November 1735; decreed by Lord Talbot.

The testator gave to trustees the sum of £6000 South Sea Annuity Stock on trust that they should sell and dispose of the same as soon as might be after his decease and apply the money in purchasing lands to be settled according to the directions of his will. At the time of making his will, the testator had but £5350 South Sea Annuities.

And it was adjudged that it must be taken as it was and should not be made up. And certainly upon the strongest reason in the world, for here was a plain intention to give only what he was possessed of and the difference between the round sum of £6000 stock mentioned in his will and the broken sum which in fact he had was such a misapprehension or mistake as a man might naturally fall into;

---

[1] *Backhouse v. Wells* (1712), 10 Modern 181, 88 E.R. 683, Fortescue 133, 92 E.R. 791, Gilbert Cas. 20, 129, 93 E.R. 247, 282, 1 Eq. Cas. Abr. 184, 21 E.R. 976.

besides, the trust was to sell or dispose of it as soon as might be after his decease, and it would have been highly absurd to suppose that the testator intended to direct his executor to lay out his money in buying stock in order to sell again and turn it into money again immediately.

[Other reports of this case: Lincoln's Inn MS. Misc. 52, p. 165, Cases *tempore* Talbot 152, 25 E.R. 712, 3 Peere Williams 384, 24 E.R. 1111, 2 Eq. Cas. Abr. 558, 22 E.R. 470.]

36

Rolleston's Case
(Del. 1735)

Parol evidence is not admissible to vary the meaning of a will.

Jodrell 515

1735; before the [Court of] Delegates.

Rolleston had two wives, both named Elizabeth. He had lived separate from his first wife and many years with the second at Port Mahon, where he died. But, before his death, he delivered his will to his second wife, and told her it was made for her benefit.

This appeared in evidence; the will was a gift to his 'lawful wife', and the evidence was refused to be read.

37

Milward v. Milward
(Ch. 1735)

In this case, the will in issue created a tenancy in common that was valid and a contingent remainder that was void for remoteness.

Jodrell 211

1 February 1734[/35]; before the same Master of the Rolls [Jekyll].

One Milward made a nuncupative will that all his mortgages and debts should go to his sons, John and Samuel, paying £100 each

and, in case either of them shall die without issue, his part thereof shall go to 'my wife and my two other sons'.

His Honor [JEKYLL] was of opinion in the first place that this was a tenancy in common and not a joint tenancy and, in the next place, that the limitation to the wife and other sons was too remote and, therefore, void.

38

Chapman v. Blisset
(Ch. 1735)

A legal estate in trustees will support contingent remainders, even of a trust declared by a will where no conveyance is directed.

1 Atkyns 594, 26 E.R. 374

[Lord Hardwicke:] The case of Chapman v. Blisset, decreed by Lord Talbot in 1735, is a clear authority that the legal estate in trustees will support contingent remainders, even of a trust declared by a will where no conveyance is directed.

The case was [thus]. J. Blisset, after several directions and charges upon his real estate, devises all other his real estates to trustees and their heirs in trust to pay his son J. Blisset quarterly £37 10s. during his life and, if there were any child or children, he gave the rest and residue of his real estate for the education and benefit of such child or children and, if his son married with such consent as the will mentions, £100 *per annum* to his wife; if without, £10 *per annum*. And, after his said son's decease, he gave one moiety of the said trust estate to such child or children, their respective heirs, executors, and assigns, the survivor of them, etc. and the other moiety to the child or children of Joseph, etc. and, if J. Blisset died without issue, to such child etc. of my daughter etc. with a remainder over. The testator dies. J. Blisset marries, and has a son; then died. Joseph, who was the testator's grandson, had no son born at the time of the death of J. Blisset, but had a son four years after.

And, upon this, a bill was brought by the heir at law, insisting that these limitations were void, particularly to the son of Joseph, not being born until four years after the death of J. Blisset.

The first question was whether it was to be considered as a legal estate subsisting in the trustees or whether it was not a use executed by the Statute.[1]

LORD TALBOT (and myself [LORD HARDWICKE] on a rehearing) were of opinion that the legal estate in fee was in the trustees and all the limitations in the subsequent interest were trusts.

The next question was whether the limitation to the son of Joseph was good and, if so, whether as an executory devise or a contingent remainder.

LORD TALBOT was of opinion that it might be good even as an executory devise in a legal limitation and the only objection was that the limitation was *in verba de praesenti*. But he said the words were to be considered as the testator meant them, that he knew Joseph was an infant and young, and devising a moiety to his child (knowing he had none) must necessarily intend it future, and, therefore it was impossible to show an intention more clearly of children thereafter to be born. But he went on that, when J. Blisset had a child born that had a freehold in the trust during the life of J. Blisset, whether, after that, it was to be considered as an executory devise or a contingent remainder, the child of J. Blisset, having a kind of freehold in the trust itself, he held, that, if, taken as a remainder (in case of a limitation of a legal estate), it was clearly void, for the freehold would be in abeyance for four years, between the death of the son of J. Blisset and the birth of the son of Joseph. But he said the reason of that rule failed in the case of trusts. And he was of opinion, that the first estate in the trustees preserved the whole trust, and, therefore, whether it was to be considered as an executory devise or a contingent remainder of a trust, that it was good and that the plaintiff was entitled to a moiety.

[Other reports of this case: West *tempore* Hardwicke 328, 25 E.R. 964, Cases *tempore* Talbot 145, 25 E.R. 708, 2 Eq. Cas. Abr. 703, 22 E.R. 591.]

---

[1] Stat. 27 Hen. VIII, c. 10 (*SR*, III, 539-542).

39

Lord Donerail v. Lady Donerail
(H.L. 1735)

Evidence that is scandalous and impertinent is inadmissible, but scandalous matter that is pertinent to the issue is admissible.

2 Atkyns 338, 26 E.R. 606

The bill was brought by her for separate maintenance. The question arose upon this. Lady Donerail had charged by way of merit that she had behaved with the utmost duty and respect. My Lord Donerail, in bar to the equity insisted on by the bill, says in his answer she did not behave with that duty and affection as became a virtuous woman, much less this defendant's wife. In order to support this suggestion, he entered into particular facts of her adultery with one Barry. And, in the Chancery in Ireland, the depositions were read. But, upon an appeal to the House of Lords here, they were not admitted.

I [Lord Hardwicke] was not present in the House of Lords at the hearing of that cause, and, therefore, do not know the particular reasons. But a very strong one appears upon the pleadings themselves and brings it to that of Sidney *versus* Sidney,[1] because there is no express charge of adultery in Lord Donerail's answer.

The virtue of a woman does not consist merely in her chastity, for she may be guilty of acts of cruelty. And, indeed, it appeared in this very cause that she had not only used her husband with inhumanity, but beat him. A woman, too, may be addicted to gaming and other extravagances, which is not a virtuous behavior.

---

[1] *Sidney v. Sidney* (Ch. 1723-1734), see above, Case No. 17.

Jodrell 242

February 1734[/35]; an appeal from Ireland before the House of Lords.

There, the defendant charged that the plaintiff had not behaved herself with duty and tenderness to him as became a virtuous woman, much less his wife, and what gave a ground for this was that she had as a merit in her bill charged that she had always behaved herself with all duty, affection, and tenderness to her lord. The defendant had entered into proof of her committing adultery with one Barry, and that evidence had been admitted to be read in Ireland and was made one of the reasons for the appeal. And, as adultery was not put in issue, for chastity is certainly not the only virtue a woman may possess, the lord did right to refuse it.

[Other reports of this case: *sub nom*. Viscountess Doneraile v. Viscount Doneraile, 1 Cooper *tempore* Cottenham 534, 47 E.R. 987, 125 Selden Soc. 283.]

40

Withers v. Algood
(Ch. 1735)

In this case, the devise in issue was held to create an estate for life.

Jodrell 686

4 July 1735; decreed by Lord Talbot.

I [Lord Hardwicke] shall state it from the Register's Book, and it was this. Isaac Algood, being seised in fee of some ground rents and of certain terms for years in houses, by deed dated 10th February 1714, conveyed the same to trustees to hold such part of the premises as was freehold 'to the use' of the trustees and their heirs, and such part as was leasehold to the trustees, their executors, and administrators in trust that they should apply the rents of the premises and the benefit of the redemption thereof to the plaintiff Hannah Withers for life, and, after her death, 'to the heirs of the body' of the plaintiff Hannah Withers and of Isaac Algood, since deceased, and of Hannah Glass and Mary Algood and to their heirs, executors,

administrators, and assigns during the continuance of the estate in the premises.

After the testator's death, Hannah Withers, jointly with her husband, brought her bill for a redemption of certain mortgages which were upon the premises devised and for a performance of the trusts of the will. At the hearing, one question was what estate the plaintiff Hannah took in her share of the premises by virtue of this trust, whether for life or in tail.

And upon argument, LORD TALBOT was of opinion that she took only an estate for life. And he has declared it in his decree in these words: 'That the plaintiff Hannah Withers is entitled to the equity of redemption of the freehold and leasehold premises respectively comprised in the deed of trust during her life.' Accordingly, he decreed the redemption to her as tenant for life with proper provisions for securing the principal money upon the remainders of inheritance in the estate and for keeping down the interest during her life out of the rents and profits.

[Lord Hardwicke:] You observe that, in this case, the words were 'heirs of the body', and yet they were held to be words of purchase. I am sensible that it has been endeavored to be distinguished by saying that 'the heirs of the body of Hannah Withers' were joined in the devise with other persons who clearly must take by purchase by way of remainder and that showed the donor's intent that they should all take in the same manner by purchase. But what does that amount to? Only that a plain indication of the testator's intention will change those words from words of limitation of estate into words of purchase, for this argument was not conclusive, nor did it create any absolute necessity to make them words of purchase, since, if it had been a grant of a legal estate, Hannah Withers must have taken one-fourth part of the inheritance as tenant in tail and the other three-fourths have gone after her decease to the grantees in remainder. In a report which I have seen in this case, LORD TALBOT said expressly 'that the rule of law is not so strict as to control the intent of the party where plain'.

1 Vesey Sen. 150, 27 E.R. 949

5 July 1735.

Isaac Algood, seised in fee of ground rents and possessed of terms for years in houses, conveyed to trustees to hold such as were

freehold to the use of the trustees and their heirs, the leasehold to the trustees, their executors, and administrators in trust to apply the rents and benefit of redemption to Hannah Withers for life, and, afterward, to the heirs of her body, and of J. and M., their heirs, etc.

After the testator's death, Hannah Withers brought a bill for redemption and performance of the trust.

Upon a question whether she took an estate for life or in tail in her share by this trust, LORD TALBOT held it only an estate for life, decreeing a redemption for her as tenant for life. The words were 'heirs of the body'. And yet they were held words of purchase.

[Lord Hardwicke:] It has been said that the reason was because [they were] joined with others who were to take by purchase. But that amounts only to this, that a plain indication of the testator's intent will change words of limitation into words of purchase. This argument was not conclusive or of necessity to make them words of purchase. In a manuscript case, which I have seen of it, LORD TALBOT said the rule of law was not so strict as to control the intent where it was plain.

[Reg. Lib. 1734 B, f. 276.]

41

Law v. Law
(Ch. 1735)

A bond to secure the procuring of a public office is against public policy and is void and unenforceable.

Jodrell 643

Michaelmas term 1735; by Lord Chancellor Talbot.

A bond was given to pay money for procuring the office of Collector of Excise to one who neither had a right of nomination or interest of any kind whatsoever in the office. The office was within the Statute;[1] the contract was not.

---

[1] Stat. 5 & 6 Edw. VI, c. 16 (*SR*, IV, 151-152).

But, because the allowance of such practices would overturn the Statute, as, in many instances, it would be impossible to know what secret trust might be between the party recommended and the party appointing to the office or having such an interest in it as came near to a power of appointing, LORD TALBOT decreed the bond to be delivered up and canceled and a perpetual injunction.

[Other reports of this case: 3 Peere Williams 391, 24 E.R. 1114, Cases *tempore* Talbot 140, 25 E.R. 705, W. Kelynge 181, 25 E.R. 557, 2 Barnardiston K.B. 390, 401, 94 E.R. 572, 580, 2 Strange 960, 93 E.R. 968, 2 Eq. Cas. Abr. 187, 22 E.R. 160.]

42

Pain v. Stratton
(Ch. 1736)

The validity of the words of a will is within the jurisdiction of an ecclesiastical court, and not of a court of equity.

Jodrell 53

The dispute was on a contingent limitation of a personal estate. Upon looking on the will, it was erased, but the words were still legible. The words erased were not in the probate and were material to the construction of the limitation.

LORD MACCLESFIELD referred it to the Master to inquire whether the words were erased after execution.

But the Lords Commissioners [to Hold the Great Seal] reversed his order, and suspended the decree until that matter had been tried in the spiritual court.

And the decree was affirmed in the House of Lords.

[Other reports of this case: *sub nom*. Stratton v. Payne, 3 Brown P.C. 99, 1 E.R. 1203, 2 Eq. Cas. Abr. 325, 348, 22 E.R. 277, 296.]

43

***Ex parte* Le Frane**
(Ch. 1736)

Goods in the possession of an agent are not subject to seizure by the creditors of the agent upon the agent's bankruptcy.

Jodrell 411

January or July 1736; before Lord Talbot.

The petitioner, who lived at Paris and dealt in human hair, used to consign parcels of it to Capot and Fenwick, merchants in London, to sell for him under an agreement that the neat profit should be divided among them three equally. The petitioner consigned a large parcel to Fenwick, which was landed here. But, before it came to Fenwick, he and Capot failed. The assignees under the commission paid the freight and duties for the hair, and took them into their possession as part of the bankrupt's estate. The petitioner was no ways indebted to the bankrupts, but, on the contrary, they were indebted to him, and neither of them had advanced any money to purchase the hair. But the trade being carried on by the petitioner with his own proper stock, he prayed to have the same restored to him upon repayment of the freight and duties.

And it was ordered accordingly by LORD TALBOT.

44

Stringer v. Phillips
(Ch. 1736)

A legacy vests upon the death of the testator, even though the legatee dies before the final administration of the testator's estate.

Jodrell 698

18 December 1736; at the Rolls.

'All the residue of my personal estate I give equally to be divided between them and the survivors and survivor of them.'

The Master of the Rolls [JEKYLL] held that one of the devisee's shares, who died after the testator, should go to her representatives and that the word 'survivor' regards the time of the testator's death only, by which construction, all the words of the will had their proper sense.

[Other reports of this case: 1 Eq. Cas. Abr. 292, 21 E.R. 1054.]

45

Coulson v. Coulson
(K.B. 1740-1741)

In this case, the devise in issue created an estate tail in remainder.

Jodrell 696

The devise was of a legal estate, and the words the same as in the will.

But all the judges of the King's Bench held that, by reason of the remainder to trustees to preserve contingent uses interposing between the devise to Robert Coulson for life and the subsequent limitation to the heirs of his body, Robert took an estate for life not merged by the devise to the heirs of his body, but, by that devise, an estate tail in remainder vested in the said Robert Coulson.

[Other reports of this case: 2 Strange 1125, 93 E.R. 1074, 2 Atkyns 246, 247, 26 E.R. 552, 553, 2 Eq. Cas. Abr. 318, 22 E.R. 270.]

46

Walmsley v. Booth
(Ch. 1741)

The fairness of solicitors' fees can be examined and redressed by the court.

Jodrell 643

1741; heard before me [Lord Hardwicke].

The plaintiff, as representative of Japhet Crook [d. 1734], brought his bill to be relieved against a bond given by Japhet Crook (who was not much the favorite, either of courts of law or equity) for £1000 besides fees and disbursements due to the defendant as his solicitor and agent in consideration of the trouble and care the defendant had taken in his affairs.[1]

I [LORD HARDWICKE] was of two different opinions and, upon the first hearing, dismissed the bill. But, on a rehearing, I reversed my former decree, and directed an account of fees and expenses, the bond in the meantime to stand as a security for the balance. If such contracts with attorneys and solicitors had been given way to, persons would have been discouraged from applying to courts of justice for redress. And my judgment was convinced by the consequence of the thing and the general policy and principles which had governed other cases.

[Other reports of this case: 2 Atkyns 25, 26 E.R. 412, Barnardiston Chan. 475, 27 E.R. 726, 2 Eq. Cas. Abr. 697, 22 E.R. 586, 9 Modern 359, 88 E.R. 506.]

---

[1] Note *Rex v. Croke* (1729), 1 Barnardiston K.B. 168, 94 E.R. 115, Fitz-Gibbons 57, 94 E.R. 652.

INDEX

[These references are to case numbers, not page numbers.]