REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session, 1820.

1 GEO. IV.

ENGLAND.

WRIT OF ERROR FROM THE COURT OF KING'S BENCH.

BETWEEN

RICHARD JESSON, JOSEPH HATELY, WILLIAM WHITEHOUSE, JOSEPH WALTON, EDWARD DANGERFIELD, the elder, and THOMAS DANGERFIELD, } *Plaintiffs in Error.*

AND

JOHN DOE on the several Demises of EZEKIEL WRIGHT, JOHN WRIGHT, THOMAS WRIGHT, GEO. WRIGHT, ISAAC WRIGHT, WILLIAM WRIGHT, the younger, LUCY WRIGHT, MARY WRIGHT, DANIEL WRIGHT, ELIZABETH MOSLEY, and THOMAS STOKES, } *Defendants in Error.*

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DEVISE.—To W. (a natural son of the testator's sister) for life, and after his decease to the heirs of his body in such shares and proportions as W. by deed, &c. shall appoint; and for want of such appointment to the heirs of the body of W. share and share alike *as tenants in common*; and if but *one child* the whole to such only child, and for want of *such* issue to the heirs of devisor. Held—that an *estate tail* vested in William by this devise.

The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is clear that the testator meant otherwise.

Semble—that under such power an appointment to an only child, before others born, is effectual.

Whether a power, under which all children have an interest, can be destroyed by forfeiture. Quære.

Doe v. *Goff*, 11 East, 668, held not to be law.

THIS was an ejectment brought in the Court of King's Bench against the Plaintiff in Error, to recover the possession of tenements in the county of Stafford.

This cause came on to be tried at the assizes for the county of Stafford, holden at Stafford, on the 16th day of March, 1815, before the Honourable Mr. Justice Dallas, when the jury, by the consent of the parties, found a special verdict.

The special verdict states,

Ezekiel Persehouse seized. 24th April, 1773.

That one Ezekiel Persehouse, being seized in fee of the premises set forth in the declaration, made and published his last will in writing, on the 24th of April, 1773, executed and attested as the law requires, for passing real estates by devise, and that thereby, among other things, he gave and devised

the premises in the declaration mentioned, with the appurtenances, in the words following:

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Devises.

" I give and devise unto William, one of the
" sons of my sister Ann Wright, before mar-
" riage, all that messuage, tenement, or dwelling-
" house, malt-house, stable, buildings, garden,
" hereditaments, and premises, with their and
" every of their appurtenances, situate and being
" in the parish of Tipton, otherwise Tibbington,
" and county of Stafford, now in my own posses-
" sion: and all those two dwelling-houses, barn,
" shops, buildings, gardens, hereditaments, and
" premises, situate in the said parish of Tipton,
" otherwise Tibbington, now in the occupation of
" John Law, and Timmins: and also all
" those seven closes, pieces or parcels of land, or
" ground, to the said two dwelling-houses and
" buildings adjoining, or nearly adjoining, and
" belonging, with their and every of their appur-
" tenances, now in my own possession: to hold
" the same premises unto the said William, son of
" my said sister Ann Wright, for and during the
" term of his natural life, he keeping all the said
" dwelling-houses and buildings in tenantable re-
" pair: and from and after his decease, I give and
" devise all the said dwelling-houses or tenements,
" buildings, garden, lands, hereditaments, and
" premises, with their and every of their appurte-
" nances, unto the *heirs of the body* of the said
" William, son of my said sister Ann Wright,
" lawfully issuing, in such *shares and proportions*
" as he the said William, in and by any deed or
" writing, deeds or writings, or in and by his last

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" will and testament, in writing, to be by him " duly executed, in the presence of three or more " credible witnesses, shall give, direct, limit, or " appoint the same; and for want of such gift, " direction, limitation, or appointment, then to " the *heirs of the body* of the said William, son of " my said sister Ann Wright, lawfully issuing, " *share and share alike*, as *tenants in common*, and " if but *one child*, the whole to *such only child*. " And for *want of such* issue, I give and devise " all the said dwelling-houses, buildings, lands, " hereditaments, and premises, to my right heirs " for ever, charged and chargeable, nevertheless, " with and for the payment of one annuity or " yearly sum of 20*l*., of lawful money of Great " Britain, half yearly, to my said sister, Ann " Wright, and her assigns, for and during the " term of her natural life; the first half-yearly " payments thereof to begin and be made by the " said William, son of my said sister, Ann Wright, " at the end of six months next after my decease, " or by such other person or persons, who, ac- " cording to the true intent of this my will, may " be seized of the said dwelling-houses, buildings, " lands, hereditaments, and premises; and when " and so often as the said annuity, or any part " thereof, shall be behind and unpaid by the space " of twenty days, next after the same ought to be " paid, as aforesaid, that then, and at any time " then after, it shall and may be lawful to and for " my said sister, Ann Wright, or her assigns, into " and upon the said dwelling-houses, buildings, " lands, hereditaments, and premises, or any of

" them, or any part thereof, to enter and distrain; " and such distress and distresses to sell and dis- " pose of to satisfy and discharge all such arrear- " ages, with the costs and charges of taking, keep- " ing, and disposing of the same."

The special verdict then states, that the said Ezekiel Persehouse died on the same day, seized of the said premises, without altering his will; and that, upon the death of the said Ezekiel Persehouse, Thomas Stokes, Ann Wright, and Elizabeth Persehouse, were his co-heirs, of whom Ann Wright and Elizabeth dying, respectively, Daniel Wright and Elizabeth Mosley succeeded, as heirs, which said Thomas Stokes, Daniel Wright, and Elizabeth Mosley, are three of the lessors of the Plaintiff.

Ezekiel Persehouse dies seized on the same day.

Tho. Stokes, Ann Wright, and Elizabeth Persehouse, his co-heirs.

Ann Wright and Elizabeth Persehouse dying, Daniel Wright and Elizabeth Mosley succeeded as heirs.

The special verdict further states, that immediately after the death of the said Ezekiel Persehouse, the said William Wright named in his will, entered in the said premises, and became seized of such estates as legally passed to him under the will of the said Ezekiel Persehouse; and that, afterwards, on the 13th December, 1774, he married one Mary Jones, by whom he had issue, Edward Wright, Elizabeth Wright, Lucy Wright, Ezekiel Wright, John Wright, Thomas Wright, George Wright, Isaac Wright, Mary Wright, and William Wright, the younger, born in the above order, of whom Elizabeth, afterwards, on the 23d February, 1798, died without issue; and Lucy, Ezekiel, John, Thomas, George, Isaac, Mary, and William, the younger, are the other lessors of the Plaintiff.

Said William Wright entered.

13th December, 1774, marries.

And has issue, Edw. Wright, Eliz. Wright, Lucy Wright, Ezek. Wright, John Wright, Tho. Wright. Geo. Wright, Isaac Wright, Mary Wright, and William Wright, the younger.

23d February, 1798, death of Eliz. Wright.

The special verdict further states, that *after-*

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16th and 17th January, 1800. Indentures between William Wright, and Mary, his wife, and Edward Wright, their eldest son, to Robert Long, for suffering a common recovery. Hilary Term following. Recovery suffered accordingly. Wherein William Wright, and Mary, his wife, and Edward Wright, were vouchees.

wards, by certain indentures of lease and release, executed, respectively, on the 16th and 17th January, 1800, the said premises were conveyed by the said William Wright, and Mary, his wife, and the said Edward Wright, *their eldest son*, to Robert Long, as tenants, to the precipe, to the intent that a common recovery might be suffered, for the purpose of barring and extinguishing all estates tail, and all remainders and reversions, of and in the said premises; and, that a recovery accordingly was afterwards suffered as of the Hilary Term following, wherein the said William Wright, and Mary, his wife, and Edward Wright, were vouched to warranty, and entered into the warranty, and defended their right in the usual way; whereupon a writ of seizin afterwards issued and was executed.

Entry of the lessors of the Plaintiff.

The special verdict then states the entries of the several and respective lessors of the Plaintiff, on the premises, and their seizin, according to law; and the several demises to John Doe, the

Ejectment and ouster.

Plaintiff in Ejectment, who entered and was possessed, until the Plaintiffs in Error entered on the premises and ejected him thereout.

Easter Term, 1816. Special verdict argued.

This special verdict was argued in Court in Easter Term, 1816, the Plaintiff below arguing that William Wright, the devisee, took an estate for life only, with remainders to his children for life, respectively, as tenants in common, while the Defendants below contended that the said William Wright took an estate tail. The Court

Judgment for Plaintiff below.

gave judgment for the Plaintiff below.*

* See the arguments and judgment, 5 Mau. and Sel. 95.

Against this judgment a writ of error was brought. The principal error assigned was, that the Court below, by their judgment, had decided, that "William Wright took only a life-estate un- "der the will of, &c., with remainder to his chil- "dren for life; and that the recovery suffered by "William Wright, Mary, his wife, and Edward "Wright, was a forfeiture of their estate. Where- "as the Plaintiffs in Error contended, that the "testator intended to embrace all the issue of "William Wright, which intention could only be "effected by giving William Wright an estate tail, "for which purpose the words of the will are fully "sufficient."

Writ of error and errors assigned.

For the Plaintiffs in Error—*Mr. Jervis* and *Mr. Sugden.*

It was the intention of the testator to include all William's issue, and sufficient appears on the face of the will to enable a court of law to effectuate his intention. The decision in the Court below attributes this meaning to the testator,—That if William had only one child born who survived him, such child should take the whole estate *for life;* but if he had twelve (for example), and eleven died in his lifetime, the surviving child should have only a twelfth of the estate for his life. Is this a probable intention?—Again, if he had twelve children, and they all died in his lifetime leaving issue, according to this decision none of the issue could take? If their parents, indeed, had lived, they might have been supported out of the estate, but if their parents chanced to die in William's lifetime, they could derive no benefit from

Argument for Plaintiff in Error. 7th, 9th, 12th, and 14th of June.

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the estate. William was an illegitimate child, and yet the testator thought fit to provide for him and all his unborn children. If we consider the probable duration of their lives, it is not likely that the testator intended to stop there, with all the risks attending such a limited bounty, and then to give the estate to his heir at law. What is the value of such a gift? To the devisees it is highly important, that the estate should not go over until a total failure of all their issue, but to the heir the value of a reversion in fee after a life estate to a young person with remainders for life to all his children is trifling. Suppose that twelve children had survived William, is it a probable intention, that upon the death of each a share should fall to the heir, who would thus perhaps be a long series of years acquiring all the shares in the property.

The testator has given the estate to the heirs "of the body of William lawfully issuing." Those words clearly include all the posterity of William. But it is said that he has *translated* his words to mean children. There is no doubt but that he intended the children to take. But the translation is too narrow. It makes the testator say that William's children shall take only for life, and that none of their children shall take after them. What warrant is there for this in the will? Can it be argued, that because under the latter words in the will, *had they stood alone*, William's children would merely have taken estates for life, therefore, they shall in this case take only that quantity of interest, although the testator has *expressly* given the property to

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the heirs of William's body, which would include all his possible heirs? The testator intended William to take for life, and he intended all his issue to take. But he intended his children to take as purchasers; and it is manifest that he considered, (although erroneously in point of law,) that his intention to include all William's possible issue would be effectuated if the children did take as purchasers. The argument assumes this shape, that because he intended the children to take as purchasers, and has not repeated words of inheritance, they can only take for life as tenants in common.

It seems impossible to contend, that William under this power might not have appointed *an estate of inheritance* * to a grandson, or more remote issue, born in his lifetime, and this of itself decides the case. This, it is argued, the rule of perpetuity forbids. It may be admitted, that he could not appoint to a child, with remainder to the issue of that child, to take as a purchaser; but where, as in this case, the power is to appoint to heirs of the body a class of unborn persons as

* The power is to appoint to heirs of the body of William in such share and proportions as William shall appoint, not in such *manner and form*, (as well as in such shares and proportions,) according to the power in the King *v.* the Marquis of Stafford, 7 East, 521; nor for such *estates* according to the power of devise given in Leonard Lovie's case: nor is it a power *to dispose of* the estate, as the donee should think fit, as in Liefe *v.* Saltingtone. It may be said, that an appointment to a living grandson of William, and the heirs of the body of the grandson, would be an appointment to the heirs of the body of William. In this sense of the argument, "*estate of inheritance*" means estate tail. On this point see farther, p. 23, and note.

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purchasers, it may be exercised by appointing, in the first instance, to a grandchild as a purchaser. The rule of perpetuity forbids only a possibility upon a possibility—as an appointment to an unborn son, with remainder to an unborn son of the son. Appointments to grandchildren as purchasers, under powers in marriage settlements, are of every day's practice. It is immaterial that in this view of the testator the children, &c. must take by purchase—that must be of necessity: they could not take under the power from William.* It is indeed said, that as issue taking under a power must take by purchase, this shows the words were used in that sense. If this were conceded, it would remain to be shown, that *used as words of purchase*, they were not intended to include more than the first line of generation, and merely to give to them life estates as tenants in common.

Let us consider this proposition. A devise to A. and the heirs of his body; of course he takes an estate in tail. A similar devise with a power to A. to appoint to any of the heirs of the body. Is it possible to contend that this right to defeat the estate so given to him, and to make those take by purchase, who, *if the power remained unexercised*, would take by descent, can

* At this part of the argument, the Lord Chancellor observed, as to the distribution under the power, that, although the words heirs of the body, in a legal construction, could apply to one person only, it might be contended, where a power was given to appoint to heirs of the body, that it meant a class of persons. The ulterior limitation to one child, in default of appointment, might operate as a description of the person, and would not conclusively prove that no estate tail was intended to be given.

vary the construction of the devise to A. in tail? The supposed case is not different in principle from the present. In the one the estate tail is given in the first instance, but defeasible by exercise of the power; in the other the limitation in tail follows the power. It is immaterial whether it precedes or follows. In the former case the children would take by purchase when the power should be executed in their favour. If the power remained unexercised, the heirs of the body would take by descent. So in this case—where the first limitation is to William for life, with remainder to the heirs of the body of William, according to his appointment, remainder, in default of appointment, to the heirs of his body, &c. If the power is exercised, the heirs being appointees take by purchase; if no appointment is made, the estate descends to the heir to whom it is limited. The words, notwithstanding the power, may operate as words of limitation.

This case was decided in the Court below, upon its own merits, without reference to authorities; but the decided cases are strong authorities against the judgment. In the case of *Seale* v. *Barter*,* which was a devise of all the testator's lands to his son, John, *and his children* lawfully to be begotten, with power to settle the same, or any part thereof, by will or otherwise, to them or any of them as he should think proper; *and for default of such issue*, over—it was held that John took an estate tail, and that this construction

* 2 Bos. and Pull. 485.

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was not weakened by the power. The power, it was said by *Lord Alvanley*, in delivering the judgment of the Court, had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. But the power, because it *enabled* John to make his children take by purchase, did not make it imperative on the Court to give the estate to the children by purchase in all events, and to confine them to life estates as tenants in common. So in the case of *Doe, d. Cole* v. *Goldsmith*,* which is reported by *Taunton*, vol. vii. p. 209. but more strongly to the point in question in 2 *Marshall*, 517. upon a devise to F. G. and his assigns for life, and from and immediately after his decease to the heirs of his body in such shares, &c. manner and form as he should appoint, and in default of *such* heirs of his body, *then from and immediately after his decease* to J. G. it was held by the Court, as matter beyond doubt, that the testator intended that all the heirs of F. G. in a line of succession, should be extinguished before J. G. should take by the limitation over, and, therefore, that an estate tail by implication must be held to arise to F. G. because there was no other way to perpetuate the succession in the manner intended. There was no distinct limitation, as in this case, to the heirs of the body of the tenant for life in default of appointment. That expression occurred only in the clause giving the power, and the words introducing the de-

* 7 Taun. 209. 2 Marsh. 517.

vise over, and the referential word *such* is to be found in that case as in this. In *Doe* v. *Goldsmith*, the intent to give an estate tail was implied from the words preceding the limitation over. Here is a distinct gift in words having a fixed legal operation.

The Lord Chancellor. The gift is to the heirs of the body share and share alike as tenants in common.

Mr. Sugden. If it can be made consistent with other words in the will, to give the children estates for life only,—then they must take by way of purchase, as tenants in common. But the words, share and share alike, may be construed by reference to the power which contains an implied or possible gift, under which they would take as tenants in common.

Lord Chancellor. If I had lived 200 years ago, I should have had no doubt that such limitations, as we see in this will, would have given an estate tail. But your argument supposes, that the donee of the power might appoint among grandchildren, &c. to the remotest posterity. That I should have thought impossible, if I had lived 200 years ago.

Mr. Sugden. Keeping within the rule of perpetuity, he might have appointed to any the remotest heir of the body.

It may be admitted, that if "heirs of the body" means children,—such heirs, or such issue, must mean the same thing. The same words cannot have different meanings, in the different parts of a will. But the supposed virtue of the word *such*,

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did not avail in *Doe* v. *Goldsmith*, where it must have been held an executory devise;—whereas, in this case, it is clearly a contingent remainder.

The inconvenience of the supposed intention has been already noticed. If only one child should be born, they imagine the testator meant that he should take the lands for life. If twelve children, and eleven died infants, according to one construction, the survivor would take the whole;—according to another construction, he would take only a twelfth part. If the eleven died, leaving families, the families would take nothing. It was argued in the Court below, that under the will, cross remainders for life were to be implied, as among the children of William. But this argument was adverse to the interest of the heir at law, by whose counsel it was urged. It may be necessary to ascertain on which of the counts in the declaration they have entered up the verdict.—Some are on the demise of the children, some on that of the heirs at law. The judgment itself does not furnish the information.

Mr. Taunton. Lord Ellenborough said, that as there were counts on the demise of the heir at law, as well as the children, it was unnecessary to enter into the argument, as to the cross remainders, which might be material, as between the two sets of Plaintiffs; but was immaterial, as between them and the Defendants.

Lord Redesdale. Is Edward Wright living?

Mr. Sugden. Edward the son is living as well as the father. They put it as a forfeiture of the life estate.

Lord Redesdale. If it is a forfeiture by Edward the son, it must be because he took under the appointment; and so it must be argued as a forfeiture of the whole.

Lord Chancellor. Were other children living at the time?

Mr. Sugden. That appears only by inference to be drawn from the special verdict. The word "afterwards" in that part of the verdict which states the conveyance, does not conclusively mean in point of time, after all the facts before stated in it.

Lord Redesdale. Could the power be destroyed by forfeiture where all the children have an interest?

Mr. Sugden. Such a question is now depending before the Vice-Chancellor,* and probably will go farther.

Lord Redesdale. How could it be destroyed by such instruments as these? It must be by some instrument expressly renouncing it. How can a man, having a power for the benefit of children, destroy it?

Lord Chancellor. The appointment ought to be stated. It appears by the verdict, that Edward

* Smith *v.* Death, before the Vice-Chancellor, who delivered his judgment on the 19th of June, 1820. The decision was that the power could be destroyed. The same question was argued, but not decided, in West *v.* Berney, before the Vice-Chancellor in Hilary Term, 1819.—See Sugden on Powers, pp. 80, 81, third edition.

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was the son of William. How does it appear that the appointment did not take effect in his favour before any other child was born?

Mr. Taunton. In the special verdict there is no appearance of appointment.

Lord Chancellor. We sit here to decide on cases as they appear on the record.*

Mr. Taunton. On the trial, the appointment could not be proved; and it was agreed that it should be put out of consideration. The recital of a fact in a deed is no evidence against strangers. *A fortiori,* the mere description, cannot be evidence against the Plaintiffs in the action.

Lord Redesdale. Would not this instrument (in the absence of any other) operate as an appointment?

Mr. Taunton. It was executed *alio intuitu,* merely to make a tenant to the præcipe.

Lord Chancellor. The making Edward a party to the deed, is evidence that they did not choose to deal with William, as having an estate tail; and therefore took in Edward as having such estate. The question is, whether William so acting towards Edward, the deed of William must not operate as an appointment.

* No appointment is stated in the special verdict; but, in the printed case of the Plaintiff in Error, William is described as *appointee in tail general.* Upon this point see the observations of the Lord Chancellor in giving judgment, pp. 51, 52. This part of the argument is preserved on account of the judicial observations.

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Mr. Sugden. A recital has in Chancery been held to be an appointment.* A covenant to levy a fine has been held not to operate as a destruction of the power,† because the court looks to intention. So even where a fine has been levied.‡ A deed of covenant cannot so operate, because it imports an intention that something more should be done. And where a deed, declaring the uses (after the fine levied), was executed, in the manner required by the power, it was held, that the deed and fine taken together, operated as an appointment.‡ Admitting that the description alone does not make the son appointee, yet it may operate to show an intention of appointment, and being followed by the declaration of uses in the deed of recovery, they altogether operate as an execution, and not as a destruction of the power. This is a stronger case than that of Lord Leicester, and others of that class. There the ground was intention, to be inferred from the nature of the transaction. But here is an express declaration, operating as an appointment to the son. There is nothing on the face of the verdict to show that any other child was living at the date of the appointment. The subsequent birth of issue, in such circumstances, could never defeat the estate of the son. The difficulty which occurs in other cases, where there

* Wilson *v.* Pigott, 2 Ves. J. 351.

† The Earl of Leicester's Case, 1 Ventr. 278. It is also reported under the name of Wigson *v.* Garrett, or Garrad, 2 Lev. 149. Raym. 239. 3 Keb. 366. 489. 510. 536. 572.

‡ Herring *v.* Brown, 2 Shower, 185. 1 Ventr. 368. 371. Skinner, 35. 53. 71. 184. Carth. 22. Comb. 11.

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are not contingent remainders, does not arise in this case.

The argument that the children took mere life estates, is sufficient to destroy the Respondents' case. There is no authority extant, in which the words, "heirs of the body," in such a case as this, have been cut down to life estates. The children have always been held to take the inheritance.

The authorities cited in support of the adverse claim are not applicable to this case. In *Goodtitle* v. *Herring*,* the limitation to the "heirs male of the body," was in a subsequent part of the will clearly explained, nay, even expressed to mean *sons*. In this case we have no such expression or explanation. In Archer's case,† the limitation was to the *next heir*, in the singular number, and words of limitation were superadded, viz. *to the heirs of the body* of that *next heir*. In *Cheek* v. *Day*,‡ the devise was to the heir in the singular number, and words of inheritance in fee were grafted upon that limitation. In *Walker* v. *Snow*,§ the same circumstances occurred, and it was, moreover, clearly a description of the person. *Lisle* v. *Gray* ‖ was nearly similar to *Goodtitle* v. *Herring*,** where the words heirs male of the body, were explained by the will, to mean sons successively. So in *Lawe* v. *Davies*,†† occurred the

* 1 East. 264.

† Rep. 66.

‡ Moor. 593. 2 Roll. Abr. 417. (G.) pl. 7. Cro. Eliz. 313. Ow. 148. (cited Ld. Raym. 295. and Fitz. Gib. 24). See also White *v.* Collins, Com. Rep. 289.

§ Palm. 359.

‖ 2 Lev. 223. Raym. 278.

** 1 East. 264.

†† 2 Ld. Raym. 1561.

same explanation by subsequent words, of the limitation to the *heirs lawfully to be begotten.* In *Doe* v. *Laming*,* not only were there superadded words of limitation in fee grafted on the limitation, to the *heirs of the body*; but, moreover, the devise was to heirs of the body, as well *males as females*; and being of lands in Gavelkind, those words could not operate by way of limitation, but must of necessity, in order to effectuate the intent of the testator, operate by way of purchase. For the limitation, as it stood expressed, included issue who could not take by descent.

In this case the testator by the word *such*, might mean to refer to children; children might have been the *issue* contemplated. But he had before expressed, and it must be presumed he intended an entail that all the issue of William might inherit. Here, therefore, are incompatible intentions, and the general must prevail against the particular intent. So in the case of *Coulson* v. *Coulson*,† it was argued, from the interposition of trustees, to preserve contingent remainders, that the testator contemplated, and intended to raise contingent remainders to be preserved, and probably it was so. But the general rule prevailed in that case, notwithstanding such probable particular intent to be inferred from that provision and limitation.

William being an illegitimate son, he and his children were strangers to the testator. This has in all

* 2 Burr. 1100. 1 Black. Rep. 265. Et vid Durnf. and East. Rep. a note on this case.

† 2 Stra. 1125. 2 Atk. 246, et vid Hodgson et ux *v.* Ambrose. Dougl. Rep.

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such cases furnished an argument upon the gift, over in default of issue. The words operate as a gift to the heir at law. But when vested, he is in at law by descent. The question is, whether the testator ever intended it should go to his heir at law, whether by descent or by devise, until all the issue of the illegitimate son were extinct.

As to the words "among the heirs of the body, "share and share alike, as tenants in common, "&c." they have in many cases been rejected, where it has appeared that the testator intended to give to the whole line of the issue. It is necessary in such cases, to hold it to be an estate tail, to guard against the inference from the want of any express limitation or implication of cross remainders among the children, so as to give the estate of a child dying without issue, to the survivors. The cases show that it ought not to be implied that the father takes for life only, unless the court can raise such further implication, as to give the whole estate to all the children. In *Doe* v. *Smith*,* the devise was to M. A. and the heirs of her body, as *tenants in common*, which was held to give an estate tail, notwithstanding those latter words, and the reasoning of Lord Kenyon in delivering judgment in that case, is applicable to, and decisive of this case. Again, in *Doe* v. *Cooper*,† the devise was expressly to R. C. for life *only*; and after, &c. to the *issue* of R. C. as tenants in common; and in case R. C. should *die* without *leaving lawful issue*, to E. H. and her heirs. The court held

* 7 T. R. 531. † 1 East. 229.

that an estate tail by *implication* vested in R. C., because cross remainders among the children could not be implied; and although it was admitted by the judges, that it appeared to be the particular intent of the devisor that R. C. should take only an estate for life; yet that intent, being inconsistent with the general and paramount intent, that all his issue should inherit the entire estate before it went over, was disregarded. The words of the will in that case were, on the one hand, much stronger for a tenancy for life; on the other, much weaker for a tenancy in tail, than the words of this will. In *Frank* v. *Stoven*,* which was a devise to B. F. for *life*, *without impeachment of waste*, and with *power to jointure*; and after, &c. to the *issue male of his body* and *their heirs*; and *in default of such issue*, to R. F., &c. It was held an estate tail in B. F., although the issue or children, apparently were made the stock of a new line of heirs, and the first estate was given expressly for life, with powers not wanted by a tenant in tail. In that case also, the particular intent was disregarded; and the recovery was upheld, by which the children were disappointed. So in *Franklin* v. *Lay*,† lately decided, although superadded words of inheritance occurred in that case also, the same principles of decision were upheld. In *Mogg* v. *Mogg*,‡ where the first devise was to children for life, and the remainder to the *issue* of the children

* 3 East. 548.

† Before the Vice-Chancellor, 3rd May, 1820, not reported.—See the note at the end of the report of this case.

‡ 1 Meriv. 654. Some of the children were unborn.

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and their heirs, as *tenants in common*; and in default of *such issue* over,—it was held on the doctrine of Cy-pres, where the limitations would otherwise have been void as a perpetuity, a devise to the children, as tenants in common in tail, with cross remainders. In *Mogg* v. *Mogg*, the limitation was void, as against the policy of the law, and the Court might on that account have refused to interfere. Here is no such impediment, and the children cannot otherwise than by giving an estate tail to the parent, take such interest as the testator intended. If, according to the argument, the children would take estates only for life, the necessary consequence is, that the parent must take an estate tail; otherwise the intention of the testator is frustrated. He intended to provide for the issue, and they would have no provision.

If the gift had been to "*children*," instead of "heirs of the body," the same argument would have arisen. The word children, when used as a *class*, gives the same interest. That appears by the authority of the Court of K. B. in *Doe* v. *Webber*,* a case in which there was a devise to M. H. and her heirs; and in case M. H. should die and leave no child or children to J. B., &c. The Court held that child or children meant issue, not confined to immediate, but extending to the remotest descendants. Such was the opinion of that Court upon a question, whether it was an estate tail, or an executory devise; whether the words child or children, in the contingent clause, introducing the remainder over, reduced the fee before

* 1 B. and A. 713.

given to an estate tail. Upon which point, nothing is to be collected in that case, except from the words introducing the devise over itself. But in this case, it is an express devise in tail; and the intention clearly appears not to give any estate to the heir at law, until the remotest issue of W. are extinct.

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As to the intention, the Respondents have argued nothing. They rely on the rigid legal construction of the words. They contend, 1. that under the power, the heirs of the body must take as purchasers; and if so, as children. 2. That in default of appointment, they take as tenants in common; again, as they argue, as children. Lastly, they say, the limitation introducing the remainder over, viz. in default of *such* issue, directly refers to "*child*," the last antecedent; and therefore issue in that place means children as before. To the first argument, the answer is, that the donee might have appointed to any of the heirs of the body, considering them as a class. Which of the words come first, and which last, is immaterial. The power is to appoint to heirs as purchasers, and not as descendants. Such a power cannot break the estate tail; it would not do so if the devise were to children. Taking the word to be "children," according to their construction, he might appoint to any of his descendants. *Liefe* v. *Saltingstone.** Under the power in this case, William might have

12th June.

* 1 Mod. 189. In that case the devise was to the wife for life; and "by her to be *disposed* of to such of my children, &c.;" and the judges being a majority who decided the case, relied on the word "*dispose*," as implying such a power as the testator himself had, which was to dispose of the fee.—See the next page.

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given the estate in fee * to a person filling the character of heir of the body. It is said that there are no words empowering such appointment. But the authority last cited proves that words of inheritance are not necessary, even if the devise had been to "*such children*," &c. In *Doe* v. *Goldsmith*,† the devise was to F. G. for life, and after, &c. to the *heirs of his body*, &c. as F. H. should appoint; and in default of *such heirs of his body*, then immediately after his decease to J. G. In that case *heirs of the body* must mean children, if they do so in this; and so it was argued. Yet the court held it to be an estate tail by implication. Such a power was never adjudged to defeat an estate tail. ‡

As to *Doe* v. *Goff*, where the devise was to M. and the heirs of her body, as tenants in common, and not as joint tenants; but if such issue should die before he, she, or they respectively attain the age of twenty-one, then to J. M. and his heirs, it was held an estate in the children, in common in tail, chiefly upon the effect of the

* Upon the general question, whether a fee simple may be given under a power to appoint among the heirs of the body, issue, children, &c. without any additional words to extend the power. See Sugden on Powers, 9. c. s. 10. In the King *v.* Marquis of Stafford, the Court said they would not determine the general question, but relied on the efficacy of the words *manner and form*. The power in Phelps *v.* Hay had the same words. Sugden on Powers. Appendix, No. 18.—See ante, p. 9.

† 7 Tau. Rep. 209, and 2 Marsh. Rep. 517. Mr. Sugden added, *arguendo*, that the case was free from prejudice, because Doe *v.* Jesson was not cited or noticed. V. Post. 44.

‡ That remainders in default of appointment are not suspended or kept in contingency by powers annexed to, or which accompany preceding estates. See Cunningham *v.* Moody, 1 Ves. 174. Doe *v.* Martin, 4 T. R. 39.; and the same doctrine as to personal property, 1 Ves. 210. 2 Ves. 208. Amb. 365.

words preceding the limitation over. As to *Gretton* v. *Haward*,* the devise was to A. H. she first paying all my just debts, &c.; and after her decease, to the *heirs of her body, share and share alike, if more than one; and in default of issue, to be lawfully begotten by me, to be at her own disposal.* The case was decided on the peculiar language of the will importing that the gift was not after an indefinite failure of issue. *Doe* v. *Covey*,† which is not yet reported, depends on the principle of *Doe* v. *Laming*.‡ The children themselves, in each of those cases, by the effect of the superadded words, took a fee as the stock of a new inheritance. In *Seaward* v. *Willoch*,§ the estate was given to the issue expressly for their lives only. The ground of decision was, that the will shewed a single intent to create a succession of estates for life, not warranted by law. And it could not be modelled as an executory devise, as in *Humberstone* v. *Humberstone*,‖ in Chancery. But here the devise does not confine the estate to the children, to an interest for life; but, on the contrary, clearly means to give an inheritance.

It is argued, that he meant the children to take, if more than one, because he gives to one child, if there should be but one. No doubt that was his

* 6 Tau. 94. † In the K. B. ‡ 2 Burr. 1100.

§ 5 East 198. This was a devise to A. for life; and after him to his eldest, or any other son after him for life; and after them, to as many of his descendants, issue male, as shall be *heirs of his or their bodies*, down to the tenth generation, during their lives.

‖ 1 P. W. 332. This was a devise to trustees *to convey*, &c. to children of unborn children for life, which the Court, upon *doctrines of equity* modelled, by decreeing conveyances to existing children for life, and to unborn children in tail, &c.

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intention, and that they should take as purchasers; but he also intended that children's children, to the last generation, should inherit before the estate should go to the remainder-man. In the case of one child, he meant that the one child should take the inheritance; and a limitation to children, or a child, as a class, is sufficient to give such interest. It is said, that in the power enabling appointment to the heirs of the body, there are no words of inheritance; and that, therefore, the appointment of an estate of inheritance is not authorized by the power. But it is settled, that where there is a devise to the *heir*, although there are neither words nor intent expressed to give him the inheritance, and although the estate vests in him by purchase, as a person described, yet he may take the whole inheritance. *Burchett* v. *Durdant* * was decided on this principle. The objection was taken in that case, for the want of words of inheritance; but the

* This case is reported in a former proceeding between different parties, but upon the same question and title, in 1 Ventr. 334, under the name of James *v.* Richardson. Upon the writ of error in the second proceeding it is reported, 2 Ventr. 311, under the name of Burchett *v.* Durdant; and upon the point urged in the above argument, the Court certainly held that G. D. took an estate tail, upon the ground that *heirs* is *nomen collectivum*. But the Court further held, "that in case the first words, (viz.) "*heirs* of the body now living, would carry but an estate for life "to G. D. yet the subsequent words would make an entail in "him, (*viz.*) *and to such other heirs*, male and female, as he "should hereafter happen to have *of his body*. This would clearly "vest an entail in G. D. he being heir of the body of Robert, "and surviving Robert." This case is also reported by Keble, 3, 832, Pollexfen, 457, Jones, 99, Levinz, 2, 232, and Raymond, 330, as between James and Richardson: and in Carthew, 154, Skinner, 205, and Comberbach, 153, as between Burchett *v.* Durdant.

Court held it was *a fee* * in the person described, as heir of the body now living. Such limitation operates doubly; first, to point out the person, then to give the inheritance. That is an authority depending upon three judgments in the courts below, and two in this house. The children, therefore, in this case, must take an estate of inheritance, and for that purpose, William must take an estate tail. In *Wharton* v. *Gresham*,† although the devise was to *sons*,‡ one branch only of issue, the Court held, that the tenant for life had an estate tail. In *Hodges* v. *Middleton*,§ the words child or children are used throughout the will, the limitation over is on failure of children, not issue. The Court collects the intention to give the parent the inheritance, from the use of these words as a class. So in *Jones* v. *Morgan*,‖ Lord Thurlow held, that where children are to take as a class, they must take as heirs.

As to the argument founded on the word *such*, *child*; the words are "for want of such issue;" and the fair construction, even grammatically, is not by a narrow reference to the last preceding object designated, but generally to all the limitations, to "heirs, issue, or children." Reading all the clauses of the will together, it means in default of all the issue before named or specified. It is said, the testator himself has explained what he means

* This must be understood fee-tail, for such was the decision.

† 2 Black. Rep. 1083.

‡ It was to A. and his sons in tail male; and for want of such issue over, and A. had no issue at the date of the will, or at the death of the testator.—See Wilde's case, 6 Rep. 16.

§ Dougl. Rep. 415.—See post, p. 38. ‖ 1 B. C. C. 206.

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by heirs of the body. But he does not say that children only are to take as heirs of the body; but that they are to take in the first instance, the first in the order of succession. So in *Robinson* v. *Robinson*,* and *Pierson* v. *Vickers*,† the word *such* occurred, following the word "son" in the first, and "sons and daughters" in the latter case. Yet the Court held in both those cases, that the word "such" referred to issue generally, and was not restricted to sons and daughters. So also in *Doe* v. *Goldsmith*.

The question, whether cross remainders are to be implied between the children as tenants for life, ought to be decided for the satisfaction of the Plaintiffs in Error, if the judgment is against them. It ought to be ascertained by the judgment, which of the Plaintiffs below are entitled, that the Plaintiffs in Error may know the grounds on which they are deprived of the estate, if that should be the result.

The words *heirs of the body* having, in the present case, been considered to mean *children*, the subsequent words, "and for want of *such* issue," were held by the judges in the Court below to refer only to children; for *such*, it was said, is a word of reference. But why, it may be asked, not extend it to the *heirs of the body*, to whom the estate was expressly given? There is certainly considerable evidence, on the face of the will, that the testator intended that William's children should take by purchase; but there is stronger evidence that he meant them to take such an estate as they could transmit to their issue, so as to include all, "the heirs of the "body of William issuing," for want of which

* 1 Burr. 38, and 2 Ves. 225. † 5 East. 548.

only he intended the estate to go over to his own right heirs. Some stress was laid upon the circumstance that the estate was expressly devised to William for his life. But that circumstance has been disregarded in similar cases, even where the strong negative words *only* and *no longer* have been superadded. But it is material in this view, that it shows, by opposition, that he did not intend the *children* to take life estates only. "To William "for life, and after his decease to his children." Had he intended them also to take for life only, he would, of course, have said so. *Lord Mansfield* often truly observed, that when a man gives a house to one, he always means to give the entire interest in it, the same as if he had given him a horse. To effect this intention the Courts have gone great lengths, to supply by other words and implications, the want of express words of inheritance. This is the only case in which express words of inheritance have been cut down to life estates only, and this in order to effectuate a supposed intention, which in itself is absurd, and evidence of which is wanting on the face of the will.

It is said, the provision and devise, if one child, to that one, includes the other case, viz. of there being more than one, in which case they were all to take. Granted. But still it remains to show, that, because the children were to take, they were to take life estates only. "If but one child, the whole "to that one child," *i. e.* the whole estate, and also the testator's interest in it. This is what the testator meant, although his meaning cannot in *this way* be effectuated. The gift over, "for want of "such issue," afforded irresistible evidence of the

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intention that the estate should not go over until a general failure of William's issue. The force of those words was taken away by considering them to apply only to children. The will, as it stands by force of the decision in the Court below, is certainly a very different disposition from that which the testator intended to make.

The will made by the judgment in the Court below is to William for life: remainder to his *sons and daughters* as he shall appoint, *but not giving them more than life estates:* in default of appointment, to his *sons and daughters* share and share alike *for their lives;* and if there shall only be one child *born,* the whole to that one *for life;* and *after the death of each child, his or her share* over.

It was only by this construction that it was possible to weaken the force of the words "for want "of such issue." *Lord Northington* has observed, that "for want of such issue," means for default of such issue. There is something, he adds, of peculiar force in this expression, and the law supposes the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue.* So *Mr. Justice Lawrence* said, in † *Pierson* v. *Vickers,* that these words are always construed to mean an indefinite failure of issue, unless restrained by other words. In this case there are no such words, nor any authority in the books for the construction which has been put upon the words actually used by the testator.

It is immaterial whether the words were *heirs of the body* or *children,* in either case the intention

* T. R. 227, note. † 5 East. 552.

would be equally apparent to pass the inheritance. A tenancy in common is incompatible with an estate tail in the parent, but that does not prove that the testator intended the children to take for life only.

The following rules may be safely laid down:

I. That a devise may, in favour of the intention, include all a man's possible issue, although in terms only a particular class is included.

II. That if words are used which denote an intention to give the estate to the children by purchase, they shall take in that character, where they can take by force of the will, such an estate as will include all the issue, so that the estate may not go over before a total failure of issue.

III. That although such an intention is apparent, yet where the general intention, viz. to include all the issue, can only be effectuated by vesting an estate tail in the parent, he shall take that quantity of interest in opposition to the words of the will. The particular intent of the testator shall be sacrificed in favour of his general intent.

The leading authority on the first rule is *Robinson* v. *Robinson*.* There the testator devised his estate to Lancelot Hicks, for and during the term of his natural life *and no longer*, provided that he altered his name to Robinson, and lived at his house of Boclyne. And after his decease to *such* son as he shall *have* lawfully to be begotten, taking the name of Robinson; and for default of *such* issue then, I bequeath the same to my cousin, Wm. R. and his heirs for ever. The judges certi-

* 1 Burr. 38, and 2 Ves. 225.

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fied that Lancelot must by *necessary implication* to *effectuate the manifest general intent* of the testator, be construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson, notwithstanding the *express* estate devised to him for his life *and no longer*.* This cause was decided the same way in the Court of Chancery; and afterwards, upon great consideration, was affirmed in the House of Lords.† It was the leading authority upon which *Lord Kenyon* decided many similar cases, all of which will be over-ruled, if the children in this case shall be held to take for life only.

The power in this case is in favour of the Plaintiff in Error; but we may strike out the power, without weakening the effect of the other words, upon the authority of *Seale* v. *Barter*.‡

In *Robinson* v. *Robinson*, the limitation, after Lancelot Hicks' decease, was to such son as he shall have lawfully to be begotten, taking the name; and for default of such issue over.

Will any lawyer attempt to distinguish the cases, with a view to show that Mr. Robinson intended to include all Mr. Hicks' issue, and that Mr. Pershouse did not intend to include all Mr. Wright's issue.

The case of *Robinson* v. *Robinson* is a decisive authority also in favour of the general construction of the words "for want of *such* issue." According to the decision of this case in the Court below, the will in *Robinson* v. *Robinson*

* And (it should be added, to complete the proof of the proposition,) the express devise to his son.

† 3 B. P. C. 180. ‡ 2 Bos. and Pull. 485.

should have been construed as giving an estate for life in Lancelot, with remainder to his first son for life, with remainder over. There no words like *heirs of the body* intruded themselves. It was not necessary to take away the force of any words, but merely to put a plain construction on the words which the testator had actually used; and they were simply to Lancelot for life, then to such son as he should have, and for default over.

In the case of *Pierson* v. *Vickers*,* which was decided by *Lord Ellenborough, C. J. Lawrence, J. Grose, J. and Le Blanc, J.* the limitations were to the testator's daughter, Ann, and to the heirs of her body lawfully to be begotten, *whether sons or daughters*, as tenants in common, and not as joint tenants; and in default of *such* issue, to his sisters for their joint lives; remainder to a trustee to preserve contingent remainders: and after the decease of either of them, to all and every the child and children of, &c. *whether sons or daughters*, and their heirs and assigns for ever, as tenants in common, and not as joint tenants: it was held that Ann took an estate tail, notwithstanding the argument, that the testator had explained heirs of the body to mean children, viz. sons and daughters. How, said *Lord Ellenborough*, do you get rid of the words, "in default "of such issue?" *Such*, it was insisted, had reference to sons and daughters. The testator, it was said, meant the estate to go over, if Ann left no sons or daughters living at her death. But

* 5 East. 518.

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Mr. Justice Lawrence asked, what is there in the will to confine the words, "in default of issue," to issue living at the time of Ann's death? Because, (it was answered,) a fee was before given to the children;* but the learned Judge added, "these "words are always construed to mean an inde- "finite failure of issue, unless restrained by other "words." This is a decisive authority. Where is the distinction between the cases? The devise here, it may be said, is expressly to W. for life; whereas, the other devise, is in one sentence to Ann and the heirs of her body. But we have seen, that an express devise to a man for his life *and no longer*, is in these cases immaterial. It is immaterial, *Lord Thurlow* observes, in *Jones* v. *Morgan*, that the testator meant the first estate to be an estate for life. "I take it that in all cases the "testator does mean so. I rest it upon what he "meant afterwards. If he meant that every other "person, who should be his heir, should take, he "then meant what the law could not suffer him to "give, or the heir to take as a purchaser. All "possible heirs must take as heirs." If then we discard as utterly unwarranted by law this distinction, the next difference is, that the testator, in the supposed explanation of what he means by "heirs of the body," in the one case speaks of *children*, in the other of *sons* or *daughters*. *Children* is a stronger expression in favour of an estate tail than *sons* or *daughters*. Sons or daughters, it may be said, mean males or females. No doubt

* Not so expressly to the children of the daughter.

they do; but considered, as the words in our case have been in the judgment below, they mean males or females *who are "sons and daughters,"* not males and females who are grandsons and grand-daughters. Besides, in *Pierson* v. *Vickers*, the testator had expressly in a subsequent part of the will said, that, when speaking of sons or daughters, he meant *children*, and children only. For in the devise over to the *children* of his sisters in fee, (who took strictly by purchase,) he says, "to their chil-"dren, whether sons or daughters." Did this mean whether grandsons or grand-daughters? If not, how was that meaning collected in the prior part of the will, except from the very words which are found in the present case, and lead to the same construction. But in our case, it may be urged, that the testator says "if only one child," &c. The same thing is implied in *Pierson* v. *Vickers*, for it is quite clear that if there had been only one child, he was as competent to take as an only child in our case would be. In both of the cases there was a manifest intent to include all the issue. In the case of *Pierson* v. *Vickers*, that intent was effectuated in the face of obstacles which do not occur in this case. It is impossible that the decisions in the two cases can stand together.

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The case of *Doe* and *Burnsall* * was relied upon as supporting the judgment in the Court below, but there the children *took the fee;* the words being large enough for that purpose; and therefore that case, like many others, must be classed under the second rule above noticed, and cannot govern a case

* 6 Term Rep. 30.

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in which, if the children do take by purchase, the consequence may be, that neither they nor their issue may ever derive any benefit whatever from the devise.

The only cases which were relied upon in favour of the words "for want of such issue," being construed "and after the deaths of "the children," were *Hay* v. *Lord Coventry*,* and *Denn* v. *Page*.† But those cases differ, *toto cælo*, from the present. There, after a regular provision for sons in tail, a limitation was added to daughters without words of inheritance; and for want of such issue over. That is not an improbable disposition, and cannot be compared with this case. Upon the judgment in *Denn* v. *Page*, *Lord Kenyon* has made the following observations:‡—"The case of *Denn* d. "*Briddon* v. *Page*, has been relied on by the Plain- "tiffs in Error, where *Lord Mansfield* intimated "an opinion that there was a blunder in the will. I "find myself pressed by whatever fell from so great "a judge, and it is always with doubt and distrust "of my own mind that I differ from him in opi- "nion; but I am not prepared to say that there "was any blunder in that will. There the devisor "gave to S. Nash, the son of T. and M. Nash, for "life, remainder to trustees to preserve contingent "remainders, remainder to the first and other sons "of S. Nash, and the heirs male of his and their "bodies; then having provided for the male heirs "(who are generally the favourites in cases of land-

* 3 Term Rep. 83. † And the note.

‡ In Dacre *v.* Dacre, 8 T. R. 116.

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" ed property), it is not improbable that it should oc-
" cur to the testator to provide for the present gene-
" ration, and therefore he devised to all and every
" the daughters of the body of T. Nash, by his
" then wife, and for default of such issue, to the
" right heirs of T. Nash for ever. Now, when there
" is nothing in the will to lead to such a supposition,
" why should it be supposed that that was a blunder
" which brought forward the daughters of sons in
" preference to the issue of the sisters. I have
" known many cautious testators make limitations
" in their wills like that." In the above case clearly all the children took by purchase; the sons express estates of inheritance, the daughters estates of freehold only. It was not a gift to *children* generally, but to daughters, a particular class of issue. And the words, " for want of such issue," were satisfied by the previous estates of inheritance in the sons, and the life estates in the daughters. It never occurred to any judge that that case clashed with *Robinson* v. *Robinson*, or *Pierson* v. *Vickers*, which are clear and decisive authorities, that in a case like this, the words, " for want " of such issue," mean a general failure of issue.

This is the first case in the books in which the force and operation of the words " heirs of the " body" have been so frittered away; but even if it be conceded, that the testator has explained the words *heirs* of the body to mean *children*, yet it would equally follow, that all the posterity of William were intended to take.

In *Wilde's* case * there was a devise to A. for life,

* 6 Rep. 16, Mo. 397.

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remainder to B. and the heirs of his body, remainder to Rowland Wilde and his wife, and after their decease *to their children*, Rowland and his wife then *having a son and a daughter*, it was ruled that "they took joint estates for their lives: but if A. "devise to B. and his children or issues, and he "hath not issue at the time of the devise, the same "is an estate tail." According to *Moore's* report, *Popham*, and *Gawdy*, held that Wylde took an estate tail, notwithstanding that he had children living at the time of the devise, though Fenner and Clench thought it was only an estate for life, all agreed that it was an estate tail if no children. In the present case William had no children at the time of the devise or at the death of the testator.

So a devise "to William for the term of his life "(as in the present case), and after his decease to "the men children of his body; and if William "die without man child of his body," then over was held to be an estate tail in *William*.* There are other authorities to the same effect.

The case of *Hodges* and *Middleton*,† bears closely upon this, if the words, heirs of the body, are to be read as children. There the devise was of real estate to A. and *at her death* to her *children*, and in case of failure of children, over. A. had issue living at the death of the testatrix, and at the date of the will. The court inclined to think that A. took in tail, but if she took only for life, they held that the children would take in tail. It is a powerful authority against the decision in the present case.

So in *Seale* v. *Barter*,‡ where the devise was

* 1 And. 43. † Doug. 431. ‡ 2 B. and P. 485.

to the testator's son John and his children, lawfully to be begotten, with power for him to settle the same on them; and for default of such issue, over. John had no issue at the date of the will, and it was held that he took an estate tail.

No answer was attempted to be given to these authorities, which directly prove that William Wright became entitled to an estate tail under Pershouse's will.

It is not necessary to demonstrate that the intention cannot be effectuated under the second rule. It is clear, that, if the children are to take by purchase, they cannot take all the interest which the testator intended. The very decision in their favour gives them merely life estates as tenants in common, which in event might not give to them *any* beneficial interest. In all the cases which it is possible to cite from the books, where the heirs have been held to take by purchase, the words of the will were sufficient to give them an estate, which would include all the issue for whom the testator intended to provide. There are several cases accordingly, in which, although the children taking by purchase, would take an estate tail; yet that construction was not adopted, because cross remainders could not be raised between them.*

The consequence of the exclusion of the case from the second rule, is, that it falls within the third. Certainly the intention that the children should take as tenants in common is incompatible with an estate tail in the parent; but it has long been the settled law of the land, that that circumstance shall give way to the general

* As to implication of cross-remainders, see post, p. 47, note.

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intention to include all the issue. *King* v. *Burchall*,* *Doe* v. *Applin*,† *Doe* v. *Smith*,‡ *Doe* v. *Cooper*,§ and *Pearson* v. *Vickers*,‖ have decided this point beyond the reach of controversy. It will be conceded, that all William's possible issue can only take through him. He therefore, to effectuate the testator's manifest general intent, must be held to take an estate tail.

For the Defendants in Error—*W. E. Taunton* and *C. Puller*.

The ejectment was brought on behalf of the children; and an attempt was made to argue the case, on the ground that cross remainders were to be implied among the children. But as the heirs were made parties to the action in a distinct count, the Court refused to hear that argument; and the judgment was entered up on the count for the heirs, which might be applied in favour of the children. If cross remainders can be implied, the entry of the judgment is wrong. But this does not affect the substance of the case. The proposition to be maintained is, that William took only an estate for life, with remainder for life to the children. On the other side they contend that the testator had two intentions, and that one is paramount; viz. that the estate shall not go to the ultimate remainder man, until after an indefinite failure of issue. There is no such paramount intent. The testator designates the class of persons among whom the power is to be exercised, and gives the estate over, on failure of the ob-

* Ambl. 379, 4 T. Rep. 296. † 4 T. Rep. 83.
‡ 7 T. Rep. 531. § 1 East. 229. ‖ 5 East. 548.

jects of the power, if they should not be living at the death of the tenant for life. That the words "heirs, or heirs of the body," have not always their strict technical meaning in so extensive a sense as the Plaintiffs in Error contend, it is sufficient to quote Archer's case.* That case is not indeed applicable in terms, which can rarely happen in the case of a will. But it may be cited to prove that there is no such essential virtue in the word heir, that it must carry the estate to all generations. *Walker* v. *Snow*,† *Lisle* v. *Gray*,‡ *White* v. *Collins*,§ *Lawe* v. *Davies*,‖ *Doe* v. *Laming*,** and *Goodtitle* v. *Herring*,†† may be adduced in proof of the same proposition.

In *Lawe* v. *Davies*, the devise was to B. and his heirs, lawfully to be begotten, that is to say, to his first, &c. sons successively to be begotten of the body of the said B.; and the heirs of the body of such first, &c. sons successively, &c. remainder over. That was held an estate for life in B. notwithstanding the subsequent limitation, to the heirs of the body of, &c. In the cases before cited, the words *heirs of the body*, or words equivalent, were contained in the instrument creating the limitations. Yet persons designated by those words were held to take by purchase. These words therefore may give less than the inheritance. In *Goodtitle* v. *Herring*, Lord Kenyon, speaking of

* 1 Co. 66. † Palm. 359.

‡ 2 Lev. 223. Raym. 278. § Com. Rep. 289.

‖ 2 Lord Raym. 1561.

** 2 Burr. 1100. 1 Black Rep. 265. et vide 3 Durnf. and East's Rep. a note on this case.

†† 1 East. 264.

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the technical force of those words, in delivering judgment, says, "it never has been decided "that those words might not be otherwise explained in a will by the testator himself. They "were so explained in *Lawe* v. *Davies:*" and afterwards he adds, "In former times indeed, "greater strictness was attributed to the meaning "of the words, 'heirs of the body.'" Here those words, as they are explained by the testator, are descriptive of the class of persons among whom the power was to be exercised; and it is the manifest intent of the testator, that if no such objects should be living at the decease of the tenant for life, the estate should go to the remainder-man.

The words of the will are to be weighed and considered, and also the fact that William was a natural son of the sister of the devisor. If the will had ended at the words "heirs of the body," where it occurs in the limitation over, for want of appointment, William, though the previous estate is to him expressly for life, would undoubtedly have taken an estate tail. As to the argument founded on *Seale* v. *Barter*,* if it is supposed to show that such a power of appointment is sufficient to give an estate tail, no such thing was decided in *Seale* v. *Barter:* nor do we argue that such power of appointment cannot possibly subsist with an estate tail, or that it is inconsistent with its nature. The limitations in *Seale* v. *Barter* are very different from the limitations in this case. In *Seale* v. *Barter* the question arose upon the codicil, which the Court held ought to be construed without reference to, or not to be

* 2 B. and P. 485.

controlled by, the will. By the codicil the estates were devised to J. S. and his children, lawfully to be begotten, with power for J. S. to settle the same on such of them as he should think proper; and for default of such issue, to, &c. Such a devise, without doubt, gave an estate tail to the son, no child of J. S. being in existence at the date of the will, or the death of the testator: and the Court properly held, that the power given to defeat or abridge the estate tail by appointment, did not of itself destroy that estate.

In this case there is no paramount intention that the estate should not go over, but upon indefinite failure of issue. The words "heirs of the body" must receive a limited construction. The testator himself translates the words, and shows what persons he means by "heirs of the body." In the first instance, clearly he must mean the *children*. If so, can he in the subsequent use of the same words mean something different? To make the will consist with the construction attempted by the Plaintiffs in Error, a multitude of words must be struck out of the instrument, "*Share and share alike, as* "*tenants in common; and if but one child, the* "*whole to such only child.*" All these words must be expunged. According to their construction, the former clause of these words is inconsistent, and the latter superfluous.

The words, "in default of such issue," must refer to the issue contemplated, as objects of the power of appointment, not issue indefinitely. Between a devise over to right heirs, and to a stranger, there is a material distinction. In the former case the party dies virtually intestate: for the devise is in

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operative; the heir takes by descent. But where the devise is to A. B. and then over to a stranger, he can only take in the event specially provided by the testator. An heir at law is not to be disinherited, but by express words or necessary implication. A special object of bounty must bring himself within the intent of the testator. Here the plain intent is, that if there should be no children of William, the estate should go over to the sister. "Heirs of the body" cannot here consistently mean all generations of issue, as in case of an estate tail. The donee of the power could not have appointed so as to give indefinitely to his issue for ever. William, (for instance,) could not have appointed to his eldest son, grandson, great grandson. &c. The clear intent was, that he should limit to the children living at or before his death. Could he pass by the existing generation, and appoint to a future descendant, however remote? That is forbidden by the law against perpetuities.

The provision in default of appointment for the special event, if there *should be but one child*, that he should take the estate, manifests the intent of the donor, that the power should be exercised among *children*. There is but one case adverse to this construction, *Doe* v. *Goldsmith*.*. It is an extraordinary argument to say that case is free from prejudice, because former cases were not there cited. That is rather a ground to impeach the authority of that case. If there is plain demarcation of the objects to which the words *heirs of the body* are applied, the power of appointment cannot be extended beyond them. The

* 7 Taunt. 209.

limitation over, is not in default of the issue of William, or generally, but in default of *such* issue, i. e. the particular objects of the appointment.

"Heirs of the body," in the clause conferring the power, and the limitation in default of appointment, means such heirs within a limited time, the life of William, the donee of the power. In default of *such issue*, can only mean such specific issue as before designated. There is, therefore, a total absence of the supposed paramount intention to give the estate over, only upon indefinite failure of issue. If so, the secondary, as it is called, being in fact the only intent, must prevail.

There are no words of limitation superadded, and consequently the children must take for life, according to the doctrine established in *Hay* v. *Earl of Coventry*.* There the limitation was to F. C. for life, remainder to her first and other sons in tail male; and in default of such issue, to the use of all and every the daughters of F. C. as tenants in common; and in default of such issue to his right heirs. That it is to "children" in one case, and daughters in the other, makes no difference in principle; and the limitation, over, is in the same words. The argument in that case, was not that it was to be presumed the testator did not mean to give an estate tail to the daughters, because he had expressly given one to the sons; but on the contrary, that the gift to the sons furnished a presumption of a similar intention as to the daughters, as appears by the judgment of Lord Kenyon, in which, upon this point he says, "I cannot find any words in the will to warrant

* 3 T. R. 83.

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" such a construction. If indeed, the word *such* " had not been introduced in this clause, we " might, perhaps, have said, that as issue is *genus* " *generalissimum*, it should include all the progeny. " But here the word *such* is relative, and restrains " the words which accompany it."

In *White* v. *Collins*,* the first limitation was to F. for life, and after his death to the heir male of his body for life; and the limitation over was for default of *such* heir male. It was held to mean such as before mentioned, that is, an heir male who was to take for life. In the present case, for want of words of inheritance, it is, by construction of law, an estate for life in the children. That circumstance does not, in principle, make it different from the case of *White* v. *Collins*, where the estate is given to the heir expressly for life. These are cases directly applicable, as authorities to the words of this will.

In the cases cited on behalf of the Plaintiff in Error, there was a paramount intent sufficient to over-rule the secondary intent. *Robinson* v. *Robinson* is the strongest of that class of cases, having words clearly indicating the intent, that the remainder should not take effect, but upon failure of all the issue of the particular tenant. The word used in the devise in that case, was *son* in the singular number. It was argued that the word was intended as *nomen collectivum*, meaning all the heirs for ever, and that the limitation over was to be construed and guided by that intent. In the certificate that argument was adopted: and it is to be noticed that in *Robinson* v. *Robinson*, the tes-

* Comyns. Rep. 289.

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tator at the end gave to L. H. the *perpetuity* of certain presentations *in the same manner* as he had given his estates.

In *Wharton* v. *Gresham*,* there was an express limitation in tail.

As to the dictum quoted from *Jones* v. *Morgan*, there is no doubt that to enable all the heirs to take by descent, the ancestor must have an estate of descendible quality. That principle is not denied; but the words of the will in that case were different from the words in this.

In *Bennet* v. *Lord Tankerville*,† the limitation over was in case of dying *without issue of the body*, referring to the words *heirs of the body*, which had been used before. The intent that all the issue should succeed in turn, could not be effectuated without giving an estate tail to the parent, which necessarily enlarged the estate for life. In *Doe* v. *Aplin*, *Chandler* v. *Smith*, *Doe* v. *Cooper*, and *Pierson* v. *Vickers*, the intent is clear, that the estate should not go over, but upon indefinite failure of issue. And it is to be observed, that in all those cases, the limitation over is to a stranger, who is a gratuitous object of the testator's bounty, and must bring himself within the clear intent. In this devise the limitation over is to the heir.

Frank v. *Stovin* is the case of an estate tail by implication. So in *Colson* v. *Colson*, *Mogg* v. *Mogg*, and *Doe* v. *Webb*,‡ which were decided on special

* 2 Blac. Rep. 1083. † 19 Ves. 170.

‡ 1 Tau. Rep. 234. The question in this case was upon a devise to F. and M. and A. and the heirs of their bodies respectively as tenants in common, whether cross-remainders could be implied between three devisees. It was decided in the affimative,

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grounds. In *Burchett* v. *Durdant*, the first question was whether the first limitation by way of use was executed. The decision was, that the use was not executed. But the authority of the case on that point has since been questioned.* A limitation to permit A. to receive, &c. would be a use executed. The second point in that case was, whether the remainder was contingent or vested, it being to the heir of B. *now living*. There was a son living at the date of the will and death of the devisor. Under such circumstances, the court held it a description of the person, and a vested remainder.

In *Hodges* v. *Middleton*,† the word "*estate*" occurred in the first limitation, and it was given over on failure of *children*, that is, of *children* indefinitely, which creates an estate tail by implication, upon the same principle as the words *issue*, &c. *Lief* v. *Saltingstone* is not applicable. The power in that case was altogether different. The decision in that case established only this doctrine, that a power of appointment may extend to an appointment in fee. That is not inconsistent with an estate for life in the donee, but the contrary. By a decision in favour of the Plaintiff in Error, the doctrines of implication would be carried beyond all former bounds. Here the words of the will clearly import the immediate children of the tenant for life. These were manifestly the heirs of the body in the on the ground of manifest intent appearing in the will that the estate should not be divided, but upon the limitation over go as an entirety.—See Roe *v.* Clayton, 6 East. 668, 1 Dow, 384.

* By Lord Holt in Broughton *v.* Langley, 2 L. Raym. 873. 2 Salk. 679.

† Dougl. 431.

contemplation of the testator. He has so explained himself.

Gretton v. *Haward*,* *Goodtitle* v. *Woodhull*,† *Doe* v. *Goff*,‡ are all authorities in favour of the Defendant in Error, applicable generally in language and in principle, if not in precise circumstance. As in those cases, so in this, "*such issue*" must mean such descendants of William, to whom he might, and by the will it was intended, he should appoint, that is, children. No paramount intent is to be collected from the circumstances of the case. The fact that William was an illegitimate son, is adverse to his claim.

The Lord Chancellor.§ "It is a general rule of "law, to be collected from a consideration of all the "cases, that a particular intent expressed in a will, "must give way to a general intent. It is surpris-"ing that so much pains should have been taken "to establish such a rule, the effect of which is, "usually, to enable the first taker to destroy "both general and particular intent. The words "*heirs of the body*, *prima facie*, mean all de-"scendants; and it is likewise a rule of law,

* 6 Tau. 94.

† Willes, 592. The devise, in that case, was to a son for his life, and to his male children *for their lives*, and to the *male children descending* from them. The Court held, it was a life estate only in the son.

‡ Upon the citation of Doe *v.* Goff, Lord Redesdale observed, that the words there, "'if such issue should depart this life be-"fore twenty-one,' &c." were insensible, if the estates are given to the children for life. The estates in such case would go over, whether they die before or after.—See the judgment, post, p. 58.

§ At the conclusion of the reply.

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" that all descendants should take under these " words, unless they are clearly qualified and " restricted by other words so as to give them " a more limited sense. The great judicial diffi- " culty arises in the application of these rules to " the words of each will. I cannot admit that all " the cases cited have been well decided: but it " was hardly to be expected that judges should " agree in the decision of all these cases; for the " mind is overpowered by their multitude, and " the subtlety of the distinctions between them. " These difficulties make it the more necessary " that we should deliberate before we determine " this case. The decision ought to accord with " former authorities, if possible; but, at all events, " we must adhere to the established rules of legal " construction." *Cur. adv. vult.*

15th June.

*The Lord Chancellor.** The question to be decided in this case is expressed in the words to be found in the errors assigned, the principal of which is, that the Court, by their judgment, have decided " that the said William Wright took only a " life estate under the said will of the said E. Pers- " house, with remainder to his children for life; " and that the recovery suffered by the said William " Wright, and Mary his wife, and Edward Wright, " was a forfeiture of their estate. Whereas, the said " R. Jesson, J. Hately, W. Whitehouse, J. Watton, " E. Dangerfield the elder, and T. Dangerfield, al- " lege for error, that the testator intended to embrace " all the issue of the said William Wright, which

* On moving the judgment.

" intention can only be effected by giving to the " said William Wright an estate tail, and the words " of the will are fully sufficient for that purpose." I will not trouble the House by going through all the cases in which the rule has been established; that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. The opinion which I have formed concurs with most, though not with every one of those cases. A great many certainly, and almost all of them coincide and concur in the establishment of that rule. Whether it was wise originally to adopt such a rule might be a matter of discussion; but it has been acted upon so long, that it would be to remove the land-marks of the law, if we should dispute the propriety of applying it to all cases to which it is applicable. There is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate, according to the general and paramount intent to destroy the interest both under the general and the particular intent. However, it is definitively settled as a rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

This is a short will. The decision in the Court below has proceeded upon the notion, that no such paramount intent is to be found in this will. Here, I must remark, how important it is, that, in preparing cases to be laid before the House, great

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care should be taken not to insert in them more than the words of the record. In page 3 of the printed case delivered on behalf of the Plaintiffs in Error, are to be found the words "ap- "pointee in tail general of the lands, &c. therein- "after granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. "I give and devise unto "William, one of the sons of my sister Ann "Wright before marriage, all that messuage, &c. "to hold the said premises unto the said William, "son of my said sister Ann Wright, for and dur- "ing the term of his natural life, he keeping all "the said dwelling-houses and buildings in tenant- "able repair." If we stop here, it is clear that the testator intended to give to William an interest for life only. The next words are, "and from and "after his decease, I give and devise all the said "dwelling-houses, &c. unto the *heirs of the body* "of the said William, son of my said sister Ann "Wright lawfully issuing." If we stop there, notwithstanding he had before given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control

and alter it as clear as the general intent here expressed. The words "heirs of the body" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible, and unequivocal. The will then proceeds, "in such shares "and proportions as he, the said William, shall, "by deed, &c. appoint." This part of the will makes it necessary again to advert to the extraneous words inserted in the case of the Plaintiffs in Error, and to caution those who prepare them. "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession: William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power; "and for want of such gift, direction, "limitation, or appointment, then to *the heirs of* "*the body* of the said William, son of my said sister "Ann Wright, lawfully issuing, share and share "alike as tenants in common."

It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession for ever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that "heirs "of the body," in this part of the will, must mean the same class of persons as the "heirs of the body,' among whom he had before given the power to ap-

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point; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as, for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The Defendants in Error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of appointment, the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body: but, because children are included in the words heirs of the body, it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "*for* "*want of* such *issue*," which follow, it is said,

mean for want of children; because the word such is referential, and the word child occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the "words share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms 'heirs of the body; for "want of such issue," they conclude, must mean for want of heirs of the body. If the words children and child are so to be considered as merely within the meaning of the words *heirs of the body*, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word "issue") there is an end of the question. I do not go through the cases. That of *Doe* v. *Goff* is difficult to reconcile with this case—I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary: because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law, than to provide against the hardships of particular cases.

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Lord Redesdale. There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson* v. *Colson*, it is clear that the testator did not mean to give an estate tail to the parent. If he meant any thing by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words, "heirs of the body," in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe* v. *Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should over-rule the particular, is not the most accurate expression of the prin-

ciple of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe* v. *Goff*, it has been held, that the words "*tenants in common*" do not over-rule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to over-rule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties: but look to the words used in the will. The words, "for want of *such* issue," are far from being sufficient to over-rule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "such issue," cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The Defendants in Error interpret "heirs of the body" to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words

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"heirs of the body" to mean children in this will. I think it is necessary, before I conclude, to advert to the case of "*Doe* v. *Goff*." It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe* v. *Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean—they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe* v. *Goff* is not law.

In this case even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children, might as easily be defeated, because William might, by agreement with the heir, have destroyed their estates before they arose. Suppose he had had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the

proportions would have been changed, and after-born children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

Judgment reversed.

*** *Franklin* v. *Lay*. My friend, *Mr. Sugden*, has kindly furnished me with the following note of this case:—

"I give to my grandson, John Franklyn, all that my moiety "or half part of and in all that messuage, tenement, and farm, "lands and premises, situate, lying, and being in Great Brom-"ley, in the county of Essex, called the Brush Farm, as the "same is now in the occupation of my nephew, Wm. Barnard, "of Lawford, in the same county, farmer, to hold the said "moiety of the said farm, lands, and premises unto my grand-"son, John Franklyn, and to *the issue of his body* lawfully to be "begotten; and *to the heirs* of such issue for ever, but subject "and chargeable with the payment of the mortgage of 400*l.* and "interest to my brother-in-law, Thomas Barnard, of Lawford "aforesaid, farmer. But if my said grandson, John Franklyn, "shall die without *leaving any issue* of his body lawfully begotten, "then I give and devise the said moiety of the said messuage, "farm, lands, and premises, with the appurtenances, unto my "said nephew, Wm. Barnard, and to his heirs for ever. *Held* "*to be an estate tail in John.*" *Franklin* v. *Lay*, Vice-Chancellor, May 3, 1820.