

## Construction and Execution of Trusts in Chancery, c. 1660-1750

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### Abstract

Relatively little has been written about the detailed workings of the court of chancery after the restoration. Even less is known about the doctrines of the chancery in the eighteenth century. Yet social historians of this period have relied on legal sources to generate a narrative which suggests that the landed classes were instrumental in determining the content of the rules governing family settlements. This article seeks to situate that narrative in the adjudicative context. Through a close textual analysis of the case law, supplemented by archival material, the article argues that, whilst successive chancellors did give voice to the underlying intentions of the settlor (and thus to the estate preservative policies of their class), the settlor's intention was not the sole prescribing law when construing family settlements.

### I. Introduction

The court of chancery has often been referred to as the court of the landed gentry - and not without good cause. But some socio-historical research has characterized the chancery judges as something akin to stooges for the landed gentry, permitting a patriarchal preference for preservation of family estates in the male line to determine the outcome of disputes.<sup>1</sup> It is my

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contention, however, that such a reading paints too simplistic a picture of the chancery and its judges. With the emergence of new modes of conveyancing involving complex trusts in the later seventeenth century, the chancery was required to adjudicate upon novel, sometimes sloppily drafted, instruments. Where the instrument was vague, or even self-contradictory, it was not uncommon for the judges to reason from common practice and the underlying intention of the settlor/testator. In these circumstances, it was perhaps unavoidable that judicial presumptions as to what landed fathers intended would seep into judicial decision-making – as, indeed, the secondary literature has suggested.

What is not clear from the secondary literature, but which can be gleaned from an analysis of the cases, is the extent of this jurisdiction to decree according to the perceived intentions of the settlor/testator. In this article, I consider three separate areas of the law in which the chancery was active in pursuing the intention of settlors/testators: (i) the descent of attendant terms; (ii) the payment of marriage portions; and (iii) the enforcement of executory trusts. Each area has been chosen because it reveals the complex interplay between settlor/testator intention, the policy of estate preservation and other competing concerns, including: statutory formality requirements; the standard of proof for intention; and the long-standing refusal to sanction perpetual settlements of land. In omitting the more granular aspects of adjudication, the secondary literature runs the risk of collapsing the technicalities of the law into mere verbiage which, supposedly, hides the underlying prejudices of the judges. In order to adequately explain the influence that the social has upon the legal, however, this article warns that we must first

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<sup>1</sup> For example: A. Pottage, 'Proprietary Strategies: The Legal Fabric of Aristocratic Settlements', 61 (1998) *Modern Law Review* (1998), 162; E. Spring, *Law, Land and Family: Aristocratic Inheritance in England, 1300-1800*, London, 1993; and S. Staves, *Married Women's Separate Property, 1660-1833*, Cambridge, MA, 1990.

understand the process by which those concerns enter the case law and not merely presume the existence of causal connections at the interface of law and society.

## II. Descent of Attendant Terms

The first context chosen in which the chancery pursued settlor/testator intention involved the adjudication of trusts of long leases. In our period, trusts of long leases were commonly used in mortgages and sales of land.<sup>2</sup> In the mortgage context, for example, the tenant in fee simple might grant a long lease to trustees, who would hold for the mortgagee until the mortgage debt was repaid. Upon repayment, the trustee would hold the lease for the benefit of the mortgagor. The term was then said to stand 'on foot', i.e. the owner of the land held the legal title to the fee simple and the benefit of the lease under the trust, whilst the bare legal title to the lease was left out in trustees. A problem arose in this context, however, where the owner of the land died with the term still out on trust. At law, the rules of descent meant that the fee would descend to the heir, whilst the benefit of the lease would go to the executor or administrator. The operation of the legal rules of descent therefore threatened to deprive the heir of possession of the family estate until the end of the term – against the likely intention of the deceased landowner. Originally, trusts of long leases would have included an express term that the trust should 'attend the inheritance', i.e. that the lease should descend with the fee to the heir. Where the trust lacked such an express provision, however, the chancellor would decree the term to attend the inheritance as a matter of course, thereby permitting the heir to claim the benefit of the

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<sup>2</sup> J.H. Baker, *Introduction to English Legal History*, 5th ed., Oxford, 2019, 323-324; D.E.C. Yale, *Nottingham's Chancery Cases, vol. ii* (Selden Society 79), London, 1961 (hereafter, 79 SS), 150-160.

lease.<sup>3</sup> The basis of this equitable construction was the perceived intention of the settlor to pass the long lease, with the fee simple, to the heir and thus keep the estate intact.<sup>4</sup>

Throughout our period, however, there were a number of difficult cases in which equity's role in the descent of attendant terms was disputed – typically arising where an instrument had been incorrectly drafted or some unforeseen circumstances threatened to disinherit the landowner's intended beneficiary. *Nurse v Yerworth* (1673-74)<sup>5</sup> provides a particularly vivid example of the kind of complexities which could arise in this context. In that case, Richard Yerworth the elder married the daughter of Thomas Nurse, the plaintiff. On 1 March 1649, Richard granted to the defendant, Christopher Yerworth, a lease of ninety-nine years to hold on trust for such persons as the settlor should appoint by will. On 9 March 1649, Richard Yerworth executed his will, granting a fee tail to the heirs of the body of his wife, remainder in fee simple to the defendant. Richard died on 24 March 1649 and, one month later, his son (Richard Yerworth the younger) was born. For the following two decades, it was thought by all parties that Richard Yerworth the younger was entitled to the land under the will. In 1671, Richard suffered a common recovery and devised the land to his grandfather, Thomas Nurse, for life with remainders down the maternal line. After Richard's death, Nurse exhibited his bill in chancery against the defendant, demanding a conveyance of the lease as attending

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<sup>3</sup> *Dowse v Percival* (1682-83) 1 Vern. 104, 2 Ch. Cas. 160; *North v Langton* (1683) 2 Ch. Cas. 155, 2 Ch. Rep. 271; *Saunders v Beale* (1688) 2 Vern. 62; *Best v Stamford* (1705) 2 Vern. 520, Prec. Ch. 253, 1 Salk. 154, 2 Freem. 288.

<sup>4</sup> See, for example, *Best v Stamford* (1705) Prec. Ch. 252: 'This was only an unskillful declaration, and not the intent of the party...[the term] must attend the inheritance'.

<sup>5</sup> D.E.C. Yale, *Nottingham's Chancery Cases, vol. i*, (Selden Society 73), London, 1957 (hereafter, 73 SS), 8, 70 and 114. See also: 3 Swanst. App. 608; 2 Mod. 8; Rep. t. Finch 155.

the inheritance. At the hearing, however, ‘the wit of counsel’ for the defendant turned the case on its head.<sup>6</sup> Counsel observed that it was a rule of the common law that a devise to an infant *en ventre sa mere* must be by express words (and not merely a devise to heirs begotten or to be begotten).<sup>7</sup> As such, Richard Yerworth the elder’s will had failed to devise the inheritance to his unborn son and it was Christopher Yerworth who was entitled to the inheritance as the testator’s heir at law. The question which arose on these newly emerged facts was whether Thomas Nurse, having lost the inheritance, had any right under the trust of the lease.

The defendant argued that, upon Richard Yerworth the elder’s death, he became entitled to both the inheritance (as heir at law) and to the legal title to the lease (as *per* the declaration of trust). As a result, the legal titles to the inheritance and the lease merged in his hands and there was no equity to decree in favour of Thomas Nurse.<sup>8</sup> Lord Nottingham (then Finch LK) was unpersuaded by these submissions. According to Nottingham, the common law rule relied upon by the defendant’s counsel was of debatable authority<sup>9</sup> and, whilst admitting that the rule governed devises of legal estates, he refused to apply it in equity. Had Richard Yerworth been the *cestui que* trust of a fee simple, Nottingham explained, the legal rule would not have applied because equity ‘will make any words with a presumptive intent a sufficient description to make the will work...rather than establish a disherison’.<sup>10</sup> Nottingham admitted, however, that there was a doubt as to whether equity could pursue the testator’s intention where, as in the present case, the father was a tenant in fee simple of the reversion and the *cestui que* trust of an

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<sup>6</sup> 73 SS, 115.

<sup>7</sup> *Ibid.*

<sup>8</sup> 73 SS, 70.

<sup>9</sup> 73 SS, 116.

<sup>10</sup> *Ibid.*, 117.

attendant term. It was clear that the legal rule operated to pass the inheritance to the father's heir at law and, were equity to interpose in favour of the posthumous son, the will would be relegated to operating 'by fractions' (i.e. the will would be void as to the inheritance, but valid as to the lease). Moreover, such equitable relief would require a finding that the will had severed the attendant term from the inheritance to create a term in gross.<sup>11</sup> Nevertheless, Nottingham decreed that:

though the term were originally to attend the inheritance, yet where the inheritance is carried away by a rigorous construction, the term shall not follow it, but is instantly severed by the law of equity and becomes in gross. So that the lease and reversion are not a twisted estate as Mr Pemberton [counsel for the defendant] called it, but the term is untwisted from the inheritance by act of law, the law of this court, and therefore, though equity revive this term notwithstanding the merger, yet it cannot revive it as attendant...The attendancy of long leases upon the inheritance is always governed and controlled by the conscience of this court...Now what greater cause can there be for this court to sever them than to mitigate and allay an unintended disherison?<sup>12</sup>

Nottingham thus severed the term from the inheritance to prevent an unintended disherison. The case demonstrated a willingness, not merely to construe inapt provisions of a will according to an underlying intention, but to actually dispose of the equitable interest in the testator's estate in favour of the unborn son – even though this resulted in the fragmentation of the estate across two different branches of the family. The willingness to decree the severance of a term which was expressly limited to attend the inheritance was an impressive display of judicial power, exercised in the pursuit of fealty to testator intention.

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<sup>11</sup> Ibid., 118.

<sup>12</sup> Ibid., 118-119.

The decision in *Nurse* was remarkable, but Nottingham's reasoning was carefully attuned to the facts of the dispute. Richard Yerworth the elder had intended to provide for his unborn son, but the 'infinite rigour and extremity' of the common law had thwarted the attempt.<sup>13</sup> The decree, therefore, pursued the intentions of the original testator, but there were also several suggestions in Nottingham's reasoning that the defendant, Christopher Yerworth, had not played a fair hand. Nottingham observed, for example, 'a contentedness in the defendant to let the heirs enjoy but a perfect ignorance of his own strength'<sup>14</sup> and sympathized with Richard Yerworth the younger's preference for the plaintiff over the grasping defendant ('No wonder he [Richard the younger] was so willing to defeat the defendant's expectation, who...appeared forward to succeed and so careful to provide for it'<sup>15</sup>). The family politics surrounding the disputed will, as well as both testators' intentions, thus seem to have weighed heavily in Nottingham's calculations when decreeing in favour of the plaintiff.

There were distinct limitations on the chancery's willingness to rewrite wills according to the putative intention of the testator, however, and the decision in *Nurse* may be regarded as something of an extraordinary case. In *Thruvton v AG* (1681-85),<sup>16</sup> for example, the plaintiff had also sought severance of an attendant term on the grounds of a testator's thwarted intention. Paul Williams (a bastard) had purchased a fee simple in his own name. Thereafter, he took a lease of the same land in the name of William Thruvton in trust for such purposes as he by deed or will in writing should declare and, in default of such writing, to attend the inheritance.

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<sup>13</sup> *Ibid.*, 117.

<sup>14</sup> *Ibid.*, 114.

<sup>15</sup> *Ibid.*, 115.

<sup>16</sup> 79 SS, 841 and 880; 1 Vern. 340; British Library (BL) Stowe MS 406, f 106v; BL Harg. MS 128, ff 4 and 10.

Paul purported to give all he had to Philippa Williams by an oral will. On Paul's death, oral wills being incapable of passing the inheritance<sup>17</sup> and Paul having died without heirs, the inheritance escheated to the crown. The question arose as to whether the oral will was nevertheless sufficient to sever the term from the inheritance and, thereby, pass the benefit of the lease to Philippa.

Unlike *Nurse v Yerworth*, however, Nottingham refused to sever the lease from the inheritance to provide for the testator's intended devisee. Nottingham explained that 'inasmuch as the declaration was for want of such express declaration in writing that the term should attend the inheritance that, he could not declare [by] parole or will nuncupative tho' it was insisted for the plaintiff that he did not intend to fetter himself by that declaration'.<sup>18</sup> Nottingham's decree was subsequently upheld by Jeffreys LC on the same grounds; the trust of the term had required a declaration in writing to dispose of the lease and the testator's oral devise to Philippa Williams was insufficient to sever the attendant term.<sup>19</sup> Jeffreys' reasoning does, however, provide a clue as to why the case might have been thought to differ from *Nurse v Yerworth*. In *Thrupton*, Paul Williams was reported to have granted 'all I have' to Philippa Williams.<sup>20</sup> According to Jeffreys, these words were to be construed as meaning 'all that he could dispose of by parole'<sup>21</sup> – such a construction was clearly defensible given that Paul Williams had previously limited dealings with the attendant term to those set out in writing. On this construction then, there was insufficient evidence to suggest that Paul had ever intended

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<sup>17</sup> 32 Hen. VIII, c 1.

<sup>18</sup> BL Stowe MS 406, f 106v.

<sup>19</sup> 1 Vern. 340.

<sup>20</sup> BL Stowe MS 406, 106v.

<sup>21</sup> 1 Vern. 340, 342.



to devise any interest in the land to Philippa, let alone that such an intention should be grounds for severing the attendant term. Whilst *Nurse* demonstrated that equity could intervene to prevent an unintended disinheritance arising from the descent of an attendant term, *Thrupton* proved that evidence of the testator's intention had to be indisputable.

The facts of *Thrupton* occurred prior to the passing of the Statute of Frauds 1677<sup>22</sup> and, as such, the statutory provisions did not enter into the judges' calculations when refusing a remedy to Philippa Williams. Following the passage of the statute, however, the scope for arguments from testator intention was significantly narrowed in this context. After 1677, wills of land were required to be signed by the testator and properly attested. In *Tiffin v Tiffin* (1680-81),<sup>23</sup> Nottingham again refused to sever an attendant term but now upon the basis that a contrary decree would undermine the formality requirements of the Statute of Frauds. In that case, the testator, by an oral will, purported to devise the inheritance and the benefit of a lease to JS for life, remainder to the testator's wife. The will was subsequently committed to writing and attested, but the testator died before signing it. As such, the inheritance descended to the testator's brother as the heir at law. The testator's wife took administration of the estate and the heir brought his bill in chancery seeking a declaration that the lease attended the inheritance. The term not being expressly limited to attend the inheritance, however, the wife claimed the benefit of the lease as personalty (i.e. as a term in gross).<sup>24</sup> Anthony Keck, counsel for the wife, argued that the nuncupative will demonstrated the 'plain intention of the testator, that his wife should have it'.<sup>25</sup> In these circumstances, Keck argued that equity ought not to imply the

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<sup>22</sup> 29 Car. II, c. 3.

<sup>23</sup> 1 Vern. 1; 2 Ch. Cas. 49 and 55; 2 Freem. 66; 79 SS, 872 and 886; BL Stowe MS 406, f 111.

<sup>24</sup> BL Stowe MS 406, f 111.

<sup>25</sup> 2 Ch. Cas. 49, 50.

attendant and to permit the term to pass as personalty by the nuncupative will to the testator's intended devisee. Decreeing in favour of the heir, however, Nottingham explained that to do otherwise would make a mockery of the Statute of Frauds: 'if wills not good enough for the inheritance should be allowed to be good for the lease and to sever the attendant, it were in effect to repeal the statute of [Frauds] 29 Car 2 in Chancery'.<sup>26</sup> In *Tiffin v Tiffin*, therefore, equity's respect for the testator's clearly stated intention was circumscribed by an overriding concern to maintain the integrity of the statutory formality requirements.

The primacy given to the Statute of Frauds continued to exert a limiting effect on the readiness of the chancery to pursue testator intention for the rest of our period. In *Whitchurch v Whitchurch* (1724-25),<sup>27</sup> for example, Jekyll MR refused to sever a term from the inheritance in favour of devisees under an unattested will on the grounds that 'a will not attested as the Statute of Frauds requires should not pass any estate of which the heir, as heir, would otherwise have had the benefit'.<sup>28</sup> When the case subsequently came before the lord commissioners, Raymond CJ opined that, where a term was not expressly limited to attend the inheritance, the testator could devise the term by such an unattested will. 'But', Raymond commented, 'in the principal case...there is no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance'.<sup>29</sup> According to Raymond, therefore, the testator had only ever intended to devise the inheritance with the term attendant and not to devise the term in gross. As such, there was no evidence that the testator intended the term to be severed from

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<sup>26</sup> 79 SS, 872.

<sup>27</sup> Gilb. Rep. 168; 2 P Wms 236; 1 Str. 619; 9 Mod. 124; BL Harg. MS 128, f 10.

<sup>28</sup> 2 P Wms 236, 238.

<sup>29</sup> 9 Mod. 124, 127.

the inheritance. To the argument that the will demonstrated an intention to dispose of the term, Gilbert CB robustly replied that:

‘twould be a strange construction, that this will, which was only a preparation, and was still under deliberation, whether he should disinherit the heir or not, should be construed actually to disinherit him by taking away the term, which would have gone along with the inheritance...For all solemnities in conveyancing are appointed to hinder parties from surprise, and so, tho’ the party’s intention is never so strong, yet till he has perfected the instrument according to the solemnities required by the law, the intention goes for nothing.<sup>30</sup>

In Gilbert’s words, we find a strong statement of the chancery’s policy; an intention counted for little without the appropriate form. The term could be severed from the inheritance by an informal will, but the testator was required to stipulate his intention to pass the term as an interest separate from the inheritance. In the absence of such specificity in the wording of the will, there was no guarantee that the testator had actually intended to provide for the reputed devisee at the time of his death. After all, there was slender difference between a valid, though informal, will of personalty and an abandoned, unattested will of realty. Without absolute clarity as to the testator’s intention, therefore, the chancery could not intervene without collapsing the distinction between wills of personalty and wills of realty which had been enshrined in the Statute of Frauds.

Following the passage of the Statute of Frauds 1677, therefore, the chancery had, to some extent, renounced the dispositive power it had exercised in *Nurse v Yerworth*. It is notable that in both *Tiffin* and *Whitchurch* the chancery’s refusal to sever the attendant term ensured that the estate remained intact, albeit in the heir (for whom the testator might never have intended

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<sup>30</sup> Ibid., 170.

to provide). In Gilbert's reasoning in *Whitchurch* indeed, there is the suggestion that chancery ought not to sever the term to the detriment of the heir and, in the later case of *Villiers v Villiers* (1740),<sup>31</sup> Lord Hardwicke even remarked that 'it would be absurd to say that when a will is not executed according to the statute...that such a term shall be severed from the inheritance'.<sup>32</sup> The descent of the attendant term raised decidedly complex issues of testamentary construction according to settlor intention, but ultimately these niceties were resolved with the passage of the Statute of Frauds. Thereafter, chancery elevated form over intention when construing complex testamentary devises.

### III. Restraining Sale of Reversionary Terms to raise Marriage Portions

Trusts of long leases were also used to provide marriage portions for the settlor or testator's daughters. As with the case law on attendant terms, the chancery was often called upon to regulate the execution of these trusts. Provision for a daughter's marriage portion could take effect by means of an *inter vivos* family settlement or by will. A typical settlement might take the following form: (i) to the father for life, remainder to the mother for life; (ii) remainder to issue male in fee tail; (iii) in default of issue male, to trustees for a term of 500 years to raise marriage portions; and (iv) remainder to the father in fee.<sup>33</sup> The term was thus held upon trust

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<sup>31</sup> 2 Atk. 71; Barn. Ch. 307.

<sup>32</sup> 2 Atk. 71, 72.

<sup>33</sup> This form of settlement was used in *Greaves v Mattison* (1681) Rep. t. Jones 201, but it was a common form found throughout the period. For variations in forms of settlement, see: J. Habakkuk, *Marriage, Debt and the Estates System: English Landownership, 1650-1950*,

to raise portions for the daughters of the marriage. The grant of the term to trustees acted as a mortgage of the term to pay the daughters' marriage portions – the daughters were, therefore, secured creditors of the estate.

A daughter's right to her portion was not unqualified, however. The trust of the term to raise marriage portions was contingent on the death of either parent without issue male. As such, the term would only vest in the trustees where one parent was deceased and the parents' marriage had failed to produce a son. By such clauses, the daughter was obliged to wait until the term vested – even though this might not occur until many years after her marriage. But if the purpose of the portion was to provide for the daughter upon her marriage, why would the settlor seek to leave the portion unpaid for so long? Habakkuk explains this practice on the following grounds:

It was to the advantage of the children that the portions became payable when they needed them. Daughters were likely to make poorer matches if the payment of their portions were deferred until the death of the father...[But] the father looked on the matter in a different light. Ideally he was interested in maximum flexibility. Though he might want the power to improve his daughter's prospects by raising the money for her portion on marriage, he was usually anxious to ensure that he was under no legal obligation to pay the portions until his death.<sup>34</sup>

The complexity of the drafting, therefore, was occasioned by the desire to provide for the daughter whilst simultaneously preserving flexibility for the father. The question which typically arose in this context, however, was whether the trustees could mortgage the term to

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Oxford, 1994, 15 and L. Bonfield, *Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement*, Cambridge, 1984, 108-112.

<sup>34</sup> Habakkuk, *Marriage, Debt and the Estates System*, 122.

pay the daughter's marriage portion during the life of the surviving parent (i.e. whilst the term was in vested reversion). Such mortgages of the reversionary term were not thought beneficial to the family estate. If the daughter could mortgage the reversion, the estate would become encumbered with high levels of debt (usually resulting in the sale of the family estate when the reversion fell into possession). Moreover, if the daughter were unmarried at the time she became so entitled, she could mortgage the reversion and marry without her surviving parent's consent. In *Sandys v Sands* (1721),<sup>35</sup> for example, Macclesfield LC remarked:

The selling or mortgaging [of] reversions seems a great hardship, being in effect to ruin a family for the raising of daughters' portions; and therefore I will not go one step farther, than precedents shall force me. This method cannot fail of tempting daughters to disobedience towards their fathers, and encouraging improvident marriages.<sup>36</sup>

Such sentiments are commonly found in the reported cases and the prospect of decreeing such sales was clearly of concern to a succession of chancellors in this period.<sup>37</sup> Whether the chancery would permit a mortgage of the reversionary term in the lifetime of the surviving parent, however, was a matter of construing the words of the settlement. Where the wording was vague or contradictory, the chancery regularly appealed to the perceived intention of the parties who had executed the instrument. In this way, references to settlor or testator intention guided chancery practice.

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<sup>35</sup> 1 P Wms 707.

<sup>36</sup> *Ibid.*, 709.

<sup>37</sup> *Reresby v Newland* (1722) 2 P Wms 93, 99-100; *Brome v Berkley* (1728) 2 P Wms 484, 487; *Hall v Carter* (1742) 2 Atk. 354, 356; *Stevens v Dethick* (1743) 3 Atk. 40, 43.

The first case in which these issues were raised was *Greaves v Mattison* (1681).<sup>38</sup> At some stage prior to 1681, Sir Edward Greaves brought an action in trespass against Mattison for marrying his daughter without consent and the jury awarded damages of £5000 to Sir Edward. Thereafter, the parties to the dispute agreed that a portion ought to be settled upon Sir Edward's daughter (pursuant to Sir Edward's marriage settlement) and that the judges of the king's bench ought to approve the terms of the settlement. The question which came before the king's bench in 1681 was whether, according to the terms of Sir Edward's marriage settlement, the daughter was entitled to a portion of £5000 or £6000. The settlement in the case took the following form: to Sir Edward Greaves for life, in remainder to his successive sons in tail and, in default of issue male, a term of forty years to be granted in trust for raising marriage portions for any daughters (payable upon marriage or attaining the age of twenty-one), followed by a remainder to Sir Edward in fee. The settlement further provided that, where the marriage produced only one daughter, the trustees were to raise the sum of £5000 for her portion, but that, should the marriage produce more than one daughter, the trustees should raise £6000 and divide the sum equally. After the settlement was executed, Sir Edward's wife died, leaving two daughters of the marriage and no issue male. One daughter died aged seven and the other daughter married the defendant, without Sir Edward's consent.

Pemberton CJ, Dolben and Raymond JJ held that the daughters' interest in the £6000 had vested upon the death of their mother and, as such, the surviving daughter was entitled to the entire £6000 by survivorship. In the course of their reasoning, the majority appealed to the intention of the settlors (i.e. the daughter's grandparents):

the intent of the words should be taken to be, that after the death of the mother her daughters should be provided of a maintenance and portions certainly, and should not

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<sup>38</sup> Rep. t. Jones 201. See also 3 Ch. Rep. 190, 196-199.

wait [until] the death of their father, who perhaps might marry another wife (as Sir Edward here had done) and would not have such a respect for the daughters of the deceased wife as he ought, or he might live so long that the daughters would not have their portions to keep them in any competent time.<sup>39</sup>

In the view of the majority, therefore, the daughters' right to their portions vested upon the death of their mother and the £6000 became payable at that point. Such a construction was justified by reference to the perceived intentions of the parties to the original marriage settlement; namely, that portions were intended to prefer the daughters in marriage and that, as such, payment ought not to be postponed until the death of the father.

In a dissenting opinion, Jones J proffered an alternative explanation of the settlors' intention. Whilst accepting that the express wording of the settlement might permit a sale of the reversionary term in the father's lifetime, Jones J doubted that such was the intention of the parties. In the first instance, the express words of the settlement had rendered the portion conditional upon the death of the father (rather than the mother). Further support for this construction was found in the wording of the power to raise the portions. The instrument empowered the trustees to pay the portions only out of the rents, issues and profits of the term. Read strictly, the trustees could only raise the portions from the income of the land and not by a sale or mortgage of the term whilst it remained in reversion.<sup>40</sup> Drawing these lines of interpretation together, Jones J concluded that the settlors had not intended the daughters' rights to their portions to vest in the lifetime of the father. This reading was, in turn, substantiated by

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<sup>39</sup> Rep. t. Jones 201, 202-203.

<sup>40</sup> Prior to *Greaves*, however, the chancery had in certain circumstances read the words 'rents, issues and profits' as including a power of sale: *Backhouse v Middleton* (1670) 1 Ch. Cas. 173; *Lingon v Foley* (1674) 2 Ch. Cas. 205; and *Berty v Stiles* (1675) 73 SS, 117.



an appeal to the perceived intention of the settlors, viz. that ‘another construction would be too great an encouragement of disobedience in the daughters, and to ruin themselves by mean marriages’.<sup>41</sup> The structure of Jones J’s dissenting opinion mirrored that of the majority. Both the majority and dissenting opinions relied on the admixture of a close textual reading of the settlement with an appeal to the perceived intentions of the settlors. Whilst Jones J’s reading was ultimately unsuccessful in *Greaves*, the divergent opinions in the case prefigured the lines of division which would characterize this area of law in the following decades.

The decision in *Greaves* seems to have established a presumption that the daughter’s right to her portion vested as soon as the term vested in reversion – notwithstanding that such a presumption may well result in the sale of the family estate. The earliest case identified in which the rule seems to have been applied in chancery was *Heliard v Jones* (1689).<sup>42</sup> In that case, the lord commissioners decreed (*inter alia*) that interest was payable on the daughter’s portion in the lifetime of the father, from the date of the mother’s death. Although the reasoning of the judges has not survived, the decree suggests that the commissioners considered the daughter’s right to her portion to have vested in the lifetime of the surviving parent. A clearer example of the application of the principle in *Greaves* is seen in *Staniforth v Staniforth* (1703).<sup>43</sup> In that case, no time was appointed for payment of the daughter’s portion (i.e. whether at marriage or twenty-one). The father died, leaving a daughter and the daughter sought payment of her portion in the lifetime of the mother. Citing *Heliard v Jones*, Trevor MR held that both the term and the portion were vested and so decreed the portion to be raised. Where

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<sup>41</sup> Rep. t. Jones 201, 203.

<sup>42</sup> 1 Eq. Cas. Abr. 336, pl 2; 2 Vern. 655, 658; The National Archives (TNA) C33/273/99 (there called *Jones v Hellyer*).

<sup>43</sup> 2 Vern. 460; 1 Eq. Cas. Abr. 337, pl 4.

the settlement simply omitted a time for payment, therefore, the construction derived from *Greaves v Mattison* could be applied to permit payment of the portion in the lifetime of the surviving parent. In 1718, the case was brought on a bill of review before Cowper LC who remarked that there did ‘not seem to be any great reason to vary the decree, [and] it would be hard, if after the death of the father without issue male, the daughter’s portion should not be raised during the life of the mother’.<sup>44</sup>

Where, however, the words used in the instrument were not merely vague but contradictory, it was less clear how the court should proceed. In *Gerard v Gerard* (1703),<sup>45</sup> when faced with such an ambiguously worded settlement, the lord keeper seems nevertheless to have applied the construction in *Greaves* and permitted a mortgage of the reversionary term. The settlement in *Gerard* contained the following limitations:

To use of Sir Charles for life then to the use of... [Sir Charles’ wife] Honoria for life in full [payment] of her jointure and in failure of issue male of that marriage and there were issue female then to the use of [the trustees]...for 200 years on trust by the rents and profits or mortgage of the said estate to raise portions for such daughters...to be paid at 21 years or day of marriage which should first happen next after the decease of the said Sir Charles and Honoria or within six months next after either of the said days or times respectively so as the said daughter do not marry before the age of 18 years without the consent of one of her parents or grandparents if any of them be living...wherein is a proviso that if the said Sir Charles or any other to whom the inheritance of the premises should come...should pay the said portion to such

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<sup>44</sup> Lincoln’s Inn (LI) MS Misc 11, f 60.

<sup>45</sup> 2 Vern. 458; 2 Freem. 271.

daughter...then...the said trustees...should...surrender the term of 200 years to the end the same might be extinguished.<sup>46</sup>

Sir Charles Gerard died in 1701, leaving one daughter (Elizabeth Gerard), then aged twenty-three. The daughter sued for her portion, but the defendant (Sir Francis Gerard, brother and heir of Sir Charles) refused. Counsel for the defendant argued that a literal reading of the settlement restrained payment unless and until the daughter attained the age of twenty-one or marriage *following* the death of both parents. Counsel's argument is preserved in the record of the decree:

[the portion] is not yet become due unless the [complainant] survives...her mother and shall be married after her mother's death and that if the [complainant] marry before the portion will be merged and cannot be raised by virtue of the trusts for that the said times of the [complainant] attaining her age of 21 or marriage cannot in such case happen after her mother's death and consequently that the portion will never become payable.<sup>47</sup>

Such a construction was probably justified by reference to the express statement in the settlement that the daughter was not to marry without consent; restraining payment until the death of both parents ensured that she remained within the power of the surviving parent.

Rejecting this construction, Wright LK ordered the defendant to pay the portion within twelve months, in default of which the trustees were to raise the portions by mortgage or sale of the term. The lord keeper justified his decree by reference to the 'intent appearing upon the whole deed'<sup>48</sup> and the precedents permitting sales of reversionary terms. Echoing the majority in *Greaves v Mattison*, Wright explained that 'if she [the daughter] is to expect after the decease

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<sup>46</sup> TNA C33/301/271v.

<sup>47</sup> *Ibid.*

<sup>48</sup> 2 Freem. 271, 272.

of her mother, a portion may come too late to prefer her in marriage'.<sup>49</sup> Reading the settlement as a whole, therefore, the lord keeper could conclude that the clause requiring payment at age twenty-one or marriage was to be read as demonstrating an intention that the right to the portion could vest during the lifetime of any surviving parent. The lord keeper's construction of the settlement may also have found succour in the clause permitting discharge of the term on payment of the portion by Sir Charles Gerard or his heir. In effect, the settlement had provided a mechanism by which a mortgage of the reversionary term could be avoided (whilst simultaneously ensuring payment of the daughter's portion).

In *Gerard v Gerard*, therefore, the construction in *Greaves v Mattison* took precedence when construing an apparently self-contradictory settlement. The decision was not uncontroversial, however, and the case marked the high point of the reasoning derived from *Greaves*. In the second decade of the eighteenth century, the chancery began to move away from the policy espoused in *Greaves*. This shift in chancery policy came with the decision in *Corbet v Maydewell* (1709-10).<sup>50</sup> In *Corbet*, the portions were to be raised by sale or mortgage only on the condition that the daughters were not married or otherwise provided for at the date of the father's death. On the facts, the mother died within fifteen months of the marriage, leaving a daughter. The daughter claimed her portion within the life of her father, who had subsequently remarried and had several children by that marriage. *Greaves*, *Staniforth* and *Gerrard* were cited in the daughter's favour.<sup>51</sup> In his reasoning, Cowper LC did not seek to unsettle these precedents - although he did remark that had the issue been '*res integra* I should

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<sup>49</sup> 2 Vern. 458, 459.

<sup>50</sup> 2 Vern. 640 and 655; 1 Salk. 159; 3 Ch. Rep. 190; 1 Eq. Cas. Abr. 336, pl 5.

<sup>51</sup> 3 Ch. Rep. 190, 195-202.

not decree it'.<sup>52</sup> Instead, Cowper opined that the facts of *Corbet* took it outside the precedents. In *Greaves*, for example, the right to the portion had vested on the death of the mother and, as such, the trustees were entitled to sell the reversionary term to pay the daughter. In *Corbet*, however, the daughter's right to her portion remained contingent upon her situation at the death of her father 'which is a contingency not yet happened, and therefore it comes not within the reason of [*Greaves v Mattison*]'.<sup>53</sup> The settlement was, therefore, clear that the daughter's right to her portion could not vest until the death of her father and, as such, the court could not decree a sale of the reversionary term.

There appears also to have been an attempt by counsel for the daughter in *Corbet* to argue that the clause permitting payment of maintenance might permit a sale of the reversionary term.<sup>54</sup> The settlement had provided that the portion was payable at eighteen or marriage and that, in the meantime, £30 per annum was to be raised from the profits of the term. Counsel seem to have asserted that the word 'profits' must have included a power to sell the reversionary term to pay the maintenance.<sup>55</sup> Rejecting this argument, the lord chancellor explained that '[t]his is one of those ill-penned settlements, where the conveyancer...by an ill made use of a multiplicity of words runs into those blunders which occasion trouble to this court: my opinion therefore in this case will be cleared up, by leaving out those words which are immaterial'.<sup>56</sup> In Cowper's opinion, therefore, the settlement was ill-drafted and the maintenance was not intended to be raised by a sale in the father's lifetime at all. Rather, the lord chancellor

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<sup>52</sup> 2 Vern. 655, 657.

<sup>53</sup> 1 Salk. 159, 160 *per* Lord Cowper LC.

<sup>54</sup> 3 Ch. Rep. 190, 204-205; 1 Salk. 159, 160.

<sup>55</sup> See text at note 40.

<sup>56</sup> 3 Ch. Rep. 190, 202-203.

considered that the maintenance was only intended to be paid after the father's death and until the portion had been paid 'because otherwise this absurdity must follow, that the daughter must be paid maintenance-money in the life of the father, out of the profits of a term that is not to commence till after the father's death'.<sup>57</sup> The clear statement in the settlement of an intention to restrain payment of the portion until after the death of the father seems, therefore, to have provided ballast for Cowper's construction of the maintenance clause. After all, if the settlor did not intend a sale of the reversionary term to pay the portion, it seemed unlikely that they would have intended such a sale to pay maintenance. Where the court in *Gerard* had elected to construe an ill-penned settlement as permitting sale in order to provide for the daughter, we can observe in *Corbet* the beginnings of a departure from this older policy. Where the settlor had explicitly provided that the right to the portion was not to vest until the death of the father, the chancery would give effect to the words of the settlement by refusing to order sale of the reversionary term. The settlor's intention to restrain vesting, moreover, would not be unsettled by a poorly drafted maintenance clause. In such cases, the chancery would rewrite the words of the maintenance clause to better reflect the perceived intention of the settlor.

The chancery's prejudice against sales of the reversionary term became more pronounced in the later case of *Butler v Duncomb* (1718).<sup>58</sup> In that case, a reversionary term was limited to trustees to raise marriage portions, payable at age twenty-one or marriage. The settlement further stipulated, however, that the trustees were not to raise the portions until after the commencement of the term (i.e. after the death of the father and mother). The father died, leaving a daughter who, thereafter, married the complainant, John Butler. The question in the

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<sup>57</sup> 1 Salk. 159, 160.

<sup>58</sup> 2 Vern. 276; 1 P Wms 448; 10 Mod. 434; 1 Eq. Cas. Abr. 339, pl. 6; LI MS Misc 11, f 123; LI MS Misc 384, ff 43 and 173.

case was whether the daughter was entitled to her portion from the date of her marriage (which had already happened) or whether she was obliged to wait until the death of her mother, when the term would commence in possession. Counsel for Butler insisted that the reversionary term had vested in the trustees and, it being intended to provide for the daughter upon her marriage, the court ought to favour immediate payment.<sup>59</sup> According to the complainant's counsel, therefore, the clause restraining payment until the term commenced in possession ought simply to be rejected.<sup>60</sup>

Lord Macclesfield (then Parker) rejected this argument as 'rather expunging than construing' the words of the settlement,<sup>61</sup> stating there was 'no precedent for setting aside express words'.<sup>62</sup> Instead the lord chancellor sought 'to construe the whole deed...[such] that every clause should have its effect'.<sup>63</sup> According to Macclesfield, the clauses limiting different times for payment of the portion could be reconciled by referring to the underlying intentions of the settlor:

He agreed the intention was to provide for the daughter; but still not so as to raise the portion until the term should commence; and yet the words which ordered payment of the portion to the daughter at her age of twenty-one or marriage, should have their effect; *viz.* they should vest a right in the daughter to this portion, when she attained twenty-one (as she then had), and having attained that age, her portion, in case of her death, should go to her executors or administrators as a vested interest...but still the

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<sup>59</sup> 1 P Wms 448, 450.

<sup>60</sup> *Ibid.*, 457.

<sup>61</sup> *Ibid.*

<sup>62</sup> LI MS Misc 384, f 175.

<sup>63</sup> *Ibid.*

same was not to be raised until after the commencement of the term... So that the portion in this case, though vested, was not to carry interest until the term should commence.<sup>64</sup> By this construction, therefore, the daughter's right to her portion vested upon her attaining the age of twenty-one or marriage. The right which vested in her at that date, however, was a limited right to demand payment of the portion only after the term had commenced. This construction was, in turn, buttressed by reference to the intention of the settlors:

the penning of [the settlement] in such manner might be owing to a reasonable and prudent care in the parents, to prevent the estate from being eaten up, and devoured with interest... Therefore to prevent this hardship on the family, the words seem to have been inserted... that the portion should be raised after the commencement of the term in possession.<sup>65</sup>

The decision in *Butler* thus demonstrated a clear retrenchment from the policy in *Greaves*. The extent of this shift in chancery policy was further exemplified by the decision in *Reresby v Newland* (1722).<sup>66</sup> In that case, the portions were to be paid at age eighteen or marriage 'or within as short a time as the same should or might be conveniently raised'.<sup>67</sup> Upon the death of the mother without issue male, a bill was brought for the payment of the daughter's portion in the lifetime of the father. When giving judgment, Macclesfield declared that *Greaves v Mattison* was 'not common sense' and explained that he would 'study and labour to find out a difference between that case' and the facts of *Reresby*.<sup>68</sup> Ultimately, the lord chancellor

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<sup>64</sup> *Ibid.*, 457-458. See also 10 Mod. 433, 434.

<sup>65</sup> 1 P Wms 448, 453.

<sup>66</sup> 2 P Wms 93.

<sup>67</sup> *Ibid.*, 102.

<sup>68</sup> *Ibid.*, 99.



refused to decree payment on the basis that the portions were stipulated only to be raised at a ‘convenient’ time and that a mortgage of the reversionary term would ‘ruin the estate’.<sup>69</sup> In other words, the word ‘conveniently’ was construed to mean ‘after the death of the surviving parent’. Macclesfield’s decision was later affirmed on appeal to the house of lords.<sup>70</sup>

The same reticence to decree sales of reversionary terms is found in a series of allied cases on paying maintenance to the daughters of the marriage. In *Brome v Berkley* (1728),<sup>71</sup> for example, the marriage portion was limited to be paid at age twenty-one or marriage, without more. The settlement also provided maintenance until the portion became due, but further stipulated that the maintenance was not to be paid until the term commenced in possession. The father died, leaving a daughter who, having attained the age of twenty-one, sought payment of the portion in her mother’s lifetime. Jekyll MR and King LC agreed that the portion could not be raised by a mortgage of the reversionary term. Although payment of the portion itself had not been limited until the commencement of the term, the fact that the maintenance clause had been so limited demonstrated an intention to restrain payment until the death of both parents.<sup>72</sup> This reasoning was subsequently approved by Hardwicke LC in *Stanley v Stanley* (1737)<sup>73</sup> and *Stevens v Dethick* (1743).<sup>74</sup> In *Stanley*, Hardwicke had explained that, following *Brome*, the chancery would now ‘lay hold of very small grounds, that speak the intent of the parties, to hinder the raising [of] the portions in the life of the father and mother’.<sup>75</sup>

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<sup>69</sup> *Ibid.*, 100.

<sup>70</sup> 6 Bro. PC 75.

<sup>71</sup> 2 P Wms 484; 3 Bro. PC 437.

<sup>72</sup> 2 P Wms 484, 488.

<sup>73</sup> West t. Hard. 135, 141.

<sup>74</sup> 3 Atk. 40, 42.

<sup>75</sup> 1 Atk. 549.

Between the 1710s and 1750s, therefore, the policy of the chancery had been made abundantly clear; mortgages of the reversionary term were deleterious of parental power and ruinous for the family estate. Where possible, the provisions of a trust to raise marriage portions would be construed as prohibiting a mortgage of the term in the lifetime of the surviving parent. Nevertheless, the reported cases do furnish us with instances where portions were directed to be raised from the reversionary term in this period. In *Sandys v Sandys* (1721),<sup>76</sup> for example, the trust provided for the raising of portions by ‘sale or mortgage, or by rents, issues and profits...to be paid at the daughters’ age of twenty-one, or marriage’.<sup>77</sup> Initially, Macclesfield inclined against sale on the grounds that the words ‘rents, issues and profits’ implied an intention ‘against any sale or mortgage, until such time as the trustees could take the profits’.<sup>78</sup> Perhaps considering this construction too slender a ground to refuse the complainant’s bill, however, Macclesfield ultimately ordered a mortgage of the reversionary term, commenting that:

since all the contingencies had happened, and nothing remained to suspend the execution of such trust of the term, and it did not evidently appear but that the parties intended the portions should be raised out of the reversionary term; therefore he did not look upon it to be within the discretion of the court...whether they would or would not raise the money; but said it was a thing not to be encouraged.<sup>79</sup>

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<sup>76</sup> 1 P Wms 707.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid., 709.

<sup>79</sup> Ibid., 709-710.

Where the settlement appeared to permit a mortgage of the reversionary term, therefore, and no other clauses were sufficient to ground a contrary construction, the chancery would clearly permit the raising of portions within the lifetime of the surviving parent.

In the less clear-cut case of *Ravenhill v Dansey* (1723),<sup>80</sup> Macclesfield again decreed payment of the portion in the lifetime of the surviving parent. In *Ravenhill*, the marriage portions were raisable by ‘sale, mortgage, or profits’, whilst the maintenance was stipulated to be raised merely by ‘rents and profits’.<sup>81</sup> The difference in drafting, therefore, created uncertainty as to the settlor’s intention. To the daughter’s bill requesting a mortgage of the reversionary term to pay her portion and maintenance, it was objected that the maintenance was payable only from the annual rents and profits (arising once the term had commenced in possession). As such, it was argued that the settlor had not intended either the maintenance or the portion to be paid whilst the term remained in reversion. The lord chancellor rejected this argument, explaining:

It is against my opinion to raise a portion or maintenance by selling a reversionary term, and this under colour of the word [profits]; but it has been ruled before my time, that profits shall extend to any advantage which shall be made of the land by sale or mortgage, as well as rents.<sup>82</sup>

The lord chancellor thus admitted the equitable construction of the word ‘profits’<sup>83</sup> as grounds for decreeing a mortgage of the reversionary term. The case demonstrated that the estate preservative policy pursued by the chancery in this period could be limited by a fealty to the

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<sup>80</sup> 2 P Wms 179.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, 180.

<sup>83</sup> See text at note 40.

interpretive practices of previous chancellors. The word ‘profits’ was generally considered to include a power to mortgage or sell and Macclesfield was seemingly unwilling to upset this commonly applied construction.

Further instances of chancery’s willingness to raise portions from the reversionary term are found in subsequent decades. In *Hebblethwaite v Cartwright* (1734),<sup>84</sup> for example, Talbot LC decreed that, where the reversionary term was vested in the trustees upon the death of the mother, the term could be mortgaged to raise portions in the lifetime of the father. Talbot expressly relied upon *Greaves v Mattison*, explaining that, to refuse the raising of portions, ‘might be making them wait till their fortunes could be of no service to them’.<sup>85</sup> In that case, it had been argued that a proviso permitting the father to pay the portions in his lifetime rendered the right to the portion contingent (as in *Corbet v Maydewell*). Talbot refused to construe the settlement in this manner because ‘there [i.e. in *Corbet*] it was part of the description of the daughter that she should be unmarried and unprovided for at the time of her father’s death...but we have no such description here’.<sup>86</sup> *Hebblethwaite* demonstrated, therefore, that the chancery would not always go out of its way to construe the clauses of a settlement as evincing an intention to restrain payment until the death of both parents. Where the settlement was consistent with itself, there was simply no jurisdiction to construe the settlement such that the estate could be preserved.

Similarly, in *Hall v Carter* (1742),<sup>87</sup> Hardwicke LC decreed payment during the life of the surviving parent. In that case, counsel for the defendant asserted that the trustees had the

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<sup>84</sup> Cas. t. Talb. 31.

<sup>85</sup> *Ibid.*, 33-34.

<sup>86</sup> *Ibid.*, 34.

<sup>87</sup> 2 Atk. 354; 9 Mod. 347.

power to elect whether to raise the portions from annual profits or by mortgage and that, therefore, the court ought to preserve the trustees' power of election and refuse to decree payment in the lifetime of the surviving parent. Hardwicke rejected this argument on the grounds that 'there are many cases of settlements where this election is given to trustees, and yet they shall not be allowed to postpone the raising, in order to make their election only'.<sup>88</sup> Moreover, Hardwicke observed, the words 'rents and profits' by themselves included a power of sale or mortgage and, consequently, counsel's argument was deemed unpersuasive.<sup>89</sup>

The construction in *Greaves v Mattison* survived, therefore, where the term was vested and there was no clause to restrain the payment of the portion until the death of both parents. In *Lyon v Chandos* (1746),<sup>90</sup> Hardwicke succinctly explained the chancery's approach by the mid-eighteenth century:

I am in general extremely unwilling to exercise the authority of this court in raising portions...out of reversionary terms, and therefore wherever cases have been brought before me to raise them upon construction or implication only, I have always refused to do it...But in the present case the trust of the term is so penned, that I cannot avoid decreeing it be raised...To construe this settlement otherwise, I must insert words, and go *by implication* only, when there is an express direction to raise it even in the lifetime of the [surviving parent].<sup>91</sup>

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<sup>88</sup> 2 Atk. 354, 358.

<sup>89</sup> 9 Mod. 347, 349.

<sup>90</sup> 3 Atk. 416.

<sup>91</sup> *Ibid.*, 418.

Hardwicke was clear; where the settlement lacked clauses which expressly limited the raising of the portion until the death of both parents, the chancery would not place spurious constructions on anterior clauses to demonstrate an underlying intention to restrain payment. During our period, the construction in *Greaves v Mattison* (1681), preferring the early raising of portions, gave way to the construction in *Corbet v Maydewell* (1710) which restrained payment in the life of the surviving parent. The basis for both constructions was the perceived intention of the settlor and the explanation in the shift from *Greaves* to *Corbet* can only be referable to a rising judicial preference to preserve family estates from the spiralling debts occasioned by mortgages of the reversionary term. Nevertheless, the fact that such mortgages would be ordered, even against an individual chancellor's personal judgement, demonstrated the limits of this estate preservative policy. Where there was no express prohibition on the raising of marriage portions in the lifetime of the surviving parent, the chancery was bound by these words and could not alter the provisions of the trust by reference to an intention implied from ambiguous phrases such as 'rents and profits'. The chancery may have laid hold of 'very small grounds' to restrain payment of marriage portions, but even so there were limits to this interpretive jurisdiction.

#### **IV. Enforcement of Executory Trusts**

The final area to be explored in which the chancery employed the language of intention was in the enforcement of executory trusts in the testamentary context. An executory trust might arise where the testator bequeathed land upon trust without limiting the specific estates which the beneficiaries were to take. In such circumstances, the chancery would order the drafting of a formal settlement according to the instructions of the testator – at least, insofar, as the testator's

instructions were permissible in law. In *Carveth v Lamb* (1681),<sup>92</sup> for example, the testator directed a settlement of land to B and his children, with various remainders over, ‘in such manner as the same may not be sold’. Nottingham stated that he ‘had no regard for the perpetuity which seemed to be designed but directed an ordinary settlement for life, with contingent remainders in tail’.<sup>93</sup> In limiting the immediate devisee to an estate for life, Nottingham approximated the testator’s intention that the land not be sold, but refused to go so far as to sanction a perpetual settlement. Thus, whilst the chancery would give effect to executory trusts designed to keep land in the family, this power was strictly curtailed by the long-standing prejudice against settling estates in perpetuity. Later cases continued to demonstrate this limitation to the jurisdiction wherever the testator purported to create an unbarrable entail<sup>94</sup> or other perpetuity.<sup>95</sup>

It was not until the eighteenth century, however, that the chancery came to deal with executory trusts in the testamentary context on a regular basis. By this stage, equity had developed a more fully articulated jurisprudence governing the execution of marriage articles and it was this case law which would lay the uneasy foundations for equity’s later enforcement of executory trusts. In *Jones v Langton* (1698),<sup>96</sup> for example, the marriage articles provided that the wife’s portion should be laid out in lands to be settled on the husband and wife for their lives and the survivor of them and, thereafter, to the heirs of the body of the wife, by her husband. Had these limitations been contained in a formal settlement, the words would have

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<sup>92</sup> 79 SS, 889.

<sup>93</sup> Ibid.

<sup>94</sup> *Leonard v Sussex* (1705) 2 Vern. 526.

<sup>95</sup> *Humberston v Humberston* (1716) 2 Vern. 737; 1 P Wms 332; Prec. Ch. 455.

<sup>96</sup> 1 Eq. Cas. Abr. 392, pl 2.

granted a fee tail, permitting the husband and wife to bar their issue by common recovery. Disregarding the express words of the articles, however, Trevor MR decreed the settlement to be to the first and other sons for life and, thereby, limited the husband and wife to life estates without the power to bar their issue. Although remarkable, Trevor's decree was explicable by reference to the surrounding context. A significant function of marriage articles was to agree provision for children of the marriage,<sup>97</sup> but a provision which could be barred by a common recovery was not guaranteed.<sup>98</sup> Given that the parties to the articles had provided valuable consideration in order to guarantee provision for the issue, and that the issue themselves were considered as purchasers within the marriage consideration, equity would decree a settlement which would achieve this intention (i.e. by limiting the parents to life estates only).<sup>99</sup>

The chancery's approach to execution of marriage articles was first applied in the testamentary context by Cowper LK in *Leonard v Sussex* (1705).<sup>100</sup> In that case, the testatrix, the countess of Sheppey, devised her real and personal estate to trustees to pay debts and, thereafter, to settle moieties of the residue to each of her sons and the heirs of their respective bodies 'taking special care in such settlement, that it never be in the power of either of my said sons...to dock the intail of either of the said moieties...during their, or either of their life or lives [i.e. to prevent sale of the inheritance within their lives]'.<sup>101</sup> The testatrix's intention was

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<sup>97</sup> *Seale v Seale* (1715) Gilb. Ch. 105: 'in a case of marriage articles...the intent was plainly to provide for the issue of the marriage' (*per* Cowper LC).

<sup>98</sup> *Trevor v Trevor* (1720) 1 P Wms 622; *West v Errissey* (1726) 2 P Wms 349.

<sup>99</sup> C. Fearne, *Essay on the Learning of Contingent Remainders*, 4th ed., London, 1791, 162-163.

<sup>100</sup> 2 Vern. 526; TNA C33/306/117.

<sup>101</sup> 2 Vern. 526.



forcefully stated in her will. Regarding her son Henry, for example, the countess's will provided:

whereas my said son Henry by his late marriage which is very distasteful to me [and] hath much drawn my kindness from him I having formerly given him the bulk of all my estate I do will and appoint that my executors shall pay [Henry] the sum of one hundred pounds a year immediately after my death...[in such manner] that the woman who hath so unfortunately ruined him may have no benefit thereby...But for it shall please God that my said son Henry shall survive his now wife Then my will intent and meaning is that my said Executors...shall convey the one full moiety of the remainder of all my lands...upon him my said son Henry and the heirs of his body which he shall beget upon any second or other wife...<sup>102</sup>

These words demonstrated the strength of Lady Sheppey's desire to bar her daughter-in-law from the inheritance. In discussing the case, Cowper was clear that, had these words appeared as an immediate devise in the will, the sons would have been entitled to the estate tail, 'notwithstanding any subsequent clause or declaration in the will'.<sup>103</sup> In this case, however, the trust being executory, 'the intent and meaning of the testatrix is to be pursued'.<sup>104</sup> Cowper explained that, in such cases, he 'took it to be as strong in the case of an executory devise for the benefit of the issue, as if the like provision had been contained in marriage-articles'.<sup>105</sup> The jurisdiction to enforce executory trusts according to the testator's intention was, therefore,

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<sup>102</sup> TNA PROB 11/384/83, 88.

<sup>103</sup> 2 Vern. 526, 526-527.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

explicitly hitched to the case law on marriage articles where intention performed a similarly pivotal role.

The analogy with marriage articles was not uncontroversial, however, and there was some debate as to when a testamentary trust could be deemed executory and thus admit of a liberal construction. In *Stamford v Hobart* (1709),<sup>106</sup> Cowper LC had explained that ‘where words of the articles or will were improper, or informal...[the] court would not direct a conveyance, according to such improper or informal expressions in the articles or will, but would order the conveyance or settlement to be made in a proper and legal manner, so as might best answer the intent of the parties’.<sup>107</sup> King LC would later explain Cowper’s approach in *Stamford* as suggesting that ‘where [the] article or will use[s] words imp[roper] it is executory’.<sup>108</sup> In that case, Cowper decreed the insertion of a trust to preserve contingent remainders in the will of Sir John Maynard on the grounds that the testator had intended ‘as strict a settlement as possible by law’.<sup>109</sup> Although Cowper’s decision in *Stamford* was affirmed on appeal to the house of lords, this broad definition of the executory trust threatened to permit a liberal construction of almost any will which contained trusts. To this end, the case of *Bale v Coleman* (1709-11)<sup>110</sup> marked something of a flashpoint in the development of the executory trust. In that case, the testator had devised his lands to trustees for payment of debts and then to A for life, with power to make leases, remainder to the heirs male of A’s body. At common law, a limitation to A for life coupled with the remainder to the heirs of his body would vest an

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<sup>106</sup> 3 Bro. PC 31.

<sup>107</sup> *Ibid.*, 33.

<sup>108</sup> LI MS Misc 384, f 347.

<sup>109</sup> 3 Bro. PC 31, 33.

<sup>110</sup> 2 Vern. 670; 1 P Wms 142.

estate tail in A under the rule in *Shelley's case*.<sup>111</sup> Nevertheless, Cowper LC ruled that A was a mere tenant for life because 'it differed (as he conceived) from an immediate devise; that it was rather to be looked upon as an executory devise, to take effect after debts paid...or in the nature of marriage articles for the conveying and settling of an estate to one for life'. According to Cowper, the power to make leases strongly implied that the testator did not intend A to have power over the inheritance and that a contrary decree would 'frustrate the intent of the testator'.<sup>112</sup> In 1711, however, the case came before Harcourt LK who reversed the earlier decree. For Harcourt, the liberal approach to the construction of marriage articles was inappropriate in the testamentary context.<sup>113</sup> Unlike issue claiming pursuant to marriage articles, a devisee was a mere volunteer and, as such, there was no basis for disregarding the legal effect of the testator's words. Instead, Harcourt was content to 'take words [of the will] as you find them'.<sup>114</sup>

Notwithstanding Harcourt LK's misgivings, however, the enforcement of executory trusts continued during Lord Cowper's second term as chancellor (1714-18). In *Humberston v Humberston* (1716),<sup>115</sup> for example, Cowper declared an attempt to create a perpetual settlement was 'vain and not practicable' and decreed that 'a strict settlement ought to be made, and the intent of the testator followed as far as the rules of law will admit of'.<sup>116</sup> Moreover, Cowper's successors continued to rely on the executory trust as a means of pursuing testator

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<sup>111</sup> 1 Co. Rep. 88b.

<sup>112</sup> 1 P Wms 142, 142-143.

<sup>113</sup> *Ibid.*, 145.

<sup>114</sup> 2 Vern. 670, 671

<sup>115</sup> 2 Vern. 737; 1 P Wms 332; Prec. Ch. 455.

<sup>116</sup> 2 Vern. 737, 738.

intention. In *Papillion v Voice* (1731),<sup>117</sup> King LC distinguished cases where ‘the will passes a legal estate, and where it is only executory, and the party must come to this court to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law’.<sup>118</sup> Thus, according to King, an immediate devise would be interpreted strictly, whilst those leaving some act undone requiring a chancery decree to perfect could be construed according to the testator’s underlying intent. In that case, the testator had directed trustees to purchase land to be settled on B for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of B. As in *Bale v Coleman*, it was argued that the limitation to B for life coupled with the remainder to heirs of his body vested an estate tail in B under the rule in *Shelley’s case*. On the other side, it was urged that the testator’s intention was plain; the devise was expressly to B for life and the clause stipulating no liability for waste would have been meaningless if B had taken an estate tail. The presence of a trust to preserve contingent remainders was similarly clear evidence that the testator had not intended B to have the power to bar his issue. Finding the trust executory and that the testator’s intention was clear, King LC decreed the devisee to take a life estate only.

Similarly, in *Glenorchy v Bosville* (1733),<sup>119</sup> the testator had directed his trustees to convey to his granddaughter, upon her marriage to a protestant, for life without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, with various remainders over. The question arose as to whether the granddaughter was a tenant for life or in tail. Talbot concluded from the presence of the clause ‘without impeachment of waste’ that the

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<sup>117</sup> 2 P Wms 471.

<sup>118</sup> *Ibid.*, 478.

<sup>119</sup> Cas. t. Talb. 3.

testator had intended to grant only a life estate to his granddaughter.<sup>120</sup> Admitting that, in an executed trust or an immediate devise, these words would grant an estate tail, Talbot LC observed that ‘in executory trusts [the testator] leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner...and though all parties claiming under this will are volunteers, yet they are entitled to the aid of this court to direct their trustees’.<sup>121</sup> Declaring the trust to be executory, Talbot decreed the granddaughter entitled to an estate for life only.

The jurisdiction to enforce executory trusts continued to flourish under Lord Hardwicke.<sup>122</sup> In the difficult case of *Hopkins v Hopkins* (1738),<sup>123</sup> however, Hardwicke began to push the boundaries of the jurisdiction. In that case, Hardwicke found a clear intention to create an executory trust and pursued the testator’s intention to decree a strict settlement. The case was more controversial, however, for the following section of the judgment in which Hardwicke said of the precedents on executory trusts:

It appears by these cases, that however improperly a will is penned, the court will take notice whether the testator intended a strict settlement, and direct accordingly, as far as the rules of law will permit. But a distinction was taken between those cases and the present, that they are cases of executory trusts, where the will directed a conveyance; but here there is no conveyance directed, but the trust only declared in the will. I admit the court has thrown out such sort of expressions, but I think there is no difference. All

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<sup>120</sup> *Ibid.*, 18.

<sup>121</sup> *Ibid.*, 19.

<sup>122</sup> *Roberts v Dixwell* (1738) West t. Hard. 536; *Baskerville v Baskerville* (1741) 2 Atk. 279; *Read v Snell* (1743) 2 Atk. 642.

<sup>123</sup> 1 Atk 581; West t. Hard. 606.

trusts are executory, and whether a conveyance be directed by this court or not, this court must decree one, when asked at a proper time: but I do not give any conclusive opinion to oust that distinction. In this will there is a plain direction of the testator's intention that this should be an executory trust, and that there should be in due time a strict legal conveyance made by the trustees.<sup>124</sup>

Hardwicke thus suggested that there was 'no difference' between trusts executory and trusts executed. If true, then the liberal principles of interpretation applied to marriage articles and executory trusts might just as easily be applied to any testamentary trust where an inapt expression had the effect of derailing the testator's perceived intention. Hardwicke's remarks were a long way from Harcourt's declaration in *Bale v Coleman* (1711) that the words of a will were to be taken as the court found them.

Hardwicke returned to this idea in *Bagshaw v Spencer* (1748).<sup>125</sup> In that case, the testator had devised the legal estate to trustees to hold for the life of Benjamin Bagshaw (without impeachment of waste), then to trustees to preserve contingent remainders during Benjamin's life and, after his death, to hold to the use of the heirs of his body, with like remainders over to others. The question was again whether the limitations in a testamentary trust created an estate tail or life estate. Hardwicke began his judgment by asking whether the estate devised to Benjamin was a trust or a legal estate. Hardwicke concluded that the estate was 'merely a trust in equity'<sup>126</sup> because 'the whole fee being devised to the trustees, no legal fee could be limited upon it, and Benjamin Bagshaw could take no legal estate'.<sup>127</sup> The next

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<sup>124</sup> *Ibid.*, 593-594.

<sup>125</sup> 2 Atk. 570; 1 Ves. Sen. 142.

<sup>126</sup> 2 Atk. 570, 578.

<sup>127</sup> *Ibid.*

question was whether Benjamin took an estate tail or a life estate under the will. Hardwicke explained that the answer depended on three considerations: (i) the intention of the testator; (ii) whether the intention was consistent with the rules of law and equity; and (iii) whether there was a particular rule or precedent which prevented the court from decreeing according to the testator's intention. As to the testator's intention, Hardwicke observed that the clauses 'without impeachment of waste' and 'to preserve contingent remainders' implied an intention to create a strict settlement 'as if he [the testator] had expressly declared his meaning that it should be for life only, with contingent remainders to the heirs of his body'.<sup>128</sup> Hardwicke's discussion as to whether this intention was consistent with the rules of law and equity, however, was decidedly more elaborate.

Counsel for the plaintiff had argued that, according to the rules at law, Benjamin was entitled to an estate tail under *Shelley's case* and that a contrary decree would contradict the legal rule. Hardwicke agreed that the law would not uphold devises contrary to its rules, but that this principle was not applicable in the case. It was true that the law would not permit a perpetual settlement, but this case did not involve a perpetuity. Rather, there was:

no doubt but the testator might devise for life with contingent remainders, as the defendant contends. The only objection is, that he has used improper words, which the law will not allow, although the intent is plain: but is this not hard to say, and repugnant to the first fundamental rules in explaining wills, that the intent shall govern the construction? The testator is presumed to be *inops concilii*, and therefore, though he uses inapt and barbarous words, the law will so frame and mould them, as to make proper sense to serve the intent.<sup>129</sup>

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<sup>128</sup> 1 Ves. Sen. 142, 145.

<sup>129</sup> *Ibid.*, 146.

In cases concerning the application of *Shelley's case* to wills, therefore, the law was not concerned with the creation of a perpetuity or other invalid estate, but with the use of technical language. According to Hardwicke, the expectation that testators would use such technical language accurately was too strict. These observations notwithstanding, it had been objected that the rules of law had nevertheless 'fixed the sense of those words [i.e. 'heirs of the body'] to words of limitation' such that the plaintiff was entitled to an estate tail under the will. Again Hardwicke denied this general proposition, explaining that 'this is a devise of a trust in equity' and 'here all the limitations are of a trust; the construction and direction whereof is the proper subject of the jurisdiction of this court which is bound to decree according to the intent'.<sup>130</sup> For Hardwicke, therefore, the presence of a trust permitted equity to depart from the legal rules of construction (such as the rule in *Shelley's case*) and to mould the limitations in the testamentary trust according to the testator's intention.

Finally, Hardwicke considered the objections to his liberal construction of the will in *Bagsahw*. It had been argued that equity would only admit of a liberal construction in cases of marriage articles and executory trusts. In *Bale v Coleman* (1711), Harcourt LK had distinguished equity's approach to marriage articles and testamentary trusts on the grounds that children claiming pursuant to marriage articles were purchasers. Beneficiaries under a testamentary trust were mere volunteers and equity had no jurisdiction to apply a liberal construction of testamentary words in their favour. Hardwicke demurred from this view, commenting that Harcourt's words 'include[d] all trusts, as well executory as executed...and in saying that the court must adhere to the words of the will, notwithstanding the trust is to be carried into further execution, I fear, [Harcourt] was not so fully informed of the precedents'.<sup>131</sup>

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<sup>130</sup> *Ibid.*, 148.

<sup>131</sup> *Ibid.*, 151.



According to Hardwicke, Harcourt had seemingly misunderstood the law regarding executory trusts and his remarks in *Bale v Coleman* were, therefore, to be set aside.

Having disposed with Harcourt's remarks, Hardwicke turned to the requirement for an executory trust as a ground for liberal interpretation of a will. Hardwicke admitted that the distinction between trusts executed and executory had been accepted since the early eighteenth century, but queried how the distinction had emerged. Drawing on Talbot's decision in *Glenorchy v Bosville* (1733), for example, Hardwicke remarked that he had 'great deference for Lord Talbot's opinion' but observed that the decree was 'so right as to not want the aid of the distinction there made [i.e. between executed and executory trusts]'.<sup>132</sup> On Hardwicke's view, therefore, equity was not restricted to pursuing testator intention only where the will contained an executory trust; the very fact that the devise was made in trust was sufficient to ground equity's jurisdiction to construe according to intention, rather than the strict words of the will. Apparently taking this reasoning for granted, Hardwicke did not comment on whether the testamentary trust in *Bagshaw* was executed or executory, but merely decreed according to the perceived intention of the testator to create a strict settlement. On this basis, therefore, Benjamin Bagshaw was declared only to have had an estate for life.

In this section, we have seen that equity struggled to develop clear boundaries for the doctrine – as cases such as *Bale v Coleman* and *Bagshaw v Spencer* well illustrate. The liberal constructions permitted by the executory trust strained against the legal rules of construction (such as *Shelley's case*) and, under Hardwicke, threatened to extend to all testamentary trusts. The chancery's willingness to enforce these executory trusts by limiting devisees to mere life estates must, in some measure, have been referable to an underlying perception that many landowners intended their estates to remain within the family. Nevertheless, throughout our period, the chancery refused to sanction the creation of estates which did not exist, such as an

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<sup>132</sup> *Ibid.*, 152.

unbarrable entail or other perpetual settlement. Whilst the ambit of the doctrine was in flux in the eighteenth century, the doctrine of estates formed an unwavering line which equity would not transgress.

## **V. Conclusion**

Throughout our period, intention clearly played a pivotal role in the construction and execution of trusts in chancery. Where the meaning of words in the settlement was disputed, the chancery was often more than willing to presume that the settlor/testator had intended to preserve the estate for the next generation. This reliance upon the perceived intentions of landowners was indeed the basis for the implication of attendant terms, for postponing payment of marriage portions and for limiting devisees under executory trusts to estates for life. Typically, these cases (and most especially those involving marriage portions) did indeed result in the concentration of family property in the male line. As we have seen, however, the judges did not always presume that the settlor/testator had intended the preservation of the estate. Where the strict wording of the instrument would result in the sale of the family lands, the chancery was cautious in accepting arguments as to the settlor/testator's intention to alter the meaning of the express words used – at least, not without substantial evidence that the settlor/testator had actually intended to preserve the estate. The limits of this jurisdiction were thus demonstrated by the chancery's consistent refusal to construe ambiguous words as demonstrating such an intention. The word 'profits', for example, was not evidence of an intention to restrain payment of marriage portions. Similarly, the presence of the words 'without impeachment of waste' did not necessarily connote an intention to grant a life estate. The chancery may have been willing to divine the settlor/testator's intentions from common practice, but ultimately the court was bound by the words actually used in the disputed

instrument. Moreover, even where the settlor/testator's intention was indisputable, the cases demonstrate a further limitation on chancery's jurisdiction, namely; whether that intention was consonant with the rules of law and equity. A testator might intend to devise a long lease by nuncupative will but the chancery was wary of permitting such devises contrary to the provisions of the Statute of Frauds 1677. A settlor might intend to create an unbarrable entail by means of a trust, but equity simply would not permit it. In this regard, therefore, intention was merely one factor, amongst other competing factors, which combined to determine the outcome of a legal dispute. When we come to write the history of conveyancing, therefore, it is for these competing factors that we must have regard, in addition to the perceived intentions of the landed elite.

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### **Notes on Contributor**

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