REPORTS OF CASES

DETERMINED IN

The several Courts of Westminster-Hall,

FROM

1746 TO 1779:

BY THE HONOURABLE

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS:

WITH

MEMOIRS OF HIS LIFE.

Second Edition,

REVISED AND CORRECTED,

WITH

COPIOUS NOTES AND REFERENCES,

INCLUDING SOME

FROM THE MSS. OF THE LATE MR. SERJT. HILL:

BY

CHARLES HENEAGE ELSLEY, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. I.

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1828.

THE KING v. Justices of DERBYSHIRE.

Morton and *Blackstone* shewed for cause, 1st. That the parties certifying have not shewn under what denomination of Protestant dissenters they fall, so as to entitle themselves to the indulgence shewn by the Toleration Act, which only meant (*vid.* § 17) to give ease to tender consciences, when professing such principles as neither endanger the civil government, nor undermine the fundamental doctrines of the Christian religion. These people may be Arians or Socinians. Suppose them only Methodists (*which was the fact*): As these do not dissent from the Church of England, but only pretend to observe her doctrine and discipline with greater purity than their neighbours, it may be a very serious question, how far they are the objects of the Toleration Act, and privileged to meet in conventicles. 2d. The parties applying are not of the neighbourhood, so as to be able to resort to it when recorded. *Queen* and *Peach*, Salk. 572(*d*), it was held, till 10 Ann. c. 2, that a dissenting minister, who had qualified in one county, could not officiate in another. More reasonable to require, that the persons certifying should be of the neighbourhood, who may *bonâ fide* use the meeting house when registered.—When registered, it acquires some privileges; as by 1 Geo. 1, c. 5, it is felony to begin to demolish it. May a person at any distance, and who is
[*607] no dissenter, *certify *any* tenement to the Sessions, and thereby give it those privileges? 3d. The persons certifying do not appear to have complied with the terms of the Toleration Act by taking the oaths and making the declaration: *K.* and *Larwood*, Salk. 168, 4 Mod. 274, this required by the Court: And was complied with in *Green* and *Pope*, Lord Raym. 125.

But the Court was of opinion, that in registring and recording the certificate, the Justices were merely ministerial; and that after a meeting-house has been duly registered, still, if the persons resorting to it do not bring themselves within the Act of Toleration, such registring will not protect them from the penalties of the law.

Rule for *mandamus* absolute (*e*).

(*d*) 6 Mod. 228, 310, *S. C.*

(*e*) As to granting *mandamus*, see *R.* v. *Barker*, *ante*, 300, 352; *R.* v. *Univ. Cambridge*, *ante*, 552; Bac. Abr. *Mandamus* (D).

GULLIVER on demise of CORRIE, *alias* WYKES, *v.* [Shuckburgh] ASHBY.

S. C. 4 Burr. 1929.

Devise to the heir at law *in tail* with a proviso for taking the testator's name, is not a conditional limitation. [Devise "to A. and the heirs male of his body,

EJECTMENT on the several demises of the same person, by the name, 1st. Of Ambrose Corrie; 2dly. Of Ambrose Wykes: Verdict for the plaintiff, subject to this special case.

William Wykes, on the 15th August, 1736, by his will, duly executed, gave and disposed *of his temporal estate (inter alia)* in manner following. "Whereas, for want of issue male by my "now wife, the lands, &c., settled on her in jointure are li- "mited to me and my heirs; therefore, in case I should leave

" no issue by my now wife, I give, devise and bequeath all my " mansion-house, &c. and estate at Haslebeach, from and after " my wife's interest therein, according to her settlement or this " my will, unto my loving sister Dorcas Wykes, for and during " her natural life; and from and after her decease, unto my " nephew Ambrose Saunders, and the heirs male of his body " lawfully begotten, and the heirs male of their bodies lawfully " begotten; and for want of such issue, to the heirs male of " the body of my sister Dorcas Wykes, and the heirs male of " their bodies lawfully begotten; and for want of such issue, " unto my wife and nephew's godson Ambrose Corrie, and the " heirs male of his body lawfully begotten, and the heirs male " of their bodies lawfully begotten; *remainder, to the heirs [*608] " of the body of Ambrose Saunders, Dorcas Wykes, and Ro- " bert Ekins successively; remainder, to my own right heirs " for ever. PROVIDED always, and this devise is expressly " upon this condition: that, *whenever* it shall happen, that the " said mansion-house and estates, after my wife's decease, shall " descend or come unto any of the persons herein before named; " that the person or persons, to whom the same from time to " time shall descend and come, that he or they do and shall " *then change their sirname*, and take upon them and their " heirs the *sirname of Wykes only, and not otherwise.* And " I do declare further, that my several devises of my said " estates at Haslebeach are on this express condition, likewise, " that no person shall plough up or commit any waste on the " premisses, &c. by felling trees (unless for necessary repairs) " or otherwise; but shall forfeit the premisses and ground upon " which the trees shall be so fallen, or on which such waste " shall be committed, to the person who shall be next entitled " to the premisses, according to this my will." And then follows a devise of the places so wasted, to the person next in remainder, *toties quoties.* On 9th May, 1742, the testator died, leaving his sister the said Dorcas Wykes, and his nephew the said Ambrose Saunders, his heirs at law (*f*). Grace Wykes, the testator's widow, died 16th January, 1747, upon which Dorcas entered; and on her death, 26th December, 1756, Ambrose Saunders entered, but never changed the sirname of Saunders, or took the name of Wykes. But by lease and release, 8th and 9th February, 1759, and a common recovery suffered in pursuance thereof, he conveyed the said premisses to the use of himself in fee, and died 8th October, 1765; and the defendant Ashby entered thereon (as his heir at law). On 17th January, 1766, the lessor of the plaintiff made an actual entry on parcel of the premisses for a breach of the proviso, by Saunders not changing his sirname and taking the name of Wykes.—*Qu.* 1. Whether Ambrose Saunders had an estate for life, or in tail? 2. Whether, by his not complying with the proviso for changing his name, the estate was not out of him

and the heirs] male of their bodies" gives A. an estate-tail.]

(*f*) As co-parceners, Ambrose being the son of the testator's sister Sarah Wykes, who married Saunders.

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be*fore he suffered the recovery; and consequently, the remainder to the lessor of the plaintiff shall take place?

[*609] This case was argued by *Glynn*, Serjeant, for the plaintiff, and *Leigh*, Serjeant, for the defendant, in Trinity Term last; and by *Hill* for the plaintiff, and *Blackstone* for the defendant, in the present Term.

Upon the 1st Question, it was argued for the plaintiff, that, where an estate is limited by will to an heir-male and the heirs of his body, the first word *heir* is only descriptive of the person to take; for it would be idle to add words of inheritance afterwards, if the first words were intended to give an estate of inheritance to the first taker; *Archer's* Case, 1 Rep. 66(*g*). So too in *Legate* and *Sewell*, 1 P. Wms. 87, *Tracey*, J., was clear, that such a devise as the present carried only an estate for life: and though the three other Judges certified it to be an estate tail, yet, Lord *Cowper* was so dissatisfied with their opinion, that the case was never determined. *Heirs* are not necessarily words of inheritance in a will, when the intent is plainly otherwise; T. Jones, 114(*h*); *Low* and *Davis*, Lord Raym. 1561. And it is evident the testator intended only an estate for life, by annexing to it the condition to restrain waste, which would be nugatory, if he had meant an estate tail.

But by Lord MANSFIELD, and the Court. It is too clear a point to be argued at all for the defendant (*i*). In *Archer's* and other Cases there was a previous estate for life given by the will; and here is none to Ambrose Saunders, though the testator has given others an estate for life by the same will. *Legate's* Case had also an estate for life expressly given, and yet that was decreed to be an estate tail, notwithstanding the printed book says otherwise(*k*).

Upon the 2d question it was argued *for the plaintiff*, that if the taking the name be not a condition precedent, yet it is a *conditional limitation*, the breach of which devests the estate; and not a *condition subsequent*, of which none can take advan-

[*610] tage * but the heir at law. Where to construe words to be a condition would defeat the intent of the testator, they shall make a conditional limitation; *Scholastica's* Case, Plowd. (*l*) &c. (But *per Cur'*. There is no need to cite cases to prove that words of condition may sometimes enure as conditional limitations, especially where the heir at law is the first taker.) To apply then more closely to the present case; wherever a proviso or collateral limitation is annexed to an estate in fee-simple, there the benefit of the condition will go to the heir, unless there be a devise over on breach of the condition: But where such condition is annexed to a particular estate, with a remainder expectant, there it shall always be a conditional limitation; and there needs no devise over in case of a breach, but the remainder-man shall take advantage of the breach without

(*g*) But see the observations upon that case, *post*, 1012, n.
(*h*) *Lisle* v. *Gray*.
(*i*) See *Long* v. *Lamy*, *ante*, 265, and cases there referred to.
(*k*) 2 Ves. S. 657, *acc.*
(*l*) P. 408.

it; *Andrews* and *Fulham*, Stra. 1092, Viner, *Devise*, L. 53(*m*). If the estate be defeated by such a breach, the remainder vests instantly, without any chasm; 2 Rep. 51 a; 2 Bulstr. 125, *Roberts* and *Roberts;* 3 Lev. 437, *Duncombe* and *Duncombe*, Perk. sect. 567; Bro. *Devise*, 4. If a devisee in tail *refuses* the estate or *dies without* issue, the next in remainder takes place immediately. So too if the estate tail be *originally void* in its creation; *Goodright* and *Cornish*, Lord Raym. 3, Salk. 226. The same law should take place, if the estate *be afterwards determined* by breach of the annexed condition; Hob. 346, *Sheffield* and *Ratcliffe;* Moor, 212, *Rudhall* and *Milward*. It remains therefore only to shew, that the proviso in the present case operates by way of limitation; and then it will follow that Corrie's estate vested in possession on the breach of it. The proviso could not be intended to affect Dorcas, whose name was Wykes already. The first, to whom it could relate, was Saunders; and the words "*and not otherwise*," imply a revocation of the devise, if the name was not changed. In *Wellock* and *Hammond*, Cro. Eliz. 204, 2 Leon. 114; devise to the heir at common law of lands in *Borough English* on condition, without any devise over; held, to be a limitation: *Curtis* and *Wolverstone*, Cro. Jac. 56, S. P.; Dyer, 316 b, (referred to, in 3 Rep. 21). Same point in a Gavelkind Case, *dubitatur;* now cleared by *Wellock* and *Hammond*. It may be objected, that Saunders was not the heir, because he and Dorcas Wykes were parceners, and so these cases don't apply: to this *it is answered, 1. That the heir of Dorcas could only have [*611] entered for a moiety, and the estate was meant to pass entire. 2. When Saunders came to the estate, and ought to have performed the condition, he was sole heir. 3. Wherever the heir enters for a forfeiture, he takes by descent; 1 Rep. 99; Jenk. 249. But *one* parcener cannot take by descent; Salk. 242: therefore one parcener cannot enter for a forfeiture. Lastly, The intent of the testator is clear, that the name and estate should not be separated; and upon this proviso no one can enforce that intent but by making it a conditional limitation. It is a kind of necessary implication, when all the words of the will *will not* be satisfied without this construction, and all *will* be satisfied with it. There is no hardship in barring the issue of Saunders by his default, since he might have barred them many other ways. As to the devise over, inserted in case of waste, but which is omitted here, the intent in both provisoes is not the same. In our case he meant the *whole* estate should go over; in that, only the *place* wasted: and therefore he expresses it there. As to the time when this forfeiture accrued; we say, as soon as the estate came to him, or within a reasonable time afterwards. Certainly there was reasonable time between the death of Dorcas, in 1756, and the recovery in 1759.

(*m*) *S. C.* Andr. 263; cited also in *Gulliver* v. *Wickett*, 1 Wils. 105, (which see) and in *Avelyn* v. *Ward*, 1 Ves. S. 421.

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For the defendant it was insisted, that this was a condition *subsequent*, which cannot be taken advantage of by a stranger, but only by the heir, which is barrable by recovery, 1 Mod. 111 (*n*); and therefore barred in the present case. The words are clearly words of condition, and cannot be implied into a limitation, unless to effectuate the manifest intent of the testator. Only two ways are hitherto known of implying a limitation by collecting that intent. 1st, Where there is a devise over in case of breach of condition; *Porter* and *Fry*, 1 Ventr. 199 (*o*); *Page* and *Hayward*, Pigott, 176, Salk. 570; *Rundale* and *Ealey*, Cart. 171 (*p*): in which case the law unites the condition to the remainder over, and does not suffer it to descend to the heir. 2d, Where an estate on condition is devised to the heir at law; *Wellock* and *Hammond* (*q*). The present case falls within neither of these descriptions. 1st, There is no devise over in case the condition be broken. And yet, in the very next clause, he devises over in case of a breach of
[*612] *the condition of not committing waste: plainly apprehending, that the mere breach of the condition would not occasion it to go to the remainder-man; for then the *whole* estate would pass to him by operation of law, and his express meaning is, that only the *place wasted* should pass. By the breach of a proviso (whether it be a condition or limitation) the whole estate must be defeated, and not a part of it; by *Anderson*, C. J., cited 1 Rep. 85 b. Nor, secondly, Was the estate in this case devised to the heir; Saunders was only part of an heir, a coparcener with Dorcas Wykes. He became sole heir long after the testator's death, by the decease of Dorcas without issue. If it was a limitation at all, it was so at the death of the testator; and then the reason for implying it to be so did not exist. The coparcener might have entered and defeated the whole estate, and have enjoyed a moiety; which perhaps the testator might think to be forfeiture sufficient. And, though a parcener cannot take her own moiety by descent, and her sister's by devise, when the whole land is devised to her by the ancestor, yet, if two parceners be deforced, each shall enter for her own moiety; Lutw. 802; Bro. *Co-parceners*, 2. So one coheir in gavelkind may enter (for a forfeiture) on a moiety, Dyer, 317 (*r*); resolved, in the case of *Wellock* and *Hammond*. It would be an harsh construction to suppose, that by the fault of the first taker the issue in tail should be inevitably barred. For, if it be a limitation, the estate instantly determines, *Bracebridge's* Case (*s*), Moor, 99, 633; and the forfeiture is not optional, as in case of a mere condition. Besides, in case of an estate tail, the law will raise no implication to prejudice the innocent issue in tail, who is the first object of the testator's bounty, in favour

(*n*) *Hudson* v. *Benson*; *S. C.* 2 Lev. 28; S. P. *Driver* v. *Edgar*, 1 Cowp. 379: see 2 Atk. 591.

(*o*) Or Lady *Anne Fry's* Ca.

(*p*) Denied to be law in 11 East, 666.

(*q*) *Ubi supra*: *accord*. *Wiseman* v. *Baldwin*, 1 Roll. Abr. 411, pl. 5; *Anon.* 2 Mod. 7.

(*r*) It should be, Dyer, 316 b, pl. 5, *Anon.*

(*s*) Or, *Harwell* v. *Lucas*.

of a remainder-man, who is only a secondary object. All the cases are of estates in fee. The only surmise of an implied limitation after a conditional estate tail is the confused note of *Rudhall* and *Milward*, Moor, 212, more clearly reported in Savil, 76; and there held to be no limitation, but a condition (*t*). S. P. held in *Skirne* and *Bond*, 1 Roll. Abr. 412, and *Thomas's* Case, Ibid. 411, 483.

*But, supposing it a limitation, we then insist, 1. That there [*613] was no breach before the recovery. 2. That the lessor of the plaintiff has not made out any title. 1. When no time is limited for fulfilling a condition, then if it be beneficial to any body, the performance may be hastened by request. But, where (as in the present case) it is beneficial to nobody, and depends on the sole act of the person bound to perform it, he has all his life to perform it in; 6 Rep. 30 b; 4 Leon. 125 (*v*). Either Saunders had therefore his whole life to perform it in, or it must be argued that he was bound to take the name the instant the estate vested: for if it is deferred, under the idea of giving a reasonable or convenient time, it still remains indefinite during his life. If notice is allowed to be requisite (both of the devise and the condition) how does that notice appear to be given? Saunders's most beneficial and *primâ facie* title was as heir at law. If it is objected, "This will render the testator's intention of no effect;" it is answered, "No matter: if the testator's design is to have such foolish intentions executed, he should take care to guard them better." If therefore Saunders had his whole life to perform the condition in, he had a good estate tail when he suffered the recovery; and of consequence barred, not only the estate tail, but also the condition; 1 Mod. 111 (*u*); *Page* and *Hayward* (a stronger case) (*w*). 2. If the condition ought to have been performed immediately, or soon after the estate vested, still the lessor of the plaintiff must (upon that very ground) have no title at all. For it is agreed, that when the proviso is broken in a conditional limitation, the preceding estate ceases, and the subsequent estate vests, without claim or entry; *Bracebridge's* Case, Moor, 99, 633; *Rundale* and *Ealey*, Cart. 171; Co. Litt. 214 b; 10 Rep. 40 b (*x*); *Porter* and *Fry*, 1 Ventr. 203; 2 Mod. 7, *Anon.*; *Foy* and *Hyrde*, Sir W. Jones, 58. If therefore Saunders's estate determined at any given period before the recovery in 1759, by not assuming the name, Corrie's immediately vested; and as he did not then assume the name, at the like given period, his estate also became forfeited; and so on, till Saunders's own reversion in fee as right heir of the testator took place. If a claim and entry were necessary to devest *the estate, none were made; and the recovery therefore was [*614] good. If none were necessary, the consequence will be as above stated. Nay, to this very day, the lessor of the plain-

(*t*) See Mr. Fearne's observations upon that case in F. C. R. 259, (8th ed.).

(*v*) This reference should be to 1 Leon. 305, Ca. 425, *Fabian's* Ca.

(*u*) *Benson* v. *Hudson*.

(*w*) Pigott, 176, Salk. 570.

(*x*) *Mary Portington's* Ca.

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tiff has not fully performed the condition, by using the name of Wykes *only*, for one of the demises is in the name of Corrie.

Lord MANSFIELD, C. J.—The only foundation of the plaintiff's title is, that Saunders's estate tail ceased by his not taking the name of Wykes, and vested in possession upon Corrie. It is merely a question of construction. And certainly the intent of the testator ought always to be carried into execution liberally, provided it be not contrary to law. It is pity, that in the old cases this principle is not carried throughout. They stop short in the middle, and determine partly on the intent, and partly upon technical reasons. Thus in *Wellock* and *Hammond*, the general principle is undeniably true, that where an estate in fee of the nature of *Borough English* is given to the heir at law upon condition, it shall be a limitation, to effectuate the intent of the testator. But the case then goes on directly contrary to the intent, which was to give it to the heir, *subject* to such a charge. The proviso was, "to pay in two years;" he paid it in five; and that was held a breach sufficient to devest his estate. In the present case it is admitted, that this proviso is not a condition precedent. It was impossible it should be so. The condition is not only to take the name for himself, but also for his heirs. This cannot be done, without a grant from the King, or an act of Parliament, neither of which are in the party's own power (*y*).

(*y*) *Quære* as to the necessity of having either the King's grant or an act of Parliament to enable a person to assume any particular surname; for a man may have several surnames; "may have divers names at divers times, but not divers Christian names;" Co. Lit. 3 a; *Disply* v. *Sprat*, Crok. Eliz. 57; *Fermor* v. *Dorrington*, Id. 222. From which it may be concluded, that a man may acquire a surname by reputation: for in the case of his having several surnames, he might have derived one from his ancestors,—"Cognomen majorum est ex sanguine tractum;" 6 Rep. 65 a,—and another from some accidental circumstance, or by his own assumption. Acquiring a name by reputation must be understood to mean a man's being generally called, known, described, and designated by any particular name in the *vicinetum*, which reputation or general designation has been the origin of all surnames. For they were originally descriptive of the character or person, of the rank, trade, or profession, of the residence or lands; or were patronymics. And though a bastard, being *filius nullius*, has no name (that is, no surname) by reputation as soon as he is born, he may afterwards acquire one, and a grant to such bastard will not be good till he has acquired one, that is, till he has either acquired the reputation of being the son of A.; and then it may be to him by the description of the "reputed son of A.;" or till he has acquired some surname, by which he is generally known; Co. Lit. 3 b; *Blodwell* v. *Edwards*, Crok. Eliz. 509; *Metham* v. Duke of *Devon*, 1 P. Wms. 529: and such name he may acquire without grant or act of Parliament. So it seems, that at this day a man may take upon himself a surname by styling himself and causing himself to be known and called by it, till it is given and assigned to him by general reputation; S. P. *per* Sir *J. Jekyll*, in *Barlow* v. *Bateman*, 3 P. Wms. 65. A man indeed cannot grant to another his surname and arms, without the King's grant; 4 Inst. 126: but a proviso, that a man shall assume a particular name and arms is not a grant, but merely a condition, on non-compliance with which he is to lose the benefit of the gift or devise to him. The King's license is merely a permission to use a particular name; *Leigh* v. *Leigh*, 15 Ves. 100. As to arms or armorial bearings, at this day they are granted by the Earl Marshal. A petition is presented to him, application having first been made to the Herald's College; and he thereupon grants the arms, which are limited, with his concurrence, in such manner, as the party applying for them desires. So he grants an addition or alteration to existing arms. As to the descent of arms, see Co. Lit. 27 a, 140 b. The cognizance of coats of arms belongs to the Court of

Next, it is observable, that these words are expressly penned as a condition subsequent, and not as a limitation; and yet the next clause of the will shews, that the testator knew how to limit. If this condition be turned into a limitation, it must be by implying something that is not expressed. In answer to this it is said, that no such implication has ever been raised upon a conditional estate tail. Two cases in point have *been cited by Mr. *Blackstone* to the contrary. And they go [*615] upon a very solid ground. A condition, when annexed to an estate in fee, is meant to be compulsory; but when annexed to an estate tail cannot be so meant, but merely as an intimation of his wishes; because the donee may bar the estate tail when he pleases, and the condition perishes with it. Thus it stands upon general reasoning. But, upon the words of this will it is clear, he did not mean the estate should entirely cease upon breach of the condition. It is imposed personally on those to whom the estate should successively descend and come, not on the root of their several descents, and is therefore binding only personally. This is also the testator's meaning in the clause respecting waste. He does not make the estate tail cease, but gives it to the next taker. Such a limitation is indeed void in point of law, according to *Jermyn* and

Chivalry, also called the Court of Honour, as to which see 4 Inst. 123; *R.* v. *Parker*, 1 Sid. 352. And the offence of assuming or quartering arms, to which a person has strictly no right, is cognizable only in that Court, which is now obsolete: so that it seems any arms may be assumed or quartered with impunity. Except, that perhaps upon a title of dignity being granted, it may be necessary that the grantee should be able to prove his arms at the Herald's College, or else should have arms granted to him in the regular form.

Nevertheless it is usual to adopt the following expression in the clause for taking the arms and surname:—"Provided, &c. that all and every the persons and person, who by virtue of the limitations hereinbefore contained, or of this proviso, shall become entitled to the possession of the rents and profits of the manors and other hereditaments hereby limited in strict settlement, or expressed or intended so to be, and who shall not be then called by the name or use the arms of A., shall and do within the space of one year next after they shall respectively become entitled to the possession or to the rents and profits thereof; and that C. D., the husband of the said E. F., shall and do within one year next after the said E. F. shall so become entitled as aforesaid; and that all and every the person or persons whom the said E. F., after the decease of the said C. D., shall or may marry, or whom the said G. H. or any of the daughters or issue female of the said, &c. respectively shall marry, shall and do, if the said E. F., G. H., or the daughters or issue female of the said, &c. respectively shall at the time of such her or their marriage or respective marriages be so entitled as aforesaid, then within one year next after the solemnization of such marriages respectively; and if the said E. F., G. H., or the daughters or issue female of, &c. shall not be entitled at the time of such her or their marriage or respective marriages, but shall afterwards during her or their coverture or respective covertures become so entitled as aforesaid, then within the space of one year next after she or they shall severally become so entitled as aforesaid, TAKE upon himself, herself, or themselves respectively, and use in all deeds and writings whereto or wherein he, she, or they shall or may be a party or parties, and upon all other occasions, the SURNAME of A. together with his, her, or their own family surname; (but so, nevertheless, that he, she, or they shall and be commonly styled and designated by the surname of A.); and also shall and do quarter the ARMS of A. with his, her, or their own family arms; and shall and do within the space of one year next after he, she, or they shall so become entitled as aforesaid, or after the solemnization of their said several respective marriages, (as the case may be), apply for and endeavour to obtain an act of Parliament, or proper licence from the Crown, or take such other means as may be required or proper to enable and authorize him, her, or them to take, use, and bear the said surname and arms of A."

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Arscot (*x*), yet this construction is certainly most agreeable to the testator's intent. It is not necessary to consider how far the heir could have taken advantage of such a condition as the present: that may be doubtful. But the plaintiff can only claim upon the conditional limitation.

Qu. How far an heir can take advantage of a condition for taking a name, and at what time?

Two other points have been made in the case, not necessary to be now determined, if this be a condition subsequent, and not a limitation:—1st, Whether the party had all his life-time to perform this condition in? As to which I give no opinion. 2d, Whether, supposing it a limitation, the plaintiff could now take; because the estate, by his former laches, is gone over. To this I also give no opinion at present. If it had been necessary, perhaps one strict construction might have been set up against another.

YATES, J.—I am most clearly of opinion, that this is not a conditional limitation. It is not express, nor can it be implied, because it is not necessary to effectuate the testator's intent. No interest of any third person would be defeated

[*616] *by the breach of this condition: there is nothing, therefore, to induce the Court to raise an implication to support a vain, an idle, a useless intention. The case in Moor went entirely upon the construction of the statute of uses, which had nothing to do with the distinction between a condition and a limitation. There never was, and never will be, such a limitation implied in case of an estate tail; because the Court always means to support the intent of a testator; but such an implication would defeat it, by stripping the issue in tail. The Court will never make so hard a construction. I don't consider this

(*x*) Cited in *Corbet's* Ca., 1 Rep. 85 a; from which cases, and others collected in Fearne, C. R. 252 (8th ed.), it appears, that a proviso to cease an estate tail "as if tenant in tail were dead," is repugnant and void; because the estate tail would determine not upon the death of the tenant in tail, but upon his death *without issue* (supposing him to be the first taker). Therefore it is absurd to say, that the estate should cease as if tenant in tail were dead, his death not being positively a determination of the estate. Mr. Butler, in n. (*e*), *ibid.* observes, that the expression, that the estate of tenant in tail shall cease "as if he were dead without issue," is not sufficiently accurate. For though in the case of A., the first tenant in tail, dying without issue, the estate tail would determine; yet if A. had two sons, B. and C., when B. is in possession, his dying without issue will not have the same effect: for in that case the estate tail will be continued in his brother C. and his issue. And as it is requisite that the proviso should be such as to determine the estate tail entirely (for it cannot be determined in part and be left existing in part), the expression, to meet every possible case, should be to the following effect—"as if the party becoming entitled were dead without issue, and there were a general failure of issue inheritable under the limitation to A. and the heirs of his body." Otherwise the proviso would be repugnant and void, inasmuch as B.'s being considered dead without issue, living C. or C.'s issue, would only determine the estate tail in part.

Where an estate is limited in strict settlement, this part of the proviso may be in the following terms—"And all the said manors, &c. shall go to the person next in remainder, under the limitations herein before contained, in the same manner, as if such person or persons so neglecting or refusing, or whose husband or husbands shall so neglect or refuse, being a tenant or tenants for life, were dead, or being a tenant or tenants in tail male or in tail, were dead, *without leaving any heir inheritable* to the estate tail or estates tail then vested in the person or persons so neglecting, &c. or whose husband, &c." or "without leaving issue inheritable under such entail." See also another form and Mr. Butler's very valuable observations in Harg. Co. Litt. 327 a [n. 283].—See, as to the condition of taking the surname, *Doe* v. Lord *W. Beauclerk*, 11 East, 657.

even as a condition, but as a mere recommendation only. As a condition it would be nugatory; for the party might write his name once or twice, then suffer a recovery, and bar the whole. The clause respecting waste shews the testator knew how to limit over.

ASTON, J.—I give no opinion, whether this is a condition or a recommendation; it is clearly not to be implied a limitation, being not grounded on the intent of the testator. But the interpretation prayed is clearly against his intent, and never given upon an estate in tail. The report in Savil is the best and true report of *Rudhall* and *Milward*. The next clause shews, that, on breach of the proviso, the estate was meant to go to the issue in tail, and not to the remainder-man, though the case of *Jermyn* and *Arscot* makes such a condition void. As to the time of the performance, and the other point, I give no opinion, but only think, that a rigid construction should be put upon such odious conditions.

HEWIT, J.—There are two cases in which words of condition always operate as a limitation:—1st, Where there is a devise over in case of non-performance: 2d, Where the heir-at-law is the devisee. The intent of the testator was, not that the issue should be barred by the breach of the first taker: he never meant that their estate should depend upon his: he did not mean to create an estate tail in the first taker, but has so expressed himself that it must be so by the rules of law. Here is certainly no devise over, and I am not satisfied, in this case, that Saunders is to be considered as the heir-at-law. But if he was, as this is an estate *tail, *Thomas's* Case is a case direct in point. It is unnecessary to give any opinion on the other points.

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Postea to the defendant (*a*).

(*a*) "It seems now agreed, that wherever, in a devise, a condition is annexed to a preceding estate, and upon the breach or non-performance, the estate is devised over to another, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that upon the breach or performance of it (as the case may be), the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate.—And limitations of this sort are properly called conditional limitations."—"But where there is no express limitation over, to take effect upon the breach or performance of the condition annexed to a preceding estate, there it seems the condition or proviso is not always construed as a conditional limitation; but the construction in that case is governed by the apparent intent of the testator, as in the case of *Gulliver* v. *Ashby*;" Fearne, C. R. 272 (8th ed.): see also the same work, pp. 425, 526; *Doe* v. Lord *W. Beauclerk*, 11 East, 657. As to a condition in a bequest of personals, see *Scot* v. *Tyler*, 2 Bro. C.C. 431, and Mr. Eden's note, *ibid.* 489.

WILSON *v.* SEWELL, Master of the Rolls.

S. C. 4 Burr. 1975.

The Master of the Rolls may grant as many concurrent leases as he

ACTION on two feigned issues, to try whether two leases granted by Sir Thomas Clarke, late Master of the Rolls, the one dated 9th June, 1755, the other 5th January, 1762, of certain premisses in Chancery Lane, belonging to the office of