REPORTS

OF

CASES

ARGUED AND ADJUDGED

In the Court of King's Bench,

DURING THE TIME OF

LORD MANSFIELD'S PRESIDING IN THAT COURT,

FROM

MICHAELMAS TERM 30 GEO. II. 1756, TO EASTER TERM 12 GEO. III. 1772.

IN FIVE VOLUMES.

BY SIR JAMES BURROW, KNT.

LATE MASTER OF THE CROWN OFFICE, AND ONE OF THE BENCHERS OF THE HONOURABLE SOCIETY OF THE INNER TEMPLE.

THE FIFTH EDITION, CORRECTED;

WITH THE ADDITION OF MARGINAL NOTES, AND REFERENCES TO THE REPORTS OF THE SAME CASES.

VOL. IV.

FROM *MICHAELMAS TERM* 7 GEO. III. 1766, TO *HILLARY TERM* 10 GEO. III. 1770, INCLUSIVE.

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own fault, he shall not have such leave. So, in case of not going on to trial, if it is his own laches, he shall pay costs. (To which also Lord *Mansfield* agreed.) Therefore, the question is, "Whether there is *laches or delay*; or whether it "be a *fair* transaction?" Now *this* was fair and candid. The plaintiff has done *better* for the defendant, than if he had gone on to trial: he discovered he was in the wrong; and as soon as he knew it, desisted.

THE COURT granted Mr. *Dunning*'s motion, "to discontinue *without* payment of costs;" but the plaintiff was not to bring any new action, without * leave of the Court. [* There might perhaps, arise assets *in futuro*: and then it would be reasonable for the executor to have leave to bring a new action.]

Brown, qui tam, *versus* Bailey.

Wednesday, 12 Nov. 1766.

THE COURT made a rule, That where they give * *leave to compound* a penal action, the *king's half* of the composition shall be paid into the hands of the master of the Crown-office, for the use of his majesty.

* V. 18 Eliz. c. 5. s. 3 & 4. made perpetual by 27 Eliz. c. 10.

Gulliver, on the Demise of Ambrose Corrie, Clerk; and also on two several Demises of the same Person by the name of Ambrose Wykes, Clerk; against Shuckburgh Ashby, Esq. and Others.

Friday 14th Nov. 1766. (1 Black Rep. 607. S. C.)

THIS was a special case in ejectment. The cause came on to be tried at the last *Lent*-assizes for the county of *Northampton*, before Mr. Justice *Yates*; when it was agreed, by consent of the parties, that, although a verdict was found for the plaintiff, on the last demise, it should be subject to the opinion of this Court upon the following case.

Conditional limitation cannot be implied, unless necessary to effectuate the intention of testator.

William Wykes, Esq. being seised in fee of the estate in question, (subject only to a mortgage of part thereof,) on the 15th of *August* 1736, made his last will in writing duly executed and attested; whereby he devised, (amongst other things,) in case he should die without issue, that after the death of his wife, the premises should go to his sister *Dorcas Wykes*, for life; and after her decease, unto his 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, unto the heirs male of the body of

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of his ſiſter *Dorcas Wykes*, and the heirs male of their body lawfully begotten; with remainder to his wife and nephew's godſon, *Ambroſe Corrie* (the leſſor of the plaintiff) and the heirs male of his body lawfully begotten; and the heirs male of their body lawfully begotten; remainder to the heirs of the body of his nephew *Ambroſe Saunders*; remainder to the heirs of the body of his ſiſter *Dorcas Wykes*; remainder to his kinſman *Robert Ekins*, and the heirs male of his body in tail male; remainder to his 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 ſaid eſtates, after my wife's deceaſe, "ſhall deſcend or come unto *any* of the perſons herein be-"fore named, [that] the perſon or perſons to whom the "ſame from time to time ſhall deſcend or come, [that he or "they] do or ſhall *then change their ſirname*, and *take upon* "*them and their heirs* the *ſirname* of WYKES *only*, and *not* "*otherwiſe*." But, in *this* proviſo, there is NO *deviſe over*.

Yet there is another proviſo (which immediately follows) prohibiting *waſte*, without the conſent of the perſon to whom the premiſes *ſhall next come*; and in this latter proviſo, there is a *deviſe over* to the perſon who is or ſhall be next entitled to the premiſes expectant upon the death of the waſter, of ſuch *part* of the eſtate upon which waſte ſhall be committed or ſuffered: and ſo, *toties quoties*, on every committing or ſuffering waſte by the perſon in poſſeſſion, without ſuch conſent as aforeſaid.

On the 9th of *May* 1742, the teſtator died without iſſue; leaving his ſiſter *Dorcas Wykes*, ſpinſter, and *Ambroſe Saunders*, (the only ſon of *Sarah Saunders*, his other ſiſter, then deceaſed,) his *co-heirs*: and his widow entered upon the eſtate, and enjoyed it till her death. And upon her death, which happened on the 16th of *January* 1747, his ſiſter *Dorcas* entered and enjoyed till 26th of *December* 1756; when ſhe died without iſſue; and *Ambroſe Saunders*, who was then the teſtator's *ſole* heir at law, entered, and enjoyed till 8th of *October* 1765, when he died without iſſue; and the defendant *Shuckburgh Aſhby* entered, and has (together with the other defendants, his tenants) been in poſſeſſion ever ſince.

On the 8th and 9th of *February* 1759, the ſaid *Ambroſe Saunders*, being in poſſeſſion, executed indentures of leaſe and releaſe, and became vouchee in a common recovery, which was ſuffered in the *Eaſter* term following; but NEVER CHANGED HIS NAME of *Saunders*, *nor took upon him the ſirname of Wykes*.

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On the 17th of *January* 1766, the leſſor of the plaintiff entered, for *breach of the proviſo*, by *Ambroſe Saunders*, not taking the name of *Wykes*.

It appeared, upon the trial, that *Ambroſe Saunders*, by indenture dated 26th *October* 1757, had mortgaged part of the premiſes in queſtion.

The queſtion was, "Whether, on the caſe above ſtated, "the plaintiff was entitled to recover, in this ejectment, "ſuch parts of the premiſes mentioned in the declaration "as are not compriſed in the ſaid indenture of 26th of *Oc-*"*tober* 1757, or any part thereof?"

This caſe was argued twice: firſt, by Serjeant *Glynn* for the plaintiff, and Serjeant *Leigh* for the defendants; and the ſecond time, by Mr. *Hill* for the plaintiff, and Mr. *Blackſtone* for the defendant.

Serjeant *Glynn* and Mr. *Hill* argued, that the plaintiff *has* a title to recover; both upon the general rules of conſtruction, and legal authorities; and to effectuate the intent of the teſtator.

They endeavoured to ſhew, that the proviſo "to take the "firname" operated as a *conditional limitation*, NOT as a *condition*: and therefore the leſſor of the plaintiff's title accrued *before* the common recovery was ſuffered.

They previouſly diſcuſſed the legal notion of a *condition*, and of a *limitation*; and cited *Co. Lit.* 201. *a. b.* 214. *b.* 215. *a. b.* and ſaid, that conditional limitations differ from conditions ſubſequent; and have different properties. 2 *Salk.* 570. *Page* verſus *Hayward*. 1 *Vent.* 202. the Lady *Anne Frye's* Caſe.

Wherever the eſtate determines by way of limitation (though a collateral or conditional limitation) it will go over to the next perſon appointed to take, without any deviſe over: but if the condition or limitation is annexed to an eſtate of fee-ſimple, then it will go to the heir, (either general or ſpecial,) unleſs there be a limitation over.

Wherever ſeveral eſtates are deviſed one after another, if any of the preceding eſtates become void, the next remainder-man ſhall take, though there be no expreſs deviſe over.

A remainder *veſted* cannot be *deveſted* by the determination of the preceding eſtate: and conſequently, it muſt take effect immediately. 2 *Co.* 51. *a.* Sir *Hugh Cholmley's* Caſe,

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Case, 2 *Bulst.* 425. *Roberts* versus *Roberts*. 3 *Lev.* 437. *Duncomb* versus *Duncomb*. *Perk.* § 567. *Bro. Devise* 4.

There is no distinction between remainders depending on estates tail, and remainders upon estates for life. Where the devisee in tail dies or refuses, the next in remainder shall take. In proof of which, they cited *Cro. Eliz.* 423. and the case of *Goodright* versus *Wright*, 1 *Strange* 25. and that of *Goodright* versus *Cornish*, in 4 *Mod.* 255. and 1 Lord *Raym.* 3. and 1 *Salk.* 226. S. C. where the Court held, "that if the remainder to the heirs male of *John Knowling* "was void in point of limitation, then the next remainder "limited to *Richard* took effect presently."

And there is no difference, in point of reason, where the estate tail is *originally void*, and where it determines by matter *ex post facto*.

An authority precisely to the point, is *Rudhall* versus *Milward*, *Moore* 212. *M.* 27 & 28 *Eliz.* (at which time a condition to restrain a discontinuance was, and perhaps is *now*, holden to be good; though a condition to restrain a common recovery is not so.) It was determined, "that "*William Rudhall* was enabled to take benefit of the breach, "whether it was a condition or limitation." And Lord Chief Justice *Hobart* says, in the case of *Sheffield* versus *Ratcliffe*, (page 346.) "that by the cesser of an estate-tail, "it accrues to him in reversion."

So that wherever the precedent estate-tail becomes absolutely void before a discontinuance, the estate shall not totally fail; but the next vested remainder shall take effect. And estates tail are only barrable by common recovery; or discontinuable by fine or feoffment.

They argued secondly—That here, *Saunders's* estate *became void*; and the plaintiff's remainder was let in. This, they said, was the INTENTION of the testator; which is to be supported, if it can be so by the rules of law. And they observed that a testator is not confined to technical terms.

This proviso operated as a *limitation* to the devise to *Saunders*.

The three first devises (after that to his wife) are in tail-male: *provided*, "that the person or persons to whom the "estate shall come, [he or they] shall *change* their surname, "and *take and use* the surname of *Wykes* only, and *not other-*"*wise*."

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THIS *proviſo* operated as a limitation to the deviſe to *Saunders*; and *extends* to *all* the deviſees.

The *whole* will is to be conſidered as *one act*: it was equally the teſtator's object, "that *Saunders* ſhould take his *name*, as "that he ſhould take his *eſtate*." The former was indeed the teſtator's *primary* intent; and he meant this as a *limitation*. And the deviſee ought not to retain the eſtate, unleſs he performs the condition, or *conditional limitation*; which were the ſame thing in the idea of the teſtator; for he could not mean it as a *condition*, in the *ſtrict legal* ſenſe of that word; becauſe *Saunders* was his heir at law. And they cited *Cro. Eliz.* 204. *Wellock* verſus *Hamond*, and *Cro. Jac.* 56. *Curteis* verſus *Wolverſton*, to prove this to be a limitation. The former of theſe two caſes, namely, that of *Wellock* verſus *Hamond*, is alſo in 2 *Leon.* 114. and 3 *Co.* 20. *b.* (cited in *Borcaſton*'s Caſe:) but Mr. *Hill* cited it from *Cro. Eliz.* 204. The word "paying" was conſtrued a limitation, and not a condition: "and, being a limitation, "the law ſhall conſtrue it, that upon non-payment his "eſtate ſhall *ceaſe*; and then the law ſhall carry it to the "*heir by the cuſtom*, without any limitation over." He obſerved, that the caſe in *Dyer* 317. mentioned in 3 *Co.* 21. *a.* ſhould be 316. *b. pl.* 5. (As it certainly ſhould.)

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A *condition* can only go to the *heir at law*. But the *cuſtomary* heir came in there, as upon a *limitation*.

So here the *remainder-man* ſhall come in, upon the breach of this conditional limitation; as the proviſo muſt operate by way of *limitation*. The heir at law cannot take, till all the limitations are ſpent. This is a deviſe over, *by implication* at leaſt, if not in expreſs terms. But

Thirdly—If it be ſtill objected, "that the teſtator has *not* "*deviſed over* in *expreſs* terms, upon breach of this condi-"tion:"

They anſwered, that it was not neceſſary for him to keep to exact and technical terms; even if he had, in this caſe of not taking his name, the ſame intention of the eſtate's going over, as he has expreſsly directed in the caſe of waſte: and in that caſe, he has only given over the mere *place waſted*; not the whole eſtate.

As to any objection that may be raiſed from no *particular time* being fixed upon, at which the condition may be ſaid to be broken—the anſwer is, that "it was broken before the "common recovery was ſuffered." The common recovery

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came too late. *Page* verſus *Hayward*, 2 *Salk.* 570. and *Pigott*, on common recoveries, 175. *Benſon* verſus *Hodſon*, 1 *Mod.* 111. The ſame objection might have been made, if the eſtate had been expreſsly deviſed over, in caſe of a breach of this conditional limitation.

It is ſufficient, that we ſhew a non-performance of the condition, at the time of *Ambroſe Saunders's coming* to the eſtate; and that he lived *near nine years*, and yet *never* changed his name, nor took the name of *Wykes*. They ſhew no performance at *any* time: which ſhould come on *their* ſide, if there was any pretence of a performance at all.

Therefore they prayed judgment for all the premiſes, except that part that was in mortgage.

Serjeant *Leigh* and Mr. *Blackſtone* argued on behalf of the defendant: and principally inſiſted on the *intention* of the teſtator, which does by no means ſupport or conſiſt with their notion of a conditional limitation; or *implication* of a deviſe over, in order to effectuate the teſtator's intention.

This deviſe can only be conſidered either as a condition precedent, or a condition ſubſequent.

In fact, it is only a condition *ſubſequent*. And a condition ſubſequent cannot be taken advantage of by a *ſtranger*, (as the leſſor of the plaintiff here is,) but only by the *heir at law*. And it is barrable by a common recovery, according to the opinion of *Hale*, in 1 *Mod.* 110, 111. *Benſon* verſus *Hodſon*.

Where a teſtator deviſes over, it cannot go to the heir at law. 1 *Ventr.* 199. 203. *Porter* verſus Lady *Ann Fry Carter* 171. *Rundale* verſus *Eeley* and others: and there are ſome other caſes of conditional limitations; and where the condition would become extinct by the deſcent to the heir upon breach; as in the caſe of *Wellock* verſus *Hamond*. But the preſent caſe does not fall within that of *Wellock* verſus *Hamond*. *That* was holden to be a *limitation*: this is a *condition*.

In *this proviſo*, there is no *deviſe over*. In the *next*, there *is*: namely, in caſe of waſte; in which caſe, the perſon is to forfeit to the next taker. But the waſter is to forfeit only the *locus vaſtatus*. And this ſecond proviſo is very properly worded.

Therefore, 1*ſt*, The teſtator knew *how* to limit over, when he judged proper to do ſo; and, 2*dly*, He did not intend or ſuppoſe

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ſuppoſe that the *whole* eſtate ſhould go over, *without* a deviſe over; becauſe, in the caſe of waſte, he gives *only* th *locus vaſtatus*.

And no argument can ariſe from *Ambroſe Saunders*'s being heir at law to the teſtator; becauſe, in fact, *Ambroſe Saunders* was not *ſole* heir at law, at the teſtator's death: *Dorcas Wykes* was *then* co-heir with him. And if it is a conditional limitation *now*, it muſt have been ſo at the time of the teſtator's death. But it was not ſo *then*; nor can it be made ſo now, by a *ſubſequent* event.

The teſtator meant, that the eſtate ſhould paſs *entire*. He did not intend that the eſtate-tail ſhould be defeated by the fault of the firſt taker. The caſe of *Jermyn* and *Arſcot*, in 4 *Leon*. 83. 1 *Anderſon* 186. 2 *Anderſon* 7. *Moore* 364 and 1 *Rep*. 85. (in *Corbet's* caſe) proves, "that the eſtate-"tail cannot be defeated in *part*, and remain in *part*."

The law will not raiſe ſuch an implication as this, upon an eſtate-tail. *Wellock* verſus *Hamond* (which is the only caſe of an heir by cuſtom taking advantage of the breach) was a fee; and was a deviſe of the *whole* fee. And *Cro. Eliz*. 205. is expreſs, "that *being a limitation*, the law ſhall conſtrue it, "that upon the non-payment of the money, his eſtate ſhall "ceaſe: and then the law ſhall carry it to the *heir by cuſtom*, "without any limitation over." In the caſe of *Skirne* and Dame *Bond*, in 1 *Ro. Abr*. 412. title Condition, *pl*. 6. it was reſolved, "that if a man deviſes land to another in *tail*, "upon condition that he ſhall not alien; and that if he dies "without iſſue, it ſhall remain over to another in fee; and "after, the deviſee aliens; yet he in remainder can not enter "for the condition broken; but the heir at common law: for "this is no limitation, but a condition."

Though it might have been conſtrued a limitation, if it had been annexed to an eſtate in fee; yet when it is annexed to an eſtate-*tail*, it ſhall be conſtrued a *condition*, for the ſake of the iſſue. *Dorothy Wykes* might have left iſſue: and they ought not to have been deprived of their moiety.

The caſe of *Rudhall* verſus *Milward*, in *Moore* 212. is a confuſed note: nothing can be collected from that report, "whether it was a condition, or a limitation." But *Savil* 76. S. C. explains it, and ſhews clearly, "that it was a con-"dition, and *not* a limitation."

Thomas's Caſe, in 1 *Ro. Abr*. 411. title "Condition or Limitation," *pl*. 1. and 843. letter L, *pl*. 1. is in point: and

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and that was determined five years ſubſequent to the caſe of *Wellock* verſus *Hamond*. It was a deviſe to his daughter in *tail*, with divers remainders over: *provided*, "that the "daughter, and every one in remainder, ſhould permit and "ſuffer *T*. (who then occupied the land) to enjoy it during his "life." This is *not* a limitation; though the daughter was heir general, and ſo was herſelf to have the advantage of the condition, if it be a condition: notwithſtanding which, it was holden to be a *condition*.

And theſe two caſes are reconcileable, *only* by the diſtinction between being in *fee*, and in *tail*.

Therefore they concluded, that no limitation ſhall be raiſed in the preſent caſe, by *implication*.

But even *ſuppoſing*, that it might be conſtrued as a conditional limitation—yet, 1ſt, There is *no breach*: 2dly, If there was, the leſſor of the plaintiff could not *take advantage* of it.

Firſt—The perſon required to change his name, had his *whole life-time* to take the ſirname of *Wykes*. And as an authority for this aſſertion, they cited *Bothie*'s Caſe, in 6 *Rep.* 30, 31. And in 4 *Leon.* 305. caſe 425. it was agreed by all the judges, "that conditions which go in defeazance "of an eſtate, are *odious* in law; and no re-entry ſhall in "ſuch caſe be given, unleſs the demand be preciſely and "ſtrictly followed."

The words "not otherwiſe" in this proviſo, only mean "*no other name*."

The taking the name of *Wykes* was of no benefit to any body; and the deviſees are *not fixed* to a *particular time*. Therefore the condition is not broken, if the poſſeſſor of the eſtate takes the name at *any* time during life.

Ambroſe Saunders was heir at law for half. The Court will not preſume him conuſant of the will and proviſo. However, it certainly was not neceſſary for him to do it *inſtantly*: he muſt, at leaſt, have convenient time. And *convenient* time is during the *whole life* of the taker; it being left *indefinite*; and no benefit accruing to any body by his taking the name.

Conſequently, *Ambroſe Saunders* had a *good eſtate-tail in him*, at the time *when* he ſuffered the common recovery; and thereby acquired a fee. 1 *Mod.* 111. *Benſon* verſus *Hodſon*, 1 *Salk.* 570. the fourth adjudication in *Page* verſus *Hayward*.

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In that caſe of *Page* verſus *Hayward*, 2 *Salk.* 570. reported alſo by Mr. *Pigott* in his treatiſe of Common Recoveries, page 175. the condition was—" to marry a *Searle*; and *Mary Bryant* had actually married *another* man: yet, ſtill, there was a *poſſibility* of her performing the condition. Bnt it was reſolved, that if it had been—" provided, and upon condition, that if ſhe marry *any but* a *Searle*, " it ſhall *then* remain and be to *J. S.* and his heirs;" a common recovery ſuffered *before* marriage would bar the eſtate-tail and remainders; and though ſhe *after* marry with another, it ſhall not avoid the recovery.

Secondly—But even admitting that it was conditional limitation, and that *Ambroſe Saunders* ought to have taken the name preſently, yet the leſſor of the *plaintiff* can have no right to recover. For, upon a limitation, the eſtate ceaſes, without entry or claim: and the law caſts it upon the party to whom it is limited. To prove which, they cited *Moore* 633. *Anthony Mildmay* verſus *Humphrey Mildmay*. *Carter* 171. Sir *William Jones* 58. *Walter Foy* verſus *William Hyrde*. *Co. Litt.* 214. *b.* 10 *Rep.* 49. and 2 Mod. 7.

Therefore, upon their *own* principles, *Corrie* ought immediately to have taken the name of *Wykes*: and ſo on. So that at the laſt, by a circuity, it would come round again to *Ambroſe Saunders*, the heir at law.

But *Ambroſe Corrie* did not enter and take the name. So that he is under this dilemma: that either the eſtate of *Ambroſe Saunders* did not ceaſe upon *Saunders*'s not immediately taking the name of *Wykes*: or (if it did) then his own eſtate muſt have ceaſed, upon *his* not having immediately taken the name of *Wykes*: and the perſon next in remainder muſt take. So that, either way, he could have no title.

Even at the *time* of his bringing the ejectment, he had *not* taken the name of *Wykes*, and *Wykes only*. For one of the demiſes is by the name of *Ambroſe Corrie*: though the other two call him *Ambroſe Wykes*: ſo that he did not take the name of *Wykes only*. Now the eſtate and the condition muſt veſt *together*. If he was in by relation, he ought alſo by relation to have taken the name of *Wykes only*.

Therefore *quacunque via datâ*, he has no title to recover, in this ejectment.

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In reply—The counſel for the plaintiff endeavoured to ſupport their former grounds of the leſſor's title; and to anſwer the objections that had been made to it.

Their argument conſiſted of two parts: 1ſt. That the proviſo ought to be conſtrued as a *limitation*; 2dly, That an *implied* deviſe to the plaintiff appears upon the face of the will.

They argued, that this proviſo ought not to be conſtrued as a condition ſubſequent, but as a *conditional limitation*; both according to the rules of law, and according to the intention of the teſtator: and conſequently, the heir at law ſhall not take, on breach of it; eſpecially, as he was here the very perſon who broke it.

As to the caſe of *Porter* verſus *Frye*, (Lady *Anne Frye's* Caſe) 1 *Vent.* 202. that they ſaid, was a reſtraint on marriage: and whenever the condition is in reſtraint of marriage, it will fail, unleſs there be a deviſe over*; as in the caſe of *Hervey* verſus *Aſton*.

* Lord Mansfield ſaid, that was a condition precedent; and therefore the eſtate never veſted. And in chancery it is held, "that "ſubſequent conditions of forfeiture in reſtraint of marriage are only meant "in terrorem; unleſs there is a deviſe over."

Where the heir at law is the only perſon that can take a benefit by the breach, it is a conditional limitation: becauſe it would be nugatory "to conſtrue it a condition." And here *Ambroſe Saunders* was *ſole* heir at the *time of the recovery ſuffered*: therefore it would be *nugatory*, if conſtrued as a condition.

The teſtator meant the eſtate and the name to go *all* together: not in moieties of the eſtate. And it was certain that *A. S.* would *become* ſole heir, whenever *Dorcas* ſhould die without iſſue. Beſides, *Dorcas Wykes* and *Ambroſe Saunders* were but *one* heir: and it was an *entire deſcent* to both. And it muſt have been an † *entire* entry for the breach: and not in moieties. *Eaſtcourt* verſus *Weekes*, 1 *Lut.* 802. one co-parcener cannot enter for ſelf and the other co-parcener. No entry can be for a moiety: they are but one heir.

† Brooke, Coparceners, pa. 179, pl. 8.

There is a difference between parceners by *cuſtom*, and parceners by *common* law. The latter are conſidered as *one* repreſentative of the deceaſed: the former, as ſeveral; each as to his reſpective part.

As to proviſoes tending to reſtrain alienation by tenant in tail—they ſaid, that an attempt to introduce perpetuities ſhall

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ſhall never prevail. They agreed, that a limitation can not make *part* of the eſtate ceaſe, and not the reſt: and conſequently they admitted, that if this eſtate ceaſed as to *Ambroſe Saunders*, it alſo ceaſed as to his iſſue. But they argued, that it is no hardſhip upon the iſſue of *Ambroſe Saunders*. In ſupport of which they cited what was ſaid by Lord *Parker*, in the caſe of *Goodright* verſus *Wright*, in 1 *Stra.* 32. in anſwer to the ſuppoſition of hardſhip upon the iſſue; who were not in being at the time of that deviſe. And in the caſe at bar, *Ambroſe Saunders* had no iſſue at the time of the deviſe. Therefore the iſſue of *Ambroſe Saunders* could *not* be the *primary* object of the teſtator's regard; and the remainder-men only ſecondary objects of it. They inſiſted, that this breach of the conditional limitation makes a total failure of inheritable iſſue; and therefore is the ſame as if there were none at all.

As to *Ambroſe Saunders*'s having time *during his whole life*, to take the name of *Wykes*—here *is* a time expreſsly limited: "*whenever* the eſtate ſhould come to the taker," he was *then* to take the name of *Wykes*.

But if it had not been particularly limited, yet it ought to have been done *as ſoon* as it could conveniently be done. Whereas this recovery was *above two years* after the eſtate came to him: and he *never* took the name; not even *upon* the recovery itſelf. Therefore he forfeited, on not doing it immediately; or at leaſt as ſoon as conveniently might be.

As to *Hales*'s opinion, in 1 *Mod.* 111. and the caſe of *Page* verſus *Hayward*—they go upon the ſuppoſition "that "the condition was not at that time broken." But here it was broken, at the *time* when the recovery was ſuffered.

As to the *leſſor of the plaintiff* not taking the name immediately himſelf—he was not to take it *till* he came into *poſſeſſion*: he has never entered. He was not to take the name *without* the eſtate. He took it as ſoon as he claimed the eſtate.

As to the proviſo againſt waſte being explicit in giving over the place waſted—though that ſecond proviſo is indeed *more* explicit than the former, yet the proviſo now in queſtion contains a very ſtrong *implication*: and *all* the words of this will cannot be ſatisfied, unleſs this implication be *made*. Therefore ſuch an implication ſhall be made upon this firſt proviſo.

Lord MANSFIELD, after ſtating the caſe, obſerved, that the only foundation of the plaintiff's title is, "that the *eſtate-*"*tail was to ceaſe* upon *Ambroſe Saunders*'s not taking the firſt "name

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" name of *Wykes*; and that, for want of his taking ſuch " ſirname, it *went over* to the *next in remainder*."

The whole of this caſe is a queſtion of *conſtruction*; provided the intention of the teſtator be not contrary to law.

With a view to effectuate the intent of the teſtator, it is certain, that a condition *may* be conſtrued into a limitation. And there is nothing plainer than the *principles* upon which the caſe of *Wellock* verſus *Hamond* was determined; " that " it muſt be underſtood in the nature of a limitation, when " the eſtate to which the condition ſtands annexed is given " to the *heir at law*: becauſe, in caſe it were a *condition*, it " would deſcend upon the heir *himſelf*, and extinguiſh in " him; and there would be no remedy for the breach of it."

But then that caſe goes on, and determines directly contrary to the intent, " that the law ſhall carry it to the heir " by the cuſtom, without any limitation over."

In that caſe, the money was to be paid by the eldeſt ſon to his brothers and ſiſter, within two years after the death of the teſtator's wife. He did not pay it within two years: but he paid it within five years.

And at a diſtance of time the Court determined, " that " the *heir by the cuſtom* ſhould take advantage of the " breach*." *That*, certainly, was contrary to the intention of the teſtator: for he only intended, " that the heir at law " ſhould have it *as* a *pledge*."

* V. ante 1934.

In the preſent caſe his Lordſhip held—

Firſt—That this is *not* a condition *precedent*. It cannot be complied with inſtantly. It is " to take the name for them- " ſelves and *their heirs*." Now many acts are to be done, in order to oblige the heirs to take it: ſuch as a grant from the King, or an act of parliament. It is not, therefore, a condition *precedent*; but, being penned *as* a condition, it muſt be a condition *ſubſequent*. It cannot be a *limitation*: for, the next proviſo (againſt waſte) ſhews that the teſtator knew how to limit over, when he thought proper to do ſo. And in *that* caſe, he did think it proper to do it: and therefore *that* proviſo is turned into a limitation.

As to any *implication* of a limitation upon the firſt proviſo —the Court cannot intend or imply what does not appear to be the teſtator's intention. And no ſuch intention of the teſtator

teſtator appears in this caſe: rather the contrary, and yet it is ſaid, "that the *eſtate-tail* ſhall *ceaſe*; and it ſhall go over to "the next taker, by implication." But there is no caſe or authority produced in ſupport of ſuch implication. The caſe of *Skyrne* verſus *Bond*, and *Thomas's* caſe, are, both of them, contrary to it.

A condition annexed to an *eſtate-tail* can never be meant to be compulſory: becauſe the teſtator muſt know, that the tenant in tail could bar it the very next term. Therefore this condition could not be intended by the teſtator to be compulſory, ſo as to bar the eſtate-tail which he had given to *Ambroſe Saunders*.

On this will, it is clear that the teſtator did *not* mean the *eſtate-tail* to ceaſe: for the condition is impoſed *perſonally* upon *every* heir—"The *perſon* or *perſons* to whom the eſtate "ſhall from time to time deſcend or come." Therefore the teſtator meant to paſs over *only* the particular *perſon breaking* the condition, and to impoſe the forfeiture upon him or them *perſonally*; but never meant that the *whole eſtate-tail* ſhould ceaſe.

Now it is a limitation void in law, "that an eſtate tail "ſhall ceaſe in *part*, and not in the whole." The caſe of *Jermyn* and *Arſcot* * is in point. It would be a limitation void therefore in itſelf, even if it *could* be implied.

* V. ante 1935.

It is not neceſſary to inquire whether the *heir* at law can take advantage of this condition, or not: it is enough, that the *preſent plaintiff* cannot claim: It is plain to me, that he cannot: and I am clear that the teſtator had no ſuch meaning as has been ſuggeſted and ſuppoſed on the part of the plaintiff.

As to the queſtion, "Whether the condition was broken, "or not?"—In ſuch a caſe, (of ſo ſilly a condition as this is,) the Court would perhaps incline againſt the rigour of the forfeiture. But as to *this* I give *no opinion*; nor upon Mr. *Blackſtone's* ingenious conceit of the plaintiff's not having taken the name, and therefore having *himſelf* forfeited. The plaintiff, who inſiſts ſo ſtrictly upon this being a forfeiture of the eſtate, has certainly no pretence to any *favour* from the Court However, in this caſe, there is no need to meddle with the queſtion about the forfeiture: for the recovery was *well* ſuffered; and therefore the plaintiff has no title.

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Mr. Justice *Yates*—This is certainly not a condition *precedent*.

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The question then is, "Whether it be a *conditional limitation*?" I am clearly of opinion, it is *not*. Doubtless, 'tis *not an express* limitation: and an *implication* of one can only be made, in order to *effectuate* the testator's intention; and must be a *necessary* implication to that purpose.

Now this would *not* be so. Exclusive of this recovery, all the devises would take effect according to the testator's intention, *without* such an implication. And the court will not make an implication, to support an *idle* intention, beneficial to nobody: nor shall such an implication be made upon a limitation after *estates-tail*.

* V. ante 1932. Mr. Hill cited the case of * *Rudhall* versus *Milward*, (in *Savile* 76. and *Moore* 212.) But that case does not come up to a limitation after an estate-tail. †

† Note, Lord Mansfield had observed, at the end of Mr. Hill's argument, "that Rudhall v. Milward was a hard determination, that there was no implied limitation; and that the remainder was "to the heir at law, who was to take the advantage of the breach of the condition."

If this was to be construed a *conditional limitation*, it would strip the *issue* of *Ambrose Saunders*; and consequently defeat the intention of the testator; he never meant to exclude *them*. And ‡ V. ante 1939. yet it is urged "that they should be excluded."‡

It cannot, therefore, be considered as a *conditional limitation*; Nor is it a *condition* subsequent: for, it would be nugatory; as *Ambrose Saunders* might immediately suffer a common recovery, and bar the estate. It can only *operate* as a *recommendation* or *desire*. And this is the stronger; by reason of the *express* condition annexed to the second proviso; (notwithstanding that it is an ineffectual one.)

Mr. Justice *Aston* — Whether this be a condition, or a recommendation; yet the rules of making implications do not hold in the case now before us. The cases cited in support of making the implication are founded upon reasons which do not exist in the present case.

I take it to be a condition subsequent; and, as such, barred by the common recovery.

The case of *Rudhall* versus *Milward* is best reported in *Savile* 76. That was considered as a condition, and not a limitation.

limitation. And that is agreeable to *Thomas's* case in 1 *Ro. Abr.* 411.

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The implication contended for, in the present case, is contrary to the manifest intention of the testator; who never meant that the *estate-tail* should cease on a breach of the condition mentioned in the *first* proviso. He certainly meant that the issue in tail should take, in case of a breach upon the *second* proviso. For the "person to consent to the waste," was *the issue in tail: it* was not meant to *exclude* him. He agreed to the observation, "that the case of *Jermyn* versus "*Arscott* seems to make this condition void *." He inclined to think that *Ambrose Saunders* had his *whole life* for taking the name. He concurred in opinion with Lord *Mansfield* and Mr. Justice *Yates*, "that the lessor of the plaintiff had no title."

* V. ante, 1935. 1941.

Mr. Justice *Hewitt* — If this be considered as a condition, it is collateral and subsequent, and would be destroyed by the recovery.

Such a proviso as this is, shall operate as a limitation, where there is a devise over; and also in *some* cases where the devise is to the heir. The latter is an implied conditional limitation: and this case must be of that sort, if it were a limitation at all.

But here the intention of the testator appears to be contrary to such implications. Such an implication would defeat the issue: whereas he *intended* that they should be the next takers, in case of a breach; not that they should *suffer* by it.

However, there is no authority that such an implication of a devise over can be made, after a devise in *tail*.

Wellock versus *Hamond* was a devise of a fee. And if it had been construed a condition, it must have descended to the eldest son upon his own breach of it.

Rudhall's case seems rather to have been considered as a condition, than as a limitation. However, 'tis no authority in the present case.

In the case of *Jermyn* versus *Arscot*, the proviso was repugnant: it could not take effect by law. The estate was "to "cease, as if the tenant in tail male was naturally dead. But "the mere death of such a person does not determine his es- "tate. It must be a dying without issue male."† So, here, a like repugnancy would follow upon a like construction.

† 1 Co. 86. a.

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As to its being only a *recommendation*—I find no caſe in the books about *recommendations:* and I ſhall not enter into the queſtion "Whether this is to be conſidered as a *mere recommendation*, or as a *condition*."

Thomas's caſe in 1 *Ro. Abr.* 411. 843. ſeems in point. If that was a *ſingle heir*, that caſe is in point: if not, *one* coheir may * enter *for both*. And no advantage was here taken of the condition, *before* the recovery was *ſuffered*.

* V. Bro. Abr. Coparceners, 8.

He concluded with ſaying, that this condition, or whatever elſe it may be called, is not ſuch a limitation as will carry the eſtate *over* to the next remainder-man, upon breach of the condition enjoined: and therefore the *plaintiff*, who is that next remainder-man, and only claims as being ſo, can have no title to recover.

Per Cur. unanimouſly—

Let the *poſtea* be delivered to the defendant.

Monday, 17th Nov. 1766.

Howe, Eſq. *verſ.* Nappier.

Prohibition ſhall go to the Admiralty-Court, in a ſuit there for ſeamen's wages, if agreement be ſpecial or under ſeal.

A Prohibition had been moved for, to the Court of Admiralty, in a ſuit there for ſeamen's wages, upon a ſuggeſtion "that it was by *deed executed*." It was upon an *Eaſt India* Company's charter-party: which are always (as it was ſaid) under ſeal.

1 Ld. Raym. 577. 1206.

On the laſt day of laſt term, Mr. *Dunning* ſhewed cauſe againſt the prohibition; and alledged that theſe contracts uſed to be *without* deed: but by 2 G. 2. *c.* 36. it was provided that they ſhould be *in writing*, declaring the wages, and expreſſing the voyage. That act ſays—"The agreement ſhall be "made in *writiug*.†" But it did not intend to deprive the ſailors of the benefit of ſuing in the Admiralty-Court; where they could obtain their wages in a more ſummary and expeditious method, than in the common law courts.

† Sect. 1.

Sir *Fletcher Norton* and Mr. *Walker*, *contra*, argued for the prohibition; and urged, that the Admiralty-Courts have no juriſdiction, where the contract is *under ſeal*. 2 Sir *J. S.* 968. *Day et al. verſus Searle*, 1 *Salk.* 31. *Opy verſus Addiſon*. [*V.* 12 *Mod.* 38. *S. C.*] 1 *Ld. Raym.* 577. [See it alſo in 2 *Mod.* 405.] *Clay* v. *Snelgrave*. They proceed by a *different manner of proof*; they require *two* witneſſes; the common law, only *one*.

LORD