REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

Lord Chancellor Eldon;

FROM THE

COMMENCEMENT OF THE SITTINGS BEFORE HILARY TERM, 1818,

TO THE

END OF THE SITTINGS AFTER MICHAELMAS TERM, 1819.

BY CLEMENT TUDWAY SWANSTON, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

1818, 1819, 58, 59 GEO. III.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR JOSEPH BUTTERWORTH AND SON, LAW-BOOKSELLERS,
43. FLEET-STREET;
AND J. COOKE, ORMOND-QUAY, DUBLIN.
1822.

LORD ELDON, *Lord High Chancellor.*
Sir THOMAS PLUMER, *Master of the Rolls.*
Sir JOHN LEACH, *Vice-Chancellor.*
Sir SAMUEL SHEPHERD, *Attorney-General.*
Sir ROBERT GIFFORD, *Solicitor-General.*

1818.

July 16, 17, 18.

RICHARD HAWKINS, and MARY, his Wife, and JOHN HAWKINS, - - PLAINTIFFS;

AND

JOHN LUSCOMBE LUSCOMBE, MARGARET MANNING, JOHN HURRELL LUSCOMBE, Heir of the surviving Trustee, and JOHN LUSCOMBE, - - DEFENDANTS.

Estates being devised to trustees and their heirs, upon trust, to permit *M. M.*, *M. C.*, and *J. J.*, to reside in a mansion house, and receive part of the rents, in recompense

THE original bill, filed on the 12th *June* 1817, stated, that *John Luscombe*, deceased, by his will, dated the 3d of *February* 1774, devised (subject to certain annuities and legacies) unto *Thomas Whinyeats*, *Thomas Coplestone Prideaux*, and *Roger Prideaux*, and their heirs, certain messuages, tenements, and hereditaments, upon trust, to permit his nieces, *Margaret Manning* and *Mary Creed*, (afterwards *Mary Hawkins*,) and *Juliana* of the maintenance of *J. L. M.*, (eldest son of *M. M.*) till he attained 21, or died, and subject thereto to the use of the trustees and their heirs, in trust for *J. L. M.*, until he should attain 21, or die, and to the intent that the rents might be accumulated, and after he attained 21, to the use of him and his assigns, during his life, he taking the testator's surname of *L.*; remainder to the use of the trustees, and their heirs, during his life, to support contingent remainders; remainder to the use of his first and other sons, taking the surname of *L.*, in tail male; remainder to the use of the second and every other son of *M. M.* by her present husband; remainder to her first and every other son by any future husband, in tail male, taking the surname of *L.*; remainder to the use of the trustees and their heirs, during the life of *M. M.* upon trust for her separate use; remainder to the use of the trustees, and their heirs, during the life of *M. C.* upon trust for her separate use; remainder to her first and other sons taking the surname of *L.* in tail male, with ulterior remainders, and a proviso, that the heirs male of the bodies of *M. M.* and *M. C.* claiming under the will, should, on taking possession of the estates, assume the surname of *L.*, and, within three years, procure their name to be altered by act of Parliament, or some other effectual way; and in case they should neglect to obtain an act of Parliament, or some other authority as effectual, for three years after being in possession, then the use and estate limited to the person so neglecting should cease and become void, and the estates should vest in the persons next in remainder, as if the person so neglecting were dead without issue; *J. L. M.*, in 1794, having attained 21, taken possession of the estates, and assumed the name of *L.*, but neglected to obtain an act of Parliament, or any other authority for the use of that name, and having had a son born in 1806, and *M. M.* having died without other sons; on a bill by *M. C.*, insisting that *J. L. M.* had forfeited the estates, the Court refused to appoint a receiver, or, infants (who are not bound by admissions) being interested, to direct a case. — What uses are executed in the trustees? — *Quære.*

Jutsham,

1818.

HAWKINS v. LUSCOMBE.

Jutsham, and the survivors and survivor of them, her executors or administrators, to inhabit a mansion-house described, and take the rents and profits of a part of the premises as a recompense for their care, maintenance, and education of the testator's cousin, *John Luscombe Manning*, afterwards *John Luscombe Lusbombe*, son of *M. Manning*, who he willed should live therewith, and be well provided for and maintained by them in all respects suitable to his condition, during so many years as should expire, until he should attain the age of twenty-one years, or die, which should first happen; and subject to the said trust-estate, as to the whole of the premises, to the use of *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, in trust for *John Luscombe Manning*, until he should attain twenty-one or die, which should first happen, and to the intent that the same might, in the mean time, be set out at yearly rents, and that the clear rents and profits, after a deduction for repairs, &c. should, from time to time, be invested in the public funds, and the interest thereof accumulated and made principal money, for the benefit of *John Luscombe Manning*, until he should attain the age of twenty-one years, when the same should be transferred or paid over to him for his own use; and in case of his death, in the meantime, the same should go to his executors or administrators to the time of his death; and immediately after he should attain the age of twenty-one years, then to the use of him and his assigns, during the term of his natural life, without impeachment of waste, he taking and using the testator's surname of *Luscombe* as, and for, and instead of his own surname; subject, as to part of the premises, to several annuities, and, as to other parts, to certain terms of years; remainder to the use of the trustees and their heirs, during the life of *John Luscombe Manning*, upon trust, to support contingent remainders, but nevertheless to permit him and his assigns to receive the rents and profits during his life, and immediately after his decease

to

1818.

HAWKINS v. LUSCOMBE.

to the use of the first son of the body of *John Luscombe Manning*, lawfully to be begotten, taking and using the testator's surname of *Luscombe* as and for his and their own surname, and of the heirs male of the body of such first son lawfully issuing, taking and using the testator's surname as, for, and instead of his and their own surname; with remainder to the use of the second, third, and every other son of the body of *John Luscombe Manning*, *&c.* in tail male, taking and using the testator's surname of *Luscombe*, *&c.*; remainder to the use of the second, third, and every other son on the body of *Margaret Manning* lawfully begotten, or to be begotten, by *R. Manning*, her then husband, and in default of such issue, *&c.* to the use of the first, second, and every other son on the body of *Margaret Manning* lawfully to be begotten by any after-taken husband or husbands, in tail male, taking and using the testator's surname of *Luscombe*, *&c.*; remainder to the use of the trustees and their heirs during the life of *Margaret Manning*, (subject as aforesaid,) upon trust, and for the sole, distinct, and separate benefit of her, exclusive of her said husband and every other husband which she should have, and to the intent that the trustees, and the survivors and survivor of them, and his heirs, should receive and take the rents and profits of the premises, and pay the clear produce of the same, after deduction and allowance, from time to time, for taxes, repairs, *&c.* unto and into the hands of *Margaret Manning*, and her only, for her own sole and separate use and benefit, distinct and apart from her then present or any other after-taken husband or husbands, and her receipt or receipts alone, from time to time, to be sufficient discharges for the same, notwithstanding her coverture; and after the decease of *Margaret Manning*, to the use of the trustees and their heirs, during the life of the testator's niece *Mary Creed*, afterwards *Mary Hawkins*, (subject as aforesaid,) upon trust, for her sole, distinct, and separate benefit, whether sole or under

1818.

HAWKINS v. LUSCOMBE.

under coverture, and to the intent that the trustees, and the survivors and survivor of them and his heirs, should receive the rents and profits of the premises, and pay the clear produce of the same, (after such deduction and allowance as aforesaid,) unto and into the hands of *Mary Creed*, whether sole or under coverture, and her only, for her own sole and separate use, distinct and apart from any husband or husbands which she might have, and her receipt and receipts, from time to time, to be good and sufficient discharges for the same, notwithstanding coverture; and immediately after her decease to the use of the first son of her body, lawfully to be begotten, using and taking the testator's surname of *Luscombe*, *&c.*, and of the heirs male of the body of such son lawfully issuing, (subject as aforesaid,) with remainder to the use of the second, third, and all and every other sons of the body of *Mary Creed*, in tail male; with divers remainders over, with the ultimate remainder to the use of the testator's right heirs; and other tenements and hereditaments the testator devised to *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, upon trust, for *John Luscombe Ryan*, until he should attain the age of twenty-one years, or die, which should first happen, and to the intent that the premises, or such part or parts of the same as should not be out in lease, should be set out at a yearly rent or rents, until *J. L. Ryan* should attain the said age, or die, and the clear rents and profits of the premises, after a deduction for all rates, taxes, *&c.*, or as much thereof as the trustees, or the survivors or survivor of them or his heirs, should in their discretion see fit, should be applied towards the maintenance and education of *J. L. Ryan*, and for placing him out apprentice, *&c.*, and the surplus should be invested in the public funds, or placed out at interest, in the names of the trustees, on real or personal security, and the interest thereof applied for the purposes aforesaid,

aforesaid, or otherwise accumulated, to be made principal-money for the benefit of *J. L. Ryan*, until he should attain that age, when the whole should be transferred or paid to him for his own use, after such deductions as aforesaid, and also after a full allowance of all sums paid or disposed of for or on his account, or in case of his death, before he should attain that age, then for the benefit of his executors or administrators to the time of his death; and immediately after he should have attained the age of twenty-one years, then to the use of him and his assigns for his life, with remainder to the trustees and their heirs, during his life, upon trust, to preserve contingent remainders, but to permit *J. L. Ryan* and his assigns to take the rents and profits of the premises to his and their own use, during the term of his life, and immediately after his decease to the use of *John Luscombe Manning* and his assigns, during the term of his life, without impeachment of waste, except voluntary waste in houses and buildings; remainder to the use of the trustees and their heirs, during the life of *John Luscombe Manning*, upon trust, to preserve contingent remainders, but to permit him and his assigns to take the rents and profits of the premises, during his life, and after his decease to the use of such persons respectively and in such order and course, and for such estate and estates, *&c.*, as the other premises were limited, subsequent to the limitation to the trustees for the life of *John Luscombe Manning*, to preserve contingent remainders; and other tenements and hereditaments the testator devised to *T. Whinyeats*, *T. C. Prideaux*, and *R. Prideaux*, and their heirs, to the use of *Juliana Jutsham* and her assigns, for her life, without impeachment of waste, except waste in houses and buildings; with remainder to the use of the trustees and their heirs, during her life, upon trust, to preserve the contingent uses and estates thereinafter limited, but to permit her and her assigns to receive the rents

1818.

HAWKINS v. LUSCOMBE.

rents and profits of the premises, during her life, and after her decease, to the use of *John Luscombe Manning* and his assigns, for his life; with like remainder as in the former devises.

The will contained the following proviso:—"Provided always, and it is my express will, and I do hereby empower, direct, and appoint, that the heirs male of the several body and bodies of the said *M. Manning* and *M. Creed*, and that the said *J. L. Ryan*, and the heirs male of his body, and each and every of them respectively claiming, or that shall claim, by, under, or in virtue of this my will, or any of the limitations, directions, or devises herein contained, any right, estate, or title in or to the capital messuage, and tenement, &c. or any other of the lands or hereditaments comprised in the first devise of this my will contained, not bearing the surname of *Luscombe*, shall, when and as soon as he or they, or any of them, shall be respectively in possession of the same premises, or any part thereof, under, or by means, or in virtue of this my will, take upon him or themselves the name of *Luscombe*, and use the same as, for, and instead of his or their own surname as aforesaid, and shall within three years then next after, get and procure his or their own name or names to be altered and changed to my name of *Luscombe*, by act or acts of parliament, or some other effectual way for that purpose, and shall for ever after have, use, and bear on all occasions the said surname of *Luscombe*, for him and them, and the heirs male of his and their body and bodies as aforesaid; and in case any or either of the heirs male of the body of the said *M. Manning*, or *M. Creed*, or the said *J. L. Ryan*, or the heirs male of his body, or any or either of them respectively, who shall be in possession of the said capital messuage, &c. or any part thereof, by, under, or in virtue of this my will, shall not use and take my said surname, but shall neglect to get

get an act of Parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he, she, or they shall be in possession of the same as aforesaid, that then and in such case the use and estate hereby given, devised, or limited, of and in the same premises, to and for the benefit of such person or persons so neglecting to get, or not getting, such act of Parliament, or other authority as aforesaid, shall cease, and become void, as if no such use or estate had been hereby given, devised, or limited; and the same premises, and every part thereof, shall, immediately upon and after the expiration of the said three years, go over to and descend upon, and vest in, such person or persons as shall be next in remainder or reversion, or unto and upon whom the said premises are hereby settled, given, devised, or limited, in the same manner, to all intents and purposes, as if such person or persons so neglecting to change his or their surname or surnames was, were, or had been dead without issue of his or their body or bodies, any thing herein contained to the contrary notwithstanding; upon this express condition, nevertheless, that such person so to take, do and shall also take my said surname, and get an act of Parliament, or such other effectual authority for so doing as aforesaid, otherwise the said capital messuage, *&c.*, and all other the premises first hereby devised, shall go over to the next person to whom the same are limited as aforesaid, who shall so take my surname as aforesaid."

The bill further stated, that by a codicil, dated the 8th of *June* 1777, the testator appointed *J. Luscombe* a trustee; and died on the 3d of *July* 1776; that *J. Luscombe Ryan* died in the lifetime of the testator, and *J. Jutsham* in *November* 1787; that *J. Luscombe* survived his co-trustees, and died in *August* 1811, leaving *J. Luscombe* his eldest son and heir; and that *M. Creed*, in *June*

1818.
HAWKINS
v.
LUSCOMBE.

1779, intermarried with *R. Hawkins*, by whom she had two sons, *John Hawkins* and *Abraham Mills Hawkins*, who had both attained the age of twenty-one years; that *John Luscombe Luscombe*, in the will named *John Luscombe Manning*, was the only son of *Margaret Manning*, and that, upon his attaining the age of twenty-one years, on the 28th of *April* 1794, he entered into the possession of the premises devised, including those devised to *J. L. Ryan* and *J. Jutsham* for life; but he did not thereupon take and use the name of *Luscombe*, instead of his own surname, nor did he, within three years then next after, procure his own name to be changed to the name of *Luscombe*, by act of Parliament, or any other effectual way; and he never, in fact, took or used the surname of *Luscombe*, or in any manner procured his name to be altered or changed to the surname of *Luscombe*, until he attained the age of forty years, or thereabouts; that, by reason of such breach of the condition in the will, the estate and interest of *John Luscombe Luscombe* in the devised premises became void, and *Margaret Manning*, as the next person in remainder, became entitled to the same for her life; that *John Luscombe Luscombe* did not marry until he was of the age of twenty-five years, and that *J. Luscombe*, his eldest son, was born in *December* 1806.

The bill also stated, that at the time when *John Luscombe Luscombe* entered into possession of the devised premises, there were large quantities of timber trees standing and growing thereon, and that he and *Margaret Manning*, or one of them, had since caused the same to be cut and felled, and sold considerable quantities thereof, and converted the money arising from the sale thereof to their own use; and that *Margaret Manning*, or *John Luscombe Luscombe*, by her authority, intended to cut other timber standing or growing upon the devised premises.

The

1818.

HAWKINS v. LUSCOMBE.

The bill, charging that *J. L. Luscombe* and *Margaret Manning*, or one of them, had committed and suffered divers acts of waste and spoil on the premises, and felled divers timber trees standing and growing thereon, and other trees likely to become timber, prayed an account of all timber cut or felled upon the premises since the death of the testator, and the money produced by the sale thereof, and of all other acts of waste, since that time, committed upon the premises; and that the Defendants might be decreed to account for the same; and that *Margaret Manning* and *J. L. Luscombe* might be restrained by injunction from cutting any timber, or trees likely to become timber, upon the premises, and from committing any other waste or spoil thereon.

The supplemental bill, filed on the 9th of *December* 1817, stated the death of *Margaret Manning* since the institution of the suit, having appointed *Harriet Manning* executrix of her will, and leaving *J. L. Luscombe*, her only son; that, by means of her decease, the Plaintiff *Mary Hawkins* became entitled to an equitable estate for life in the devised premises, and that *John Hurrell Luscombe*, with the consent of *Margaret Manning*, permitted *J. L. Luscombe* to continue in possession of the premises during the life of *Margaret Manning*; that, since the filing of the original bill, *James Yates*, *Samuel Holditch Hayne*, and *John Hawker*, Defendants, claimed some interest in the premises by virtue of some indenture, whereby they pretended that the premises, or some interest therein, were assigned to them by *J. L. Luscombe*, or by some other person, in trust for his creditors.

The supplemental bill, charging that the title-deeds, and other papers relating to the premises, were in the possession of the Defendants, some or one of them,

1818.
HAWKINS v. LUSCOMBE.

prayed, that the Plaintiffs might have the relief prayed by the original bill, and that the Defendants, *J. L. Luscombe*, and *J. H. Luscombe*, and *J. Yates*, *S. H. Hayne*, and *J. Hawker*, might account for the rents and profits of the premises received by them, or either of them, or for their use, since the decease of *Margaret Manning*, and that it might be referred to one of the Masters, to appoint a proper person to receive the rents and profits, with directions to pay the same over to *Mary Hawkins* for her life; and that an account might be taken of all the timber cut or felled upon the premises since the death of the testator, *J. Luscombe*, and of the money produced by the sale thereof, and of all other acts of waste since that time committed upon the premises, and that the Defendants might be decreed to account for the same; and that the Defendants, *J. Yates*, *S. H. Hayne*, and *J. Hawker*, might respectively be declared to have no interest in the premises, and be decreed to deliver up to the Plaintiffs all deeds, papers, and writings in their or either of their power, custody, or possession, relating to the premises; and an injunction against *J. L. Luscombe*, and *J. Yates*, *S. H. Hayne*, and *J. Hawker*.

The answer of *J. L. Luscombe*, to the original bill, stated, that upon attaining the age of twenty-one years, in *April* 1794, he entered into possession of the premises devised to him, including those devised to *J. L. Ryan* and *J. Jutsham* for life, but denied that he did not take and use the name of *Luscombe* instead of his own surname, or that he never took or used the surname of *Luscombe*, or in any other manner procured his name to be altered or changed to the name of *Luscombe*, until he attained the age of forty years, or thereabouts; admitted that he did not, within three years next after entering into possession of the premises, procure his own name to be changed

changed to the name of *Luscombe*, by act of Parliament, but the same was altered or changed in the manner thereinafter mentioned; and stated, that when he entered into possession of the premises, there were large quantities of timber trees standing and growing thereon, and that he had since caused such parts thereof, as thereinafter mentioned, to be felled and sold, and applied the produce of such sales in paying two legacies of 500*l.* and 500*l.*, bequeathed by the testator to *Elizabeth Martin Manning*, and *Mary Manning*, and also in repairing and improving the premises, and in planting trees thereon, and denied that he threatened or intended at present, either by the authority of *Margaret Manning* or otherwise, to cut any timber then standing or growing upon the premises, except such timber as might be necessary for the repairs thereof, although he claimed the right of cutting timber under the will; denied that he had ever committed or suffered any act of waste or spoil on any part of the premises, but, on the contrary, had taken great care not to cut, or cause to be cut upon the premises, any saplings or trees likely to become timber. The answer further stated, that when he was of the age of fifteen or sixteen years, and at school, he took and used the surname of *Luscombe* instead of his own surname of *Manning*, and had ever since used the surname of *Luscombe* only, upon all occasions; and in *April* 1791, when he was of the age of eighteen years, he was entered a commoner, and afterwards admitted a gentleman commoner, at *Pembroke* college, *Oxford*, under the surname of *Luscombe*; and in 1794, when he came of age, he settled the accounts of the trustees of the devised estates, and gave all receipts and vouchers, in respect thereof, under the surname of *Luscombe* only, and that he had since held, in the surname of *Luscombe* only, a lieutenant's commission, and afterwards a captain's commission, in His Majesty's *North Devon* regiment of militia, and also a com-

1818.

HAWKINS v. LUSCOMBE.

mission as a deputy-lieutenant in the county of *Devon*; and that in *April* 1796 a parish apprentice was bound to him under the name of *J. L. Luscombe*; and in 1797 he, under the surname of *Luscombe*, married his present wife; and in 1803 he was also made a freeman of the borough of *Plymouth* under that surname; and in *June* 1813 he obtained His Majesty's license for him and his issue to continue to use the surname of *Luscombe* only; and that license was, in *June* 1813 recorded in the College of Arms; and that since he was of the age of fifteen or sixteen years, in all his correspondence, he had signed, and used, and received letters under the surname of *Luscombe* only. The answer submitted that he ought not to be restrained from cutting such fir, or other timber and trees in the devised premises, as he might think proper.

By his answer to the supplemental bill *J. L. Luscombe* admitted, that he was in the possession and receipt of the rents and profits of the premises, and that the title deeds and other papers relating thereto were in his power; and stated, that the Plaintiffs *R. Hawkins* and *Mary* his wife, before he came of age, repeatedly told him, that there was no occasion for going to any expense about changing his name, and that he had already done all that was necessary, and that such was the opinion of the late Mr. Justice *Buller*, whom they had consulted upon the subject.

July 16. On this day the Plaintiffs moved for a receiver.

Sir *Samuel Romilly* and Mr. *Hampson* in support of the motion.

The Defendant *J. L. Manning*, in the pleadings named *J. L. Luscombe*, not having complied with the condition of the will, has forfeited the interest limited by it to him and

and his issue, and the Plaintiff *Mary Hawkins* is entitled to the possession of the estates. The Court will either entertain the suit, in order to decide the question itself, or will direct arrangements for obtaining a legal decision, and in either case will not suffer the Defendant to retain the estate, but will appoint a receiver.

The testator requires that the heirs male of *Margaret Manning*, claiming under his will, shall immediately on coming into possession take his surname, and, within three years, procure his name to be altered by act of Parliament, or some other equally effectual authority. A mere assumption of the name, without authority, is clearly not a compliance with this provision. The forfeiture is annexed to the omission to obtain some effectual authority within three years.

The LORD CHANCELLOR.

The question then is, whether the party forfeits, not only for himself, but for his issue, and who are the persons to take on that forfeiture?

Argument for the motion resumed.

The proviso (the words of which are direct and positive, not words of inference,) is not repugnant to the previous clause of gift. The limitations to the trustees to support contingent remainders, on determination of the particular estate, by forfeiture or otherwise, in the life of the tenant for life, are not designed to apply in case of forfeiture by non-compliance with the proviso for assuming the name. The forfeiture destroys those remainders which, in another event, the estate of the trustees would support. A condition inflicting forfeiture on the children, for the omission of the parent,

1818.

HAWKINS v. LUSCOMBE.

may be unjust, but is not repugnant. The Defendant had no issue till many years after the forfeiture.

The legal estate is in the trustees. It is true the express trust is only till the Defendant attains twenty-one, but the whole legal fee having been conveyed to them, to the use of them and their heirs, subsequent words denoting an intention to vest the legal fee in other persons cannot have that effect. The Plaintiffs, therefore, are not in a situation to try the question at law; and though the Court will not compel the Defendant to put the question in a course for legal trial, it will, if he refuses, appoint a receiver. The proper mode will be to agree on the statement of a case.

They cited *Corbet*'s case (*a*), *Co. Litt.* 327. a. note 2. *Nichols* v. *Sheffield* (*b*), *Doe* v. *Heneage* (*c*), *Carr* v. *Errol* (*d*), *Stanley* v. *Stanley*. (*e*)

Mr. *Heald* against the motion.

The Court will not, by a summary order on motion, eject a party who has had possession during twenty years since the alleged forfeiture. The general rule is, that possession is not changed pending the decision of the principal question in the cause; and on that principle the Court, in the recent case of *Cholmondeley* v. *Clinton*, refused to order payment into court of money arising from the sale of timber.

The question may be tried at law: during the minority of the Defendant, the legal estate was in the

(*a*) 1 *Co.* 83.
(*b*) 2 *Bro. C. C.* 215.
(*c*) 4 *T. R.* 13., see *Doe* v. *Hicks*, 7 *T. R.* 435.
(*d*) 6 *East*, 58.
(*e*) 16 *Ves.* 491.

trustees,

1818.

HAWKINS v. LUSCOMBE.

trustees, but on his majority it passed to him, *Goodtitle* v. *Whitby*. (*a*) The father having assumed the name of *Luscombe* long before the birth of a son, that son would be born a *Luscombe*, and by that name would take under the limitation. The Defendant, if the clause of forfeiture applies to him, which may be questioned, (for the words are, heirs male of *Margaret Manning*, a description not in strictness applicable to him then living during her life,) has complied with it: an assumption of a name, and constant use of it for all purposes, is as effectual a change as if authorized by act of Parliament or licence under the sign manual. (*b*) If the name has been assumed, the mode of assumption is immaterial. There is no means of compelling the continued use of a name: though assumed under an act of Parliament, it may be renounced. The proviso, as construed by the Plaintiffs, is repugnant, destroying the estate of the heir of the Defendant, which had been expressly limited on the forfeiture of the life-estate: an express limitation cannot be defeated by words of inference.

Sir *Samuel Romilly*, in reply, distinguished the case of *Cholmondeley* and *Clinton*, as involving an extremely doubtful question, agitated after long delay, and when the legal estate was in a mortgagee; while, in the present instance, the bill was filed within six months after the Plaintiff became entitled.

The LORD CHANCELLOR.

Under the original limitations, every person taking the estate, except *Mary Manning* and *Mary Creed*, is to assume the name of *Luscombe*; but the clause of forfeiture requires every person, without exception, to assume that name. The infancy of some of the parties

(*a*) 1 *Burr.* 228.

(*b*) See *Gulliver* v. *Ashby*, 4 *Burr.* 1929. p. 1940. *Leigh* v. *Leigh*, 15 *Ves.* 92. p. 100.

may

1818.
HAWKINS v. LUSCOMBE.

may present difficulties in the admission of facts, for obtaining the judgment of a court of law; but, considering the nice distinctions in decided cases, I cannot determine the effect of such a will. At present I entertain doubt, whether any person could sustain an ejectment under the clause of forfeiture, without having assumed the name of *Luscombe*, and if so, whether they can file a bill here in any other name.

July 17. In reference to the doubt intimated by the Lord Chancellor, Sir *Samuel Romilly* suggested, that the Plaintiff was not bound to assume the name before taking possession, and might therefore declare in ejectment, or institute a suit, in another name, using the name of *Luscombe* on entering on the estate, and obtaining an act of Parliament within three years.

July 18. *The* LORD CHANCELLOR.

I am of opinion, that I cannot order a receiver in the present stage of a case which involves so much nicety. On referring to the authorities, I have some doubt whether the legal estate is still in the trustees, at least for any other purpose than for securing the estate to the separate use of the Plaintiff *Mary Hawkins*, formerly *Mary Creed*. On that supposition, if an ejectment were brought, there could be no defence, provided that a forfeiture has occurred. It has been suggested, that any difficulty may be removed by directing a case; but the forfeiture, if any forfeiture has been incurred, affecting the issue, who are infants, I know not how admissions can be made. The question must therefore be decided on the hearing of the cause.

The

The LORD CHANCELLOR.

1818.

HAWKINS v. LUSCOMBE.

If the Defendant has forfeited for himself and his issue, a legal estate must be in the trustees, because they are to hold for the separate use of *Mary Creed*, now *Mary Hawkins*.

Sir *Samuel Romilly*.

The whole legal estate being in the trustees, the Plaintiff cannot proceed at law.

The LORD CHANCELLOR.

I doubt whether the whole legal estate is in the trustees, if the condition is not broken. In a case in the seventh volume of the Term Reports (*a*), of a devise to trustees and their heirs, with limitations to uses, the Court held, that the legal estate was in the trustees throughout; but, as it seems to me, for this reason, that there being various trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate (*b*),

Construction in favour of vesting the legal estate in trustees, for effecting a limitation to the separate use of a married woman.

(*a*) Probably *Harton* v. *Harton*, 7 *T. R.* 652. "Whether this be a use executed in the trustees or not must depend upon the intention of the devisor, which is to be collected from the will. This provision, it appears, was made in order to secure to the several femes coverts a separate allowance, free from the controul of their husbands; to effectuate which it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object that the devisor had in view." Lord *Kenyon*, p. 653, 654. See *Neville* v. *Saunders*, 1 *Vern.* 415. *South* v. *Alleyne*, 5 *Mod.* 63. 101. 1 *Salk.* 228. *Comb.* 375. *Jones* v. Lord *Say* and *Sele*, 1 *Eq. Ca. Abr.* 383. 8 *Vin. Abr.* 262. 3 *Bro. P. C.* ed. *Toml.* 457.

(*b*) See *Doe* v. *Hicks*, 7 *T. R.* 435.

there

1818.

HAWKINS v. LUSCOMBE.

there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate, after every trust for a married woman, they would not have held the whole legal estate to have been in the trustees

Sir *Samuel Romilly* observed that, in this case, the words are, to the trustees, "to the use of them and their heirs," which must vest the legal estate in them.

The LORD CHANCELLOR.

Those words are extremely important. But here is a ferfeiture, if at all, of the estates of the tenant for life, and of his infant children; and how can facts be stated in a case so as to bind infants? (*a*)

An infant is not bound by admissions.

The case was not mentioned again. (*b*)

(*a*) See *Eccleston* v. *Petty*, *Carth.* 79. 3 *Mod.* 258. *Comb.* 156. *Leigh* v. *Ward*, 2 *Vent.* 72. *Wrottesley* v. *Bendish*, 3 *P. W.* 237. *Thurston* v. *Nutton*, ibid. n. E. *Legard* v. *Sheffield*, 2 *Atk.* 377. *Copeland* v. *Wheeler*, 4 *Bro. C. C.* 256. *Redesdale on Pleadings*, 254. *Lucas* v. *Lucas*, 13 *Ves.* 274. *Cowdell* v. *Tatlock*, 3 *Ves. & Beam.* 19. *Savage* v. *Carroll*, 1 *Ball & Beatt.* 553. *Cowling* v. *Ely*, 2 *Stark*, 566.

(*b*) An ejectment was afterwards brought, and the Court of King's Bench decided, that *John Luscombe Luscombe* had not incurred a forfeiture. *Doe* v. *Yates*, 5 *Barn. & Ald.* 344.