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Courses and it. 189. fr. 128+129. Court of Error: lit. iv. fo. 61. (The proceedings me to be found a few prayer before.)

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December Grand Court, 1781.

Doe ex dim. FEARON et Ux. December 10. versus Duke and Duchess of CHANDOIS.

MANY attempts had been made to bring this great caufe to trial, but it always went off, on fome irregularity in the pleadings, or exception to evidence, or deduction of title.

It was brought for Hope effate, otherwife called Hope's Harding.

It was devided by Richard Elletfon to his executrix and executor, and to the furvivor in truft .--- 1/t, For the use of his wife Sufanna, and his eldeft fon Thomas-Hope Elletfon, and to the furvivor of them for life; remainder, after the death of both of them, to the heir male of the body of the faid Thomas ; and in default of fuch heir, the remainder to his fon Rodger-Hope Elletfon, during the term of his natural life; and at and after his decease, to the heirmale of his body; in default of fuch heir, remainder to the heirsfemale of the body of Thomas-Hope Elletfon ; remainder to the heirs-female of Rodger ; remainder to his daughter Anna Petronella Ord, the wife of James Ord for life ; remainder to the heirsmale of her body"; and in default of fuch iffue, he devifed all the faid plantation to his faid wife dum fola; and from and after her decease, or marriage, to his brother Thomas Edlyne in fee, subject to the payment of certain fums of money after mentioned. Then his will proceeds thus : ' In order that my will may be obferved, ' and kept in the difpofitions and limitations of the faid eftate of " H. H. in cafe my fon Thomas shall not, immediately after my ' decease, if then of age, or immediately after his coming of age, ' or fo foon after as he can conveniently, enter into a bond or ' obligation, with fufficient penalty, or fuch other reafonable fecurity as my executrix and executor shall require, Ge. effec-" tually to reftrain the faid Thomas-Hope Elletfon, from altering or ' making void any of the limitations, or docking the entail, or ' barring the remaindemcreated in the faid will, by any means in ' the law whatever, then in fuch cafe, I hereby expressly revoke ' the devife of the faid eftate under the faid trufts therein created ' to bis use.' Then, in case of fuch neglect, he gives the same eftate, fubject to the fum of money in the truft mentioned, to the ufe

Gremainder to the heirs female of her body

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ufe of Roger Hope Elletfon, in manner before devised, provided he enters into the like bond, in form before required of his brother *Thomas*; and, in cafe of his refufal or neglect, he revokes in like manner. *Then* devise over to his daughter, on the like conditions; and in cafe of her non-compliance, to his wife for life and dum fola;—and, lafly, To his brother *Thomas Edlyne* in fee.

By another claufe of his will he directs, in cafe his elder fon *Thomas* thall have iffue female, that his executrix and executor do raife out of the faid effate L. 4000 for the portion of fuch daughter or daughters. He appoints his wife *Sufannab* and *James Ord*, executrix and executor of his will.

They proved Mary Fearon one of the leffors of the plaintiff, to be the furviving heir-at-law of *Thomas Edlyne*, the laft remainder man in fee; and her intermarriage with the other leffor *Walrond Fearon*.

Mr BAKER objected to this flating of the will, flowing the effate in the *ceflui que ufe*, inflead of the *ceflui que truft*; becaufe, the fum of money not having been raifed, as directed by the will, he faid the *ufe* was not executed; but this objection was over-ruled. He took another objection to the reading of the will of *Ricbard Elletfon*, it appearing, by the evidence of *Thomas Barton*, that the effate of *Hope*, as at prefent, contains more land than *Hope's Harding* when devifed; but the witnefs declaring he could fhow the boundaries to an inch, as poffeffed by the *teftator*, and diferiminate it from *later* additions by *Roger Hope Elletfon*, the objection was over-ruled. A bill of exception was tendered, and allowed thereon.

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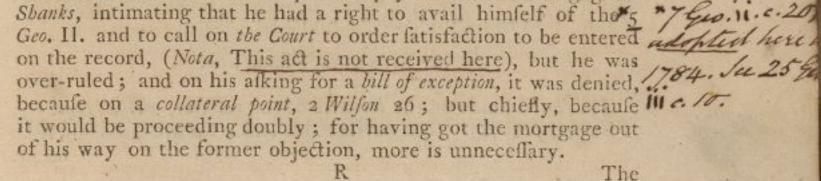
The plaintiffs then proved James Ord, the executor, to have been alive the 19th of December 1766, and that he died fince.

The defendants tendered a deed of mortgage in 1734, from the teftator to Sarab Sbanks, together with an affignment thereof from James Ord, in 1762, to Mr Venn, who, on 16th October 1763, executed a deed, by way of declaration, that he held it in truft for Roger Hope Elletfon, the purchase-money having been paid by him.

Mr BROWNE objected to the production of this mortgage, becaufe the defence is taken not under Sarah Shanks, but in the name of the Duke and Duchefs of Chandos. Tri. per pais. 424; 4 Bur. 668. Mr LEWIS anfwered; but the Court (taking into confideration Buller, p. 108. as well as Mr BROWNE's cafes) allowed the objection; and thereupon a bill of exception was prayed, and granted.

Mr BROWNE then tendered proof of payment of the mortgage to

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The defendants next produced the deeds made, with a view to cut off the entail-conveyance from Sulannab Elletion, (widow and relict of the teftator). Roger Hope Elletion, and James Prevolt; a manual by him to Marmaduke Hilton in Traft, to reconvey to the faid Sulannab for life, and to Roger Hope Elletion and his heirs forever, dated 28th July 1761, and accordingly a reconveyance the 29th.

Will of Roger Hope Elletson, devising to his wife, the prefent Duchess of Chandos, was also produced.

Here the evidence on both fides clofed,

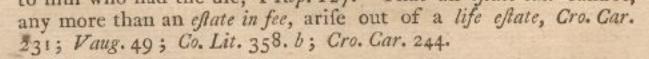
Mr PINNOCK, for the Plaintiff.

He began by anticipating fuch arguments as might be raifed, to make the devise appear a *perpetuity*. He observed that *Edlyne*, the last perfon in remainder, was *in effe* at the time of the docking, 2 Atk. 578; 2 Bac. 72; Duke of Norfolk's case: That Susannab Elletson conveyed contrary to the truft, 1 Bur. 116. 117; and that Roger Hope Elletson had only an equitable estate; therefore, that neither could make a tenant to the pracipe. He deemed the direction to give bond, a condition precedent, 2 Vern. 233. 237; (feem contradictory to each other), *ibid*, 478. The limitations, over " to the heirs of the body of the faid Thomas Hope Elletson," he thought words of *purchase*, not of *entail*; concluding with a remark, that the Court is bound to follow the *intention* of the testator, 2 Atk. 580.

Mr REDWOOD,-fame fide.

After observing that all the limitations are under condition to give bond not to dock, he contended that what would be a condition as to any other person, is a limitation as to the beir at law, 2 Blac. Com. 155; Cro. Eliz. 255. 359: That this case is not a case of perpetuity, for it did not extend beyond lives in being; and if Roger Hope Elletson had executed the bond, his heir would not be bound to do the like, 2 Salk. 229. He (contrary to Pinnock's opinion) confidered this a legal estate, under the flatute of uses; and so it was admitted on the other fide; but he denied that Roger Hope Elletson had in him an estate tail at the time of the dockings, 2 Blac. Com. 168. Remainder vests in neither during the joint lives, but does in the furvivor, Co. Lit. 26. 378; a tenant in tail cannot be feized to use, as, before the flatute, he could not execute to him who had the use, 1 Rep. 127. That an estate tail cannot, or more than an estate in feel arise out of a life estate. Cro. Car.

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Mr RICKETTS,-fame fide.

He refted much on the *intention* of the testator, 2 Blac. Com. 53; Plowden, 522.523. The devise to his sons is for life; though, if he meant

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meant to entail, he might have given generally to them, and the heirs of their body. A devife to one for life, remainder to his iffue, is but an eflate for life only; whereas had remainder been to B. it would be an eflate tail, Salk. 237; 2 Blac. 60. A devife to two, and the furvivor, (Baron and feme), until one dies, is only a life effate, Co. Lit. 26. And in the prefent cafe, (though the executorfbip is in fucceffion, first to Mrs Elletfon, then to Ord), the trufts are joint, and co-ordinate. The flatute could veft no greater eflate than was in the truftees, I Eq. Cafes, ab. 105. If a condition limits over, as to pay a fum of money, or perform any other act, it is as to an beir a limitation, Plow. 408; I Vez. 420; both flrong authorities.

Mr BROWNE cited the following cafes, that he might avail himfelf of them in reply, to Co. 42; nota on Plow, 408; Rolle, ab. 339; Cro. Eliz. 430; Moor 543; Ventris 203; adding, that Coke is miftaken in Scholastica's case, on the authority of the places cited above, from Cro. Moor and Ventris.

Mr HARRISON, for the Defendants.

He alleged that the executrix and executor did not take conjointly ; and that, at any rate, they were mere conduits: That Thomas Elletfon having had no daughter, the truft quoad that part, never could have effect: That the life effate, by the words merged in tail, he fays it is to be obferved, the condition flows the teflator was aware, that he had given an effate tail, Perrin and Blake. And he confiders, moreover, that this condition favours of perpetuity. He afferted that tenant for life, with confent of tenant in tail, may make a tenant to the pracipe. For the definition of a perpetuity, he referred to the Duke of Norfolk's cafe, and Comyn's Dig. He alfo mentioned the Duke of Marlborough's will, which laid his devifees under a condition to convey to truffees, to be by them re-conveyed to fuch devifees refpectively, for life: But the operation of law cannot be controlled by fuch conditions, Co. Lit. fec. 720; 6 Co. 40. 21; 10 Co. 113.

Mr BAKER,-fame fide.

His argument went only to maintain, that Roger Hope Elletfon had an eflate tail, not an eflate for life, 2 Bac. 56. 408; 2 Vern. 233. 251; and Perrin and Blake, in Cam. Scac. contrary to the judgment of B. R. where it was judged an eflate for life, but an

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eftate tail in error.

Mr Lewis,-fame fide.

He encountered the doctrine of its being an effate by purchase with Shelly's cafe, 1 Rep. 104. where it is laid down, that where an

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an anceftor takes an effate of freehold, the heirs of his body take by defcent, not by purchafe. To diffinguish eftates tail from eftates for life, he cited Co. Lit. 226; Ferne's Conveyancing, 57. 112; 2 Pere Will. 477; I P. Will. 399; Hob. 154; 2 Raym. 1407. infifting, that by all these authorities Roger Hope Elletfon took an eftate tail: He faid, that a condition not to dock is repugnant to law, 6 Rep. 40; and, according to this case, Plowd. 408. is not law now; that Anderfon 139. 140. is likewise against it; and Moor, 809. 810. fays, that Scholastica's case was suffained, not on account of the law, but on an incurable defect in the verdict.

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Mr BROWNE, in reply.

He repeated and enforced, with illustrations from his own cafes, the arguments to evince that Roger Hope Elletfon had only a life effate, and that Mrs Elletfon and Mr Ord held jointly in truft; and that during their lives, Mrs Elletfon, and her fon Thomas, had only an effate for life.

The Court, after recapitulating the evidence, left it to the jury; obferving, however, that Roger Hope Elletfon by the will took a remainder for life expectant; and that when he joined his mother in the execution of the deeds to break the entail, he was not in the receipt of the profits or produce, at leaft not regularly, becaufe by the will his mother had the whole right during her life, as furvivor of her fon Thomas.

Mr BROWNE applied for a direction to the jury to find for the plaintiff, which the Court declining, he prayed, and had a *bill* of EXCEPTION.

Verdict, Defendants guilty.

This judgment was affirmed in the Court of Error in Jamaica, but was

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