

*Conveyances. lib. 189. fo. 128 & 129.  
 Court of Errors. lib. iv. fo. 61. (The proceedings are to be found  
 a few pages before.)*

## December Grand Court, 1781.

*Doe ex dim.* FEARON et UX. December 10. versus Duke and  
 Duchefs of CHANDOIS.

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

It was brought for *Hope* estate, otherwise called *Hope's Harding*.

It was devised by *Richard Elletson* to his executrix and executor, and to the survivor in trust.—1<sup>st</sup>, For the use of his wife *Susanna*, and his eldest son *Thomas-Hope Elletson*, and to the survivor of them for life; remainder, after the death of both of them, to the heir-male of the body of the said *Thomas*; and in default of such heir, the remainder to his son *Rodger-Hope Elletson*, during the term of his natural life; and at and after his decease, to the heir-male of his body; in default of such heir, remainder to the heirs-female of the body of *Thomas-Hope Elletson*; remainder to the heirs-female of *Rodger*; remainder to his daughter *Anna Petronella Ord*, the wife of *James Ord* for life; remainder to the heirs-male of her body; and in default of such issue, he devised all the said plantation to his said wife *dum sola*; and from and after her decease, or marriage, to his brother *Thomas Edlyne* in fee, subject to the payment of certain sums of money after mentioned. Then his will proceeds thus: ‘ In order that my will may be observed, ‘ and kept in the dispositions and limitations of the said estate of ‘ *H. H.* in case my son *Thomas* shall not, immediately after my ‘ decease, if then of age, or immediately after his coming of age, ‘ or so soon after as he can conveniently, enter into a bond or ‘ obligation, with sufficient penalty, or such other reasonable security as my executrix and executor shall require, &c. effectually to restrain the said *Thomas-Hope Elletson*, from altering or ‘ making void any of the limitations, or docking the entail, or ‘ barring the remainders created in the said will, by any means in ‘ the law whatever, then in such case, I hereby expressly revoke ‘ the devise of the said estate under the said trusts therein created ‘ to his use.’ Then, in case of such neglect, he gives the same estate, subject to the sum of money in the trust mentioned, to the  
 use

*Remainder to the heirs female of her body*



use of *Roger Hope Elletson*, in manner before devised, provided he enters into the like bond, in form before required of his brother *Thomas*; and, in case of his refusal or neglect, he revokes in like manner. Then devise over to his daughter, on the like conditions; and in case of her non-compliance, to his wife for life and *dum sola*;—and, lastly, To his brother *Thomas Edlyne* in fee.

By another clause of his will he directs, in case his elder son *Thomas* shall have issue female, that his executrix and executor do raise out of the said estate L. 4000 for the portion of such daughter or daughters. He appoints his wife *Susannab* and *James Ord*, executrix and executor of his will.

They proved *Mary Fearon* one of the lessors of the plaintiff, to be the surviving heir-at-law of *Thomas Edlyne*, the last remainder man in fee; and her intermarriage with the other lessor *Walrond Fearon*.

Mr BAKER objected to this stating of the will, showing the estate in the *cestui que use*, instead of the *cestui que trust*; because, the sum of money not having been raised, as directed by the will, he said the use was not executed; but this objection was over-ruled. He took another objection to the reading of the will of *Richard Elletson*, it appearing, by the evidence of *Thomas Barton*, that the estate of *Hope*, as at present, contains more land than *Hope's Harding* when devised; but the witness declaring he could show the boundaries to an inch, as possessed by the testator, and discriminate it from later additions by *Roger Hope Elletson*, the objection was over-ruled. A bill of exception was tendered, and allowed thereon.

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

The defendants tendered a deed of mortgage in 1734, from the testator to *Sarah Shanks*, together with an assignment 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 trust for *Roger Hope Elletson*, the purchase-money having been paid by him.

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

Mr BROWNE then tendered proof of payment of the mortgage to *Shanks*, intimating that he had a right to avail himself of the 5<sup>th</sup> Geo. II. and to call on the Court to order satisfaction to be entered on the record, (*Nota*, This act is not received here), but he was over-ruled; and on his asking for a bill of exception, it was denied, because on a collateral point, 2 *Wilson* 26; but chiefly, because it would be proceeding doubly; for having got the mortgage out of his way on the former objection, more is unnecessary.

R

The

\*7 Geo. ii. c. 20  
adopted here  
1784. See 25 Geo.  
iii c. 10.



The defendants next produced the deeds made, with a view to cut off the entail-conveyance from *Susannab Elletson*, (widow and relict of the testator), ~~and Roger Hope Elletson, and James Prevost;~~ *reconveyance by him* to *Marmaduke Hilton* in trust, to reconvey to the said *Susannab* for life, and to *Roger Hope Elletson* and his heirs forever, dated 28th July 1761, and accordingly a reconveyance the 29th.

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

Here the evidence on both sides closed.

Mr PINNOCK, for the Plaintiff.

He began by anticipating such arguments as might be raised, to make the devise appear a *perpetuity*. He observed that *Edlyne*, the last person in remainder, was *in esse* at the time of the docking, 2 *Atk.* 578; 2 *Bac.* 72; *Duke of Norfolk's* case: That *Susannab Elletson* conveyed contrary to the trust, 1 *Bur.* 116. 117; and that *Roger Hope Elletson* had only an *equitable estate*; therefore, that neither could make a *tenant* to the *præcipe*. He deemed the direction to give bond, a *condition precedent*, 2 *Vern.* 233. 237; (seem contradictory to each other), *ibid.* 478. The limitations, over "to the heirs of the body of the said *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,—same side.

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 *heir* 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) considered this a *legal estate*, under the statute of uses; and so it was admitted on the other side; 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 survivor, *Co. Lit.* 26. 378; a *tenant in tail* cannot be seized to *uses*, as, before the statute, he could not execute to him who had the use, 1 *Rep.* 127. That an *estate tail* cannot, any more than an *estate in fee*, arise out of a *life estate*, *Cro. Car.* 231; *Vaug.* 49; *Co. Lit.* 358. b; *Cro. Car.* 244.

Mr RICKETTS,—same side.

He rested 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



meant to entail, he might have given generally to them, and the heirs of their body. A devise to one for life, remainder to his issue, is but an *estate for life only*; whereas had remainder been to B. it would be an *estate tail*, *Salk.* 237; 2 *Bac.* 60. A devise to two, and the survivor, (Baron and feme), until one dies, is only a life estate, *Co. Lit.* 26. And in the present case, (though the *executorship* is in *succession*, first to Mrs *Elletson*, then to *Ord*), the trusts are joint, and co-ordinate. The statute could vest no greater estate than was in the trustees, 1 *Eq. Cases*, ab. 105. If a condition limits over, as to pay a sum of money, or perform any other act, it is as to an heir a limitation, *Plow.* 408; 1 *Vez.* 420; both strong authorities.

Mr BROWNE cited the following cases, that he might avail himself of them in reply, 10 *Co.* 42; *nota* on *Plow*, 408; *Rolle*, ab. 339; *Cro. Eliz.* 430; *Moor* 543; *Ventris* 203; adding, that *Coke* is mistaken 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 jointly; and that, at any rate, they were mere conduits: That *Thomas Elletson* having had no daughter, the trust *quoad* that part, never could have effect: That the life estate, by the words *merged in tail*, he says it is to be observed, the condition shows the testator was aware, that he had given an *estate tail*, *Perrin and Blake*. And he considers, moreover, that this condition favours of *perpetuity*. He asserted that tenant for life, with consent of tenant in tail, may make a tenant to the *præcipe*. For the definition of a *perpetuity*, he referred to the *Duke of Norfolk's* case, and *Comyn's Dig.* He also mentioned the *Duke of Marlborough's* will, which laid his devisees under a condition to convey to trustees, to be by them re-conveyed to such devisees respectively, for life: But the operation of law cannot be controlled by such conditions, *Co. Lit.* sec. 720; 6 *Co.* 40. 21; 10 *Co.* 113.

Mr BAKER,—same side.

His argument went only to maintain, that *Roger Hope Elletson* had an *estate tail*, not an estate 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 estate for life, but an estate tail in error.

Mr LEWIS,—same side.

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



an *ancestor* takes an estate of freehold, the heirs of his body take by *descent*, not by *purchase*. To distinguish *estates tail* from *estates for life*, he cited *Co. Lit.* 226; *Ferne's Conveyancing*, 57. 112; 2 *Pere Will.* 477; 1 *P. Will.* 399; *Hob.* 154; 2 *Raym.* 1407. insisting, that by all these authorities *Roger Hope Elletson* took an *estate tail*: He said, 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 *Anderson* 139. 140. is likewise against it; and *Moor*, 809. 810. says, that *Scholastica's* case was sustained, *not* on account of the *law*, but on an incurable defect in the verdict.

Mr BROWNE, in reply.

He repeated and enforced, with illustrations from his own cases, the arguments to evince that *Roger Hope Elletson* had only a *life estate*, and that Mrs *Elletson* and Mr *Ord* held *jointly* in trust; and that during their *lives*, Mrs *Elletson*, and her son *Thomas*, had only an estate for *life*.

The Court, after recapitulating the evidence, left it to the jury; observing, however, that *Roger Hope Elletson* 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 least not regularly, because by the will his mother had the whole right during her life, as survivor of her son *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

Reversed by the *King in Council*.