

[1803-13] All ER Rep 178; Also reported 14 Ves 341; 33 ER 552

touching the validity of the will was determined; and that he is, therefore, in sufficient time. To that it is answered that if there is no breach of the condition, there is no occasion to come into a court of equity: besides, that it was by the plaintiff's own act that the probate was delayed so long; and it may be doubted whether it would be competent to him to take advantage of his own groundless resistance to the proof of the will.

But it is said, this court relieves against forfeiture, and breaches of condition. To that it was answered by the defendants that this is not a mere breach of condition, but a conditional limitation over in a given event; and, where there is a devise over to any other than that person who would by disposition of law take the estate, the court never relieves and for that distinction *Cage v Russel* (1) was referred to That this is a conditional limitation, and not a mere condition, is clear from *Avelyn v Ward* (2) The question there was not of the same kind, but the limitation in the will was precisely the same as this: a limitation to the heir-at-law upon condition of giving a release within a certain period; and that was held a conditional limitation

not a strict condition. If this be a conditional limitation, it seems to follow that the event having taken place, the court cannot possibly relieve. Though the estate is given over to the executrix, who would have been benefited by the release, yet it is a real estate, which she could not take as executrix; and, therefore, the circumstance that she is so makes no difference.

It is then contended upon the case of *Earl of Northumberland v Earl of Aylesford* (3) that Michael Simpson by entering into possession of the devised estate was obliged upon the doctrine of election to make the release, when called upon to do so, and, therefore, it is to be considered as executed. In that case Algernon never did release his claim: but it was decreed that his executors should then execute a release: as, by taking the benefit he had contracted the obligation to execute it. But the circumstances of this case are not the same, for Michael Simpson cannot be considered as possessing the estate under the devise. He was the heir-at-law. He entered, contesting the will. During that time he cannot be considered in possession as devisee. Afterwards, when the question was determined, he offers a release; but clogged with a condition that it should be accepted within three days; which implied that if that condition was not complied with, he would hold adversely to the will, and as no longer bound to comply with those terms.

This is quite different, therefore, from that case, where the possession taken could be ascribed to nothing but the will. Besides, that decision is materially shaken by *Lord Beaulieu v Lord Cardigan* (4) in the House of Lords, which had been determined by LORD NORTHINGTON upon the same principle and in the same way: viz, that the estate should go, as if it had been actually settled according to the condition. The House of Lords, however, declared that the estate not being settled pursuant to the condition, the devise made on that condition did not take effect.

That applies precisely to this case. Michael Simpson not having complied with the condition of giving a release of all claims upon Elizabeth Simpson is not entitled to the benefit of the devise, made upon that condition. There is no doubt that he is entitled to an

For internal use only