of tenants by sufferance, with regard to whom entry and suit was just as indispensable, as with regard to any other tenure. (*Co. Lit.* 57.) In the application of the doctrines on the statute of limitations, the incidents to the two tenures ought not to be confounded.

Judgment affirmed.

[Devise. Condition precedent or subsequent.]

Robert J. Taylor and others, *Appellants*,

v.

John Thompson Mason, *Respondent*.

R. B., being seised of lands in Maryland, made three instruments of writing, each purporting to be his will. The first, dated in 1789, gave his whole estate to his nephew, J. T. M., after certain pecuniary legacies to his other nephews and nieces. In the second will, dated in 1800, the testator gave his whole real estate to J. T. M., during his life; and after his death, to his eldest son, A., in tail, on condition of his changing his name to *A. Barnes*, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, for ever, on their changing their surnames to Barnes.

The third will, which was executed after the others, and probably in 1803, after some small bequests, proceeded thus: "I give the whole of my property, after complying with that I have mentioned, to the male heirs of my nephew, J. T. M., *lawfully begotten, for ever*, agreeably to the law of England, which was the law of our State before the revolution, that is, the oldest male heir to take all, on the following terms: that the *name of the one that may have the right*, at the age of twenty-one, with his consent, be changed to A. Barnes, by an act of public authority of the State, without any name added, together with his taking an oath, before he has

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possession, before a magistrate of St. Mary's county, and have it recorded in the office of the Clerk of the county, that he will not make any change, during his life, in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir, on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the same terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say, not exceeding twelve months, *if in that time it can be done*, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above mentioned terms; and on their refusal, to the male heirs of my niece, Mrs. C., lawfully begotten, on their complying with the above mentioned terms; and on their refusal, to the daughter of my nephew, J. T. M., named Mary, so on to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of 1600 dollars per annum, for his life, and adds, "and my will is, that he shall keep the whole of my property in his possession, during his life." He then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which, to be the property of the person that may have a right to it, as above mentioned."

Held, that the conditions, annexed to the estate devised to the oldest male heir of J. T. M., were *subsequent* and not *precedent*, and that, consequently, the contingency on which the devise was to take effect, was not too remote, the estate vesting on the death of J. T. M.; to be devested, on the non-performance of the condition.

Quære, Whether J. T. M. took an estate tail?

Quære, Whether the last will revoked those which preceded it?

APPEAL from the Circuit Court of Maryland.

The bill in this cause was filed in behalf of

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one of the coheirs of Richard Barnes, deceased, and her children; and claims an account of the profits of his estate, from the defendant, J. T. M., also a co-heir, who claims and holds possession of the estate, under the will of the said Richard.

Three instruments of writing, purporting to be the will of the testator, all of them properly authenticated, were exhibited in the record. The first, dated on the 31st day of October, in the year 1789, gives his whole estate, after pecuniary legacies to his other nephews and niece, to the defendant, J. T. M.

In the second will, which is dated the 16th day of July, 1800, the testator gives his whole real estate to J. T. M. during his life, and after his death to his eldest son, Abraham, in tail, on condition of his changing his name to Abraham Barnes, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, forever, on their changing their surname to Barnes.

The third will is without date, but is proved, by its contents, to have been executed after the others, probably in the year 1803. After some small bequests, the testator says, "I give the whole of my property, after complying with what I have mentioned, *to the male heirs of my nephew, J. T. M., lawfully begotten, for ever*, agreeable to the law of England, which was the law of our State before the revolution, that is, the oldest male heir to take all, on the following terms: that *the name of the one that may have the right*, at the age of twenty-one, with his consent, be changed to Abra-

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ham Barnes, by an act of public authority of the State, without any name added; together with his taking an oath, before he has possession, before a magistrate of Saint Mary's county, and have it recorded in the office of the clerk of the county, that he will not make any change during his life in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the above terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, *if in that time it can be done*, so that no act of intention to defeat my will shall be allowed of; and of their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above mentioned terms; and on their refusal, to the male heirs of my niece, Mrs. Chichester, lawfully begotten, on their complying with the above mentioned terms; and their refusal, to the daughter of my nephew, J. T. M., named Mary; so on, to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of sixteen hundred dollars per year for his life; and adds, "and that my will is, that he shall keep the whole of my proper-

ty in his possession during his life." The testator then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and to build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which, to be the property of the person that may have a right to it, as above mentioned." The testator also requires his executor to take an oath, "that he will justly account for the property that he may have the power of."

Richard Barnes died in April, 1804, and J. T. M. proved three several paper writings, as his last will, and qualified as his executor. The testator had one brother, who died in his lifetime without issue, and one sister, who intermarried with Thompson Mason, and died also in the lifetime of the testator, leaving three sons, H. T. M., A. B. T. M., and J. T. M., and one daughter, A. T. M., one of the complainants, who intermarried with R. W. Chichester. The rights of the said A. T. Chichester are conveyed, by deed, to trustees, for the benefit of herself and children. J. T. M. had no son living at the death of the testator, but has two after-born sons, who are now alive.

The Circuit Court dismissed the bill, and the cause was brought by appeal to this Court.

The appellants made the following points in this Court:

1. That the third will, whether its disposition

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be valid or not, revokes the other two, since it expresses a clear intention on the part of the testator, to dispose differently of the whole estate.

2. That it gives no estate for life or years, absolute or in trust, to John Thompson Mason, the respondent, but merely the custody and care of the property, during his life, as agent or curator, with a salary for his services.

3. That no estate for life or years, can be raised for him by implication, because the original estate did not move from him, and never was in him.

4. Consequently, that he has no estate of freehold, with which a subsequent limitation in fee could unite, so as to create a fee in him, under the rule in Shelly's case.

5. That if he takes a life estate, it is merely fiduciary, and not beneficial, for which reason it could not unite with a limitation over in fee, if there were one, so as to give him a fee under the rule.

6. That the words in this will, " the male heir of my nephew, John Thompson Mason, lawfully begotten, for ever," as explained and modified by the subsequent expressions, designate the " male heir of the body of J. T. Mason," as the person who is to take the estate, and thus operate as a" *descriptio personæ*," and not as a " limitation." Consequently, that they do not create such an estate of inheritance, as is capable of uniting with a life estate, under the rule; but must operate, if at all, as a devise, *per se*, of an estate

in possession or remainder, or as an executory devise.

7. That this disposition cannot operate as the devise of an estate in possession, for want of some person, in existence at the testator's death, who could then take: 1st. Because the person designated, was to be "the heir" of John Thompson Mason, who was then alive, and *nemo est hæres viventis*. 2d. Because, as he had then no issue male, or heir male of his body, there was no person who answered the description, taken in its largest and most general sense.

8. That the disposition in question cannot operate as a remainder, vested or contingent, because there was no preceding estate to support it; none having been directly given to John Thompson Mason by the will, or being raised for him by implication.

9. That, admitting John Thompson Mason to have a life estate under the will, which might support a remainder, this disposition cannot operate as a vested remainder, because, at the testator's death, there was no person in existence who answered the description; nor as a contingent remainder, because it depended on two distinct and successive contingencies: 1st. That John T. Mason should have a son; 2d. That this son should live to the age of twenty-one years, then assume the name of Abraham Barnes, by legislative authority, and take the oath prescribed by the will, which is a possibility too remote.

10. That this disposition cannot be supported as an executory devise, because it was to take

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effect on two remote and contingent events: 1st. That the eldest son of John T. Mason should voluntarily, and after he attained the age of twenty-one years, change his name to that of Abraham Barnes, through the operation of a legislative enactment; and, 2d. That he should take an oath, as prescribed by the will; which events, if they took place at all, might not happen within the lifetime of John Thompson Mason, and twenty-one years and nine months afterwards.

March 3d, 1823.

The cause was fully argued, upon all these points, by Mr. *Jones* and Mr. *Harper* for the appellants, and by the *Attorney-General* and Mr. *Emmet*, for the respondents; but, as the questions whether an estate tail vested in John Thompson Mason, and whether the last will revoked those which preceded it, were not considered and determined by the Court, it has not been thought necessary to report that part of the argument.

The counsel for the appellants stated, that as to whether a condition be *precedent* or *subsequent*, it is always a matter of construction, depending on the intention of the testator. The principle is, that where an intention appears to create an estate at all events, and merely to annex a condition to it, by which it may be defeated, this is a condition *subsequent:* and if followed by a limitation over, in case the condition be not fulfilled, it makes a *conditional limitation.* But if the intent appear to be, that the vesting or creation

of the estate shall depend on the condition, then it is *precedent.*[a] There could be no dispute as to general principles, which were incontrovertibly settled by all the authorities. The only question was, as to the application of them to the particular case. They entered into a critical examination of the words of the last will, to show that the conditions annexed to the estate devised to the oldest male heir of J. T. M., were precedent and not subsequent.

The counsel for the respondents considered the conditions as *subsequent* and not *precedent;* or rather, they considered them as conditional limitations, attached to, and defeating, in each instance, the preceding estate, on refusal to perform the acts required, and thus creating a new estate in tail male. It was said to be laid down by the authorities, that there are no precise technical words required *in a deed, (a fortiori* in a will,) to make a stipulation a condition precedent or subsequent.[b] Neither does it depend on the circumstance, whether the clause was placed prior or posterior in the deed, so that it operated as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction.[c]

a 2 *Cruise Dig.* 3, 4, 5. *Cas. temp. Talb.* 165. 1 *T. R.* 645. 2 *Bos. & Pull.* 295. 2 *Vern.* 620. *Fearne Cont. Rem.* 424, 425. 502. *Coll. Jurid.* 378.

b 1 *Plowd.* 23. 2 *Vern.* 660. *Cas. temp. Talb.* 164. 1 *Burr.* 38. 4 *Burr.* 1929.

c Hotham v. East India Co. 1 *T. R.* 645.

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Thus, Lord Eldon says,[a] "I take it to be fully settled, that a condition is to be construed to be precedent or subsequent, as the intention of the testator may require." And Heath, J., in the same case, adds, "It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction, according to the intent of the devisor." Now, let that test be applied to the point in question. It is clear that the testator intended the estate for the benefit of the sons of J. T. M., after his death, and successively for the heirs male. If this be a condition precedent, as is contended by the appellants, and the will of 1789 be entirely revoked, the fee will be in the heirs at law, from the death of J. T. M., till the condition be performed, and the rents, issues, and profits, belong to them. Suppose the first heir male an infant of tender years; the rents, &c. do not go to his maintenance and education, nor yet accumulate for his benefit, as was directed, even in the lifetime of his father. Let him die under twenty-two, without having performed the condition, leaving an infant son; that son must take by inheritance, if at all, and not by purchase. Can he take by inheritance from his father, an estate tail that never vested in his father? But suppose he can, there is still another long enjoyment of the estate by the heirs at law, for their own benefit. The appellants seek, by making this a con-

a In Planner v. Scudamore, 2 *Bos. & Pul.* 295.

dition precedent, entirely to defeat the testator's bountiful intentions in favour of J. T. M.'s family: for they say, this being a condition precedent, the limitation cannot take effect as a contingent remainder; for then there would be three contingencies, and a possibility on a possibility necessary to its vesting. It is clear, then, that to preserve the testator's primary or general intention, or indeed any part of his intention towards that family, the terms must not be considered as a condition precedent. In a will, no words of condition are too strong to bend to the testator's intention. Thus, "if a man devises a term to A., and that if his wife suffers the devisee to enjoy it for three years, she shall have all his goods as executrix; but if she disturbs A., then he makes B. his executor, and dies; his wife is executrix presently: for though in grants, the estate shall not vest till the condition precedent is performed, *yet it is otherwise in a will*, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of the executrix, if she perform it not."[a] Although the conditions over may be void, their existence may be used to illustrate the testator's intention, and to show that this was intended to operate only as a limitation. It was intended that every one having the right, should change his name, and take the oath, before he had possession; "so that no act of intention to defeat his will should be

[a] Jennings v. Gore, *Cro. Eliz.* 219.

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allowed of." Those, then, taking by inheritance through the first heir male, were to be subject to this condition, and on their refusing, the estate was to go over. It is impossible to contend, that those so taking by inheritance, should be regarded as purchasers, or that, with them, this should be considered as a *condition precedent:* and why should not the same construction of the testator's intention, that must be given with respect to them, be given in the first instance, where the same proviso is used, viz. that it is a conditional limitation, on the refusal to perform which, the antecedent estate is defeated, and a new one arises? Unquestionably the limitation, on refusal to comply, is a conditional limitation. If, then, between such conditional limitation and a condition precedent, bearing on the same object, (let the words be ever so clear,) there be a positive incompatibility, the principle must be applied, that if words be so inconsistent that they cannot possibly stand or be reconciled, those words shall be rejected which are least consistent with the general intention of the testator.[a] The incompatibility between conditions and conditional limitations, results from this: "conditions can only be reserved to the feoffer, donor, lessor, or their heirs, but not to a stranger;" and this by implication, without any words of reservation; and for

a 2 *Fonbl. Eq.* c. 3. s. 3. (Note *l.* p. 69.) Haws v. Haws, 3 *Atk.* 524. 1 *Vez.* 14. Perkins v. Bayntum, 1 *Bro. Ch. Cas.* 118. Doe v. Aplyn, 4 *T. R.* 88.

b 1 *Co. Litt.* 214 *b.*

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every condition broken, the *heir* of the donor shall enter, and by so doing, restore the original estate. So that, except in gavelkind[a] and borough-english,[b] and a husband's alienating his wife's estate on condition,[c] the heir at law enters and holds for his own benefit. This applies to conditions *subsequent.* As to conditions *precedent,* the estate remains in the heir at law, and *never vests* till the performance of the condition, and, during all that time, the heir at law holds it beneficially. But the effect of a conditional limitation is, that the next devisee alone can enter, and he takes and enjoys for his own benefit. Now, it is incompatible, that the heir at law should have the right to hold the estate for his own benefit, and the devisee to hold it for his benefit; and in these incompatible results, the question, which shall prevail, must depend upon which is conformable to the intention of the testator. Thus, it is laid down that "words of an *express condition* shall not ordinarily be construed into a *limitation;* but where an estate is to remain over for breach of a condition, which is by express words a condition, yet it ought to be intended as a limitation."[d] And the contrary doctrine in *Mary Portington's* case,[e] has been often denied to be law.[f]

a Co. *Litt.* 11, 12.
b *Godb.* 3.
c 8 *Co.* 43.
d Page v. Hayward, 11 *Mod.* 61. 2 *Salk.* 578.
e 10 *Co.* 35.
f *Brownl.* 65. *Roll. Abr.* 412. *Ventr.* 200. 3 *Lev.* 132. 2 *Show.* 398. 1 *Bos. & Pull.* 313.

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The expression "before he has possession," is much relied on, as showing a condition precedent. But is must, like other equally strong expressions, bend to the testator's general intent, and to the words "who has the right." How "has the right," if obtaining an act of the legislature and changing the name after twenty-one, be a condition precedent? For then no estate can vest, and no right be had, till the condition be performed. So it is said, the will shows the right is not to commence till he has arrived at twenty-one. But the age of twenty-one connects itself, both in sense and grammar, with the act to be done, and not with the vesting of the right. The expression "refusing to comply," and the giving over the estate to others, show the refusal to be the definite act, by which one estate was to be determined, and the other to commence. Thus where similar words were used, "on condition that he should in twelve months after the testator's death, or in twelve months after he attained the age of twenty-one years, suffer a recovery of an estate in the county of Warwick, and settle it to certain uses," they were clearly taken to be a condition subsequent, and not a conditional limitation.[a] Indeed, the words "before he has possession," are susceptible of another interpretation, consistent with the previous vesting of the estate. The testator did not view all possible contingencies accurately. He clearly took for granted that the one to take would be an infant, and meant to make a provision accordingly. He probably used those words to dis-

a Duke of Montague v. Beaulieu, 3 *Bro. Parl. Cas.* 277.

tinguish the time when a guardian would receive the rents, issues and profits, from that when the minor would come into the actual possession of his estate.

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The cause was continued for advisement, to the present term.

Mr. Chief Justice MARSHALL delivered the opinion of the Court; and, after stating the case, proceeded as follows: *Feb. 3, 1824.*

If the estate should yield any surplus profits, after satisfying the charges placed on it by the testator, J. T. M. is directed to account for those profits, and they are the property of "the person that may have the right," according to the language of the will.

Are the heirs at law the persons "who have the right," according to this language?

Certainly not. The plain intention of the will is to exclude them. They admit this; and support their claim by alleging that the will, so far as respects the devises which are to take place after the death of J. T. M., is utterly void, the limitations over being too remote.

The first limitation is to "the male heirs of my nephew, J. T. M., lawfully begotten, for ever, agreeably to the law of England;" that is, the oldest male heir to take all.

If the clause stopped here, there could be no question in the case. The person who should be the eldest male heir of J. T. M. at the time of his death, would take the estate. But the testator proceeds to prescribe the "terms" on which such

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eldest male heir should take. They are, "that the name of the one that may have the right, at the age of twenty-one, with his consent, be changed to Abraham Barnes, by an act of public authority of the State, without any name added, together with his taking an oath before he has possession;" "that he will not make any change during his life in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir, on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the above terms; and all of them refusing to comply in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, if in that time it can be done, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, H. T. M." &c.

The time allowed the eldest male heir of J. T. M. to perform the condition on which his estate would, according to the words of the will, become absolute, is twelve months after he shall attain his age of twenty-one years. As J. T. M. might die, leaving no son alive at his death, but leaving his wife ensient of a son, it is obvious that the contingency on which the estate depended might not happen within a life, or lives, in being, or within twenty-one years and nine months after the death of J. T. M. If, therefore, the estate did not vest until the contingency should happen, the limitation over to the eldest male heir of J. T. M., de-

pends on an event which is too remote to be tolerated by the policy of the law, and the remainder is, consequently, void. If, on the contrary, the estate is to vest on the death of J. T. M., to be devested on the non-performance of the condition, the limitation in remainder is valid, and the plaintiffs are not entitled to the account for which the bill prays.

The inquiry, then, is, whether the conditions annexed to the devise of the remainder, be precedent or subsequent; and this, it is admitted, must be determined by the intention of the testator, which intention is to be searched for in his will.

All the instruments of writing purporting to be his last will, show that his firm and continuing purpose, from the 31st day of October, in the year 1789, to the time of his death, in the year 1804, was to preserve his estate entire for the benefit of a single devisee, and not to permit it to be divided among his heirs. The same papers, likewise, show that the first object of his affection and bounty, was J. T. M.; and the second, was the eldest male heir of J. T. M. An ample and unconditional provision, perhaps equivalent to the whole value of his real estate, is made for J. T. M. during his life; and on his death, the whole real estate, with any residuum of profit which might possibly be accumulated during his life, is given to his eldest male heir. If these devises should be expressed in ambiguous language, this obvious and paramount intention ought to serve as a key to the construction.

The language of the devise in remainder, imports an intention that it should take effect on the

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determination of the particular estate. So soon as J. T. M., the first object of his bounty, is removed, the eldest male heir of J. T. M., the second object of his bounty, comes into view: "I give the whole of my property" "to the male heirs of my nephew, J. T. M., lawfully begotten, for ever, agreeable to the law of England; that is, the oldest male heir to take all, on the following terms," &c. These words postpone the interest of the devisee no longer than till he can be ascertained; that is, till the death of J. T. M., who was to occupy the premises for his life. The eldest male heir of J. T. M. would be known at his death, at which time the particular estate which was carved out of this general devise, would determine, or at farthest, within nine months afterwards. The language is not such as a man would be apt to use who contemplated any interval between the particular estate and the remainder. The words import the same intention, as if he had said, I give to the eldest male heir of J. T. M. all my property, on condition that, at the age of twenty-one years, his name be changed to that of Abraham Barnes, by an act of public authority of the State, &c. Such words, it seems to the Court, would carry the estate immediately to the devisee, without waiting for the performance of the condition.

With this general intent, manifested in each of these instruments, and this language, showing the expectation that no interest would intervene between the particular estate devised to J. T. M. and that to his eldest male heir, the conditions on which that devise was made, must be expressed

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in language to show very clearly, that they were to be performed before the estate could vest, to justify the Court in putting that construction on this will.

Let that language be examined. The devise is of the whole property to the male heirs of J. T. M., in succession, the eldest to take first. The condition is to be performed by "the one that may have the right." In the mind of the testator, then, the right was to precede the condition, not be created by it. He would not have described the person who was to perform the condition, as already having "the right," if the impression on his mind had been, that no person would have the right until the condition should be performed.

This expression is entitled to the more influence, from the consideration that the condition is to be performed by the person having the right at the age of twenty-one, or in a convenient time afterwards. The devisee might be an infant at the time of the death of J. T. M. The person who has the right, if an infant, is allowed till he attains his age of twenty-one years, and a reasonable time afterwards, to perform the condition. This is inconsistent with the idea that the condition must be performed before the estate vested, before the right accrued.

The testator then directs, in addition to the change of name, that an oath, prescribed in his will, shall be taken, and then proceeds, "and on his (the person that may have the right) refusing

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to comply with the above mentioned terms, to the next male heir on the same terms."

The property is, in the first instance, devised to all the male heirs of J. T. M., the oldest to take first. The testator then proceeds to describe the state of things in which the next oldest is to take. That state of things *is* the *refusal* of the oldest to comply with the terms annexed to the estate given to him. Upon this refusal, the devise is immediate. No intervention of the heir at law is necessary to defeat the title of the oldest, and to vest the property in the next male heir. But, until this refusal, the rights of the oldest remain unchanged.

Although the words "refusing to comply," may, in general, have the same operation in law as the words "failing to comply" would have; yet, in this case, they are accompanied and explained by other words, which show that the word "refusing" was used in a sense which might leave the estate in the devisee, though his name should not be changed. Where the condition to be performed depends on the will of the devisee, his failure to perform it is equivalent to a refusal. But where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between "refusing," and "failing" to comply with it. The first is an act of the will, the second may be an act of inevitable necessity.

In this case, the name is to be changed by a legislative act. Now the eldest male heir of J. T. M. may petition for this act, but the Legisla-

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ture may refuse to pass it. In such a case, the devisee would not "refuse" to comply with the terms on which the estate was given to him; those terms would neither be literally nor substantially violated. If there were nothing in the words of the will to give additional strength to this construction, the refusal of the Legislature to pass the act would not be a refusal of the devisee to comply with the terms, and would seem in reason to dispense with the condition, as effectually as the passage of an act to render the condition illegal. Its performance would be impossible, without any default of the devisee.

But there are other words which show conclusively that the testator intended, by this expression, to make the devise to the next and other devisees to depend entirely on a wilful and voluntary disregard, on the part of the eldest, of the terms on which the property was devised to him.

After giving the estate to the male heirs of J. T. M., in succession, the testator proceeds, "And all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, *if in that time it can be done, so that no act of intention to defeat my will shall be allowed of*, and of their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, H. T. M.," &c.

These words expressly refer to all the male heirs of J. T. M., including the oldest, apply to each particular devise, and fully explain the intention of the testator on the subject of the change of

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name. It is to be changed in twelve months after the devisee attains his age of twenty-one years, "if in that time it can be done;" and this provision is made, that "no act of intention to defeat his will may be allowed of." The devise over is on "refusing" to comply with the terms on which the estate is given in the first instance, and this "refusing to comply," takes place only "if it can be done"—exists only where there is "an act of intention to defeat his will." If it "cannot be done," if there be "no act of intention to defeat his will," then there is not that "refusing to comply with the terms" on which the devise over is to take place.

All these provisions appear to the Court to demonstrate that the testator intended the devise to take effect immediately, to be defeated by the devisee's refusing to comply with the terms on which the property was given.

The devisees are, all of them, the coheirs of the testator, and the whole purpose of the will is to prevent their inheriting any part of his estate as his heirs. J. T. M. takes an interest for life, beneficially, to a considerable extent, perhaps to the whole extent of the profits, certainly to the whole extent, if he chooses to expend the whole, except 1600 dollars per annum, in repairs, buildings, and the support of himself and family; and is to take the surplus profits, if there be any, as trustee: but as trustee for whom? For his eldest male heir, not for the heirs of his testator.

That eldest male heir takes the whole property, including these possible surplus profits, on

certain conditions, one of which is, the change of his name by act of Assembly. He might possibly, nay probably, be an infant, for J. T. M. had no male heir at the death of the testator. The event of his being an infant is particularly contemplated, and provided for, in the will. Such infant devisee is allowed twelve months, after attaining his full age, to perform the condition. No provision whatever, if the estate does not vest immediately, is made for his education and maintenance. Not even these surplus profits, which are so carefully to accumulate for his use, are given to him. The infant orphan, heir of an enormous estate, who was the particular favourite, and whose future grandeur constituted the pride of his ancestor, is cast, by this construction, on the world, without the means of subsistence, while the whole profits of his estate pass, without account, to those for whom the testator intended nothing.

The estate is devised, in succession, to each of the heirs of the testator, on the same condition; and, if it be a condition precedent, the consequence is, that the same persons who could not take it in succession, as he wished it to pass, would take it in common, as he wished it not to pass. The whole scheme of the will would be defeated, and an object be effected, which all his ingenuity had been exerted to prevent.

In this view of the case, it may be proper again to observe, that the devise over to the second male heir of J. T. M., is limited to take effect on the refusal of the oldest to perform the terms on which the estate is given to him. This must be a volun-

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tary refusal, an "act of intention to defeat his will." Now, a failure to perform the condition may take place, although the devisee may have used his utmost endeavours to perform it: the Legislature may refuse to pass the act required.

If it be a condition precedent, the estate, in that event, can never vest, and the whole intention of the testator may be defeated, without the fault of the devisee. But the will was framed with very different views. The testator declares, that each devise over is to take effect on the previous devisee's "refusing" to comply with the terms on which the devise was made to him; on his obtaining the act of Assembly, "if it can be done;" on there being no "act of intention to defeat his will." This construction would make the devise to depend on the will of the Legislature, although the testator declares that it shall depend on the devisee himself.

To take the oath not to make any alteration in the will, so far as respects the real property, is completely within the power of the devisee, and this is directed to be taken "before he has possession." This direction shows the opinion of the testator, that the estate vested immediately, otherwise there could be no necessity for the clause suspending the possession. It would be a very useless declaration, to say, that the devisee should not take possession of an estate to which he had no right. This assists, too, in marking more clearly the distinction taken by the testator, between a condition annexed to the estate, which was in the power of the devisee, and one not in his power. The pos-

session is not postponed until he shall obtain an act of the Legislature for the change of his name, but is postponed until he shall take the oath directed by the will.

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In the case of *Gulliver v. Ashby*, (4 *Burr.* 1929.) William Wykes devised his estate to several persons in succession, after the death of his wife, and added the following clause: "Provided always, and this devise is expressly on this condition, that whenever it shall happen that the said mansion house, and said estates, after my wife's decease, shall descend or come to any of the persons herein before named, [that] the person or persons to whom the same shall, from time to time, descend or come, [that he or they] do or shall then change their surname, and take upon them and their heirs the surname of Wykes only, and not otherwise."

In giving his opinion on this case, Lord Mansfield said, "First, that this is not a condition precedent. It can not be complied with instantly. It is 'to take the name for themselves 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."

All the Judges concurred in the opinion, that it was not a condition precedent. Mr. Justice Yates thought it no more than a recommendation. The other Judges considered it as a condition subsequent.

To the reason given by Lord Mansfield, for

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considering the conditions on which the testator, in the case in Burrow, devised his estates, as conditions subsequent, are superadded, in the case at the bar, others of great weight, which have been mentioned and relied on.

The case put at the bar, that the eldest male heir of J. T. M. might die within twelve months after attaining his age of twenty-one years, leaving an infant son, deserves serious consideration. If the estate vested in the ancestor, it would descend to him. If the condition be precedent, the estate did not vest, and cannot descend to him. This would be contrary to the general spirit of the will.

If the change of name constituted the whole condition of the devise, the proofs furnished by the will of its being a condition subsequent, are so strong as to dispel all reasonable doubt. But there is another condition, respecting which the intention is less obvious.

The person "that may have the right" is to procure an act of Assembly for the change of his name, "together with his taking an oath, before he has possession, before a magistrate," &c. "that he will not make any change during his life in this my will, relative to my real property."

It has been truly said, that this condition is against law, is repugnant to the nature of the estate, and consequently void. But if this be a condition precedent, its being void will not benefit the devisee. It becomes necessary to inquire, therefore, whether this also be a condition subsequent, or must be performed before the estate can vest.

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In making the devise, the testator uses the words, "I give the whole of my property." Immediately afterwards, he describes the person who is to perform the conditions on which the property is given, as "the one that may have the right;" and, after directing the change of name, adds, "together with his taking an oath, *before he has possession*, before a magistrate of St. Mary's county," &c.

The person who "has the right," is to take the oath "before he has possession." Title then is distinguished from possession. The most attentive perusal of the will furnishes no reason for the opinion that the testator has confounded possession with title. All those parts of the will which respect change of name, dispose of the whole property, and dispose of it in such terms as to show, we think, a clear intention that the right should vest in the devisee on the death of J. T. M., to be defeated on the non-performance of the condition annexed to the estate. The change of language, and the adoption of the word "possession," indicate very strongly that the word was used in its popular sense, to denote the taking actual and corporal possession of an estate. The testator was contemplating the event of an infant becoming entitled to his property, and providing for that event. Such infant was, within twelve months after attaining his age of twenty-one years, "if in that time it could be done," to obtain an act of the Legislature for the change of his name; and moreover to take the oath prescribed, "before he has possession;" alluding, we think, clearly, to that possession which an infant devisee takes of

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his estate, when he attains his majority. A different construction would make this devise repugnant to itself. It would make the devise to depend on two conditions, to be performed at the same time, and yet the one to precede the vesting of the estate, and the other to be capable of being performed more than twenty years after it had vested. The word possession cannot be construed as equivalent to right, for the purpose of producing such consequences as these.

After disposing of his estate in fee tail, the testator proceeds to carve out a particular estate for his favourite nephew, J. T. M.; and it is not entirely unworthy of notice, that he continues the use of the word "possession," with the obvious intent to affix to it the meaning of simple occupancy. It is impossible to read these wills, without perceiving a continuing and uninterrupted desire to bestow his whole estate on J. T. M. and his family. The first will gives him the estate absolutely. His desire to preserve it in mass, and to connect it with his name, increased with his age; and his second will gives his estate to J. T. M. for life, remainder to his eldest son in tail male, remainder to the heirs of J. T. M., the oldest to take all, on condition of their changing their surname to that of Barnes. The last will contains intrinsic evidence that, preserving the same intention with respect to his estate, he had been alarmed by the suggestion that the remainder in tail to the heirs of J. T. M. might coalesce with his life estate, and, vesting in him, might enable him to break the entail and divide the estate. To re-

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concile his kindness to J. T. M. with his pride, he endeavours to give his nephew the advantages of an estate for life, in such form as to leave him no power over the fee. It is not unworthy of remark, that in endeavouring to accomplish this object, he continues the use of the word "possession." My will is, he says, "that he (J. T. M.) shall keep the whole of my property in his possession during his life, with full power," &c. Whether the legal effect of this clause be the same with an express devise to J. T. M. for life, remainder to his heirs in tail, is unimportant with respect to the present inquiry. It shows the intention of the testator, and the sense in which he used the word. It shows that he distinguished between possession and title.

The Court is of opinion, that were the paper which is supposed to have been executed in 1803 to be considered as constituting singly the will of Richard Barnes, and were it to be admitted, that an estate tail did not vest in J. T. M., still the conditions annexed to the estate devised to his oldest heir male are subsequent, and not precedent; and, consequently, the contingency on which the devise is to take effect is not too remote. This opinion renders it unnecessary to decide the questions, so elaborately discussed at the bar, whether the last will revoked those which preceded it, and whether an estate tail is vested in J. T. M. It would be improper to decide those questions at this time, because persons may be interested in them who are not now before the Court.

Decree affirmed.