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Taylor Vs. Thompson

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Decided On : 1823

Appeal No. : 22 U.S. 325

Appellant : Taylor

Respondent : Thompson

Judgement :

Taylor v. Thompson - 22 U.S. 325 (1823)
U.S. Supreme Court Taylor v. Thompson, 22 U.S. 9 Wheat. 325 325 (1823)

Taylor v. Thompson

22 U.S. (9 Wheat.) 325

APPEAL FROM THE CIRCUIT

COURT OF MARYLAND

SYLLABUS

R.B., being seized 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, forever, 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, forever, 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 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 bf 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 one thousand six hundred 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 divested on the nonperformance of the condition.

Quaere whether J.T.M. took an estate tail?

Quaere whether the last will revoked those which preceded it?

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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 31 October, 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 16 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, forever, 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 Abraham

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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 property

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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, forever," 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 personae,"* 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

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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 haeres 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.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court, and after stating the case proceeded as follows:

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, forever, 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 enceinte 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. depends

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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 divested on the nonperformance 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 31 October, 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, forever, 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 here of J.T.M. may petition for this act, but the legislature

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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 willful 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 $1,600 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

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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 favorite, 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 voluntary

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 endeavors 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 possession

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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.

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 hereinbefore 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 cannot 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 state vested in the ancestor, it would descend to him. If the condition be precedent, the estate die 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, . . . 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.

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 nonperformance 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

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 favorite 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 reconcile

his kindness to J.T.M. with his pride, he endeavors 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 endeavoring 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.

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