

Finlay Vs. King's Lessee

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Decided On : 1830

Appeal No. : 28 U.S. 346

Appellant : Finlay

Respondent : King's Lessee

Judgement :

Finlay v. King's Lessee - 28 U.S. 346 (1830)

U.S. Supreme Court Finlay v. King's Lessee, 28 U.S. 3 Pet. 346 346 (1830)

Finlay v. King's Lessee

28 U.S. (3 Pet.) 346

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE WESTERN DISTRICT OF VIRGINIA

SYLLABUS

The testator was seized of a very large real and personal estate, in the States of Virginia, Kentucky, Ohio, and Tennessee. After snaking, by his will, in addition to her dower, a very liberal provision for his wife, for her life, out of part of his real

estate, and devising, in case of his having a child or children, the whole of his estate to such child or children, with the exception of the provision for his wife and certain other bequests, his will declares:

"In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage, and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King or of sister Elizabeth, wife to John Mitchell, and to their issue."

The testator died without issue. He survived his father, and had brothers and sisters of the whole and half blood who survived him, and also a sister of the whole blood, Elizabeth, the wife of John Mitchell, who died before him. William and Rachel Trigg never had a daughter, but had four sons. James King, the father of William King, the devisee, had only one daughter, who intermarried with Alexander McCall. Elizabeth, the wife of John Mitchell, had two daughters, both of whom are married, one to William Heiskill, the other to Abraham B. Trigg.

By the Court:

"We have found no case in which a general devise in words importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, have been construed, from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. The condition on which the devise to William King depended is a condition subsequent."

It is certainly well settled that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a

question of intention. If the language of the particular clause or of the whole will shows that the act upon which the estate depends must be performed before the estate can vest, the condition of course is precedent, and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.

It is a general rule that a devise in words of the present time, as "I give to A. my lands in B.," imports, if no contrary intent appears, an immediate interest which vests in the devisee on the death of the testator. It is also a general

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rule that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for performance. The result of these principles seems to be that a devise on condition that he shall marry B., if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marry B. at any other time during his life. The condition is subsequent.

The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived and is not contrary to some positive rule of law, it must prevail, although in giving effect to it, some words should be rejected or so restrained in their application as to change their literal meaning in the particular instance.

As the devise in the will to William King was on a condition subsequent, it may be construed, so far as respects the time of taking possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession if the intent of the testator shall require that construction.

The introductory clause in the will states "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing say worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent in a case where the whole property is given and the question arises between the heir and devisee respecting

the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King." The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for life is postponed until her death.

Quaere: did William King take an estate which, in the events that have happened, enures to his own benefit, or is he, in the existing state of things, to be considered a trustee for the heirs of the testator? This question cannot be decided in this cause; it belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust.

This was an ejectment brought in the District Court of the Western District of Virginia, and the question involved in the suit was the construction to be given to the will of William King, deceased, formerly of Washington County in Virginia.

The cause was argued in the court below, on the following case agreed; and the judgment of that court being in favor of the defendant in error, the plaintiffs brought the case into this Court.

"The following is the case agreed: "

"We agree that William King departed this life on 8

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October 1808, having first duly made and published his last will and testament, which was afterwards admitted to record in the County Court of Washington County in Virginia, where he had resided, and is in the words and figures following:
"

" Meditating on the uncertainty of human life, I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following, to-wit: "

" To my beloved wife Mary, in addition to her legal dower of all my estate, the dwelling house and other buildings on lot number ten in Abingdon, where I now reside, together with the garden, orchard, and that part of my fruit hill plantation south of the great road and lands adjacent to Abingdon, now rented to C. Finlay and Co., and at my father's decease, including those in his occupancy on the north side of the great road, for her natural life."

" I also will and declare that in case my beloved wife Mary hath hereafter a child or children by me, that the said child or children is and are to be sole heirs of my whole estate, real and personal, excepting one-third part of specified legacies and appropriations hereinafter mentioned; which, in case of my having children, will reduce each legacy hereinafter mentioned to one-third part of the amount hereafter specified, and the disposition of the real estate, as hereafter mentioned in that case wholly void."

" In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage, and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg that will marry a child of my brother James King or of sister Elizabeth, wife to John Mitchell, and to their issue -- and during the lifetime of my wife, it is my intention and request that William Trigg, James King, and her do carry on my business in co-partnership, both salt works and merchandizing,

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each equal shares, and that in consideration of the use of my capital they pay out of the same the following legacies: "

" To John Mitchell, on condition of his assisting and carrying on business with them at the usual salary as formerly, viz., \$1,000 per year, for from two to five years, as they may wish his assistance. An additional sum of \$10,000, payable

five years after my decease, and to each of his children upon coming of age \$1,000 more than the general legacy hereafter mentioned."

" To Connally Finlay a like sum of \$10,000, payable in five years."

" To my nieces Elizabeth Finlay and Elizabeth Mitchell (being called for my grandmother with whom I was brought up) \$10,000 in twelve months after marriage, provided they are then eighteen years of age; if not, at the age of eighteen; to each of my other nephews and nieces at the age of eighteen, that is children of my brother James, sisters Nancy and Elizabeth, \$1,000 each -- to each of the children of my half-brother Samuel and half-sister Hannah \$300 each, as aforesaid; to my said sister Hannah, in two years after my decease \$1,000; and to my said half-brother Samuel, in case of personal application to the manager at Saltville or to my executors in Abingdon, on the 1 January annually during his life \$150, if not called for on said day to be void for that year, and receipt to be personally given."

" It is my wish and request that my wife, William Trigg, and James King, or any two of them that shall concur in carrying on the business, should either join all the young men that may reside with me and be assisting me in my decease that are worthy, or furnish them with four or five thousand dollars worth of goods at a reasonable advance, on a credit of from three to five years, taking bonds with interest from one year after supply."

" In case my brother James should prefer continuing partnership with Charles S. Carson (in place of closing the business of King, Carson & King as soon as legal and convenient), then my will is that William Trigg and my wife carry on the business, one-third of each for their own

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account and the remaining third to be equally divided between the children of my brother James and sister Nancy and Elizabeth."

" To my father, Thomas King, I leave during his life the houses he now resides in and occupies at Fruit hill, together with that part of my land in said tract north of the great road that he chooses to farm, with what fruit he may want from the orchard, the spring house being intended for a wash house with the appurtenances, subject to the direction of my beloved wife Mary, as also the orchard, except as aforesaid. I also leave and bequeath to my father the sum of two hundred dollars per annum during his life, and if, accidentally, fire should destroy his Fincastle house and buildings, a further sum of two hundred dollars per annum while his income from there would cease."

" I also leave and bequeath to the Abingdon academy the sum of \$10,000, payable to the trustees in the year 1816, or lands to that amount, to be vested in said academy with the interest or rents thereon forever."

" Abingdon, Virginia, 3 March, 1806."

"WILLIAM KING"

" Test. WM. D. NEELSON"

" JNO. DOHERTY"

" I hereby appoint William Trigg of Abingdon and James King of Nashville executors of my last will and testament enclosed, written by my own hand and signed this 3 March. 1806."

"WILLIAM KING"

" The other wills of previous dates to said 3 March, 1806, being void."

"WILLIAM KING"

"We agree that William King, at the time of his death, was seized and possessed of seventy-six tracts of land in the said County of Washington, containing in the whole 19,473 acres of land, on one of which tracts is the salt works, which have, since his death, been leased for years, at the annual rent of \$30,000; also of

nineteen lots in the Town of Abingdon in Washington County, nine of which produced

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an annual rent of \$660; also of fourteen tracts of land in the county of Wythe, containing 3,494 1/2; also of eighteen tracts of land in the State of Tennessee, containing in the whole 10,880; also of shares in town lots in several of the towns in the said State of Tennessee. We also agree that the said William King survived his father in the will mentioned; that the said William King had brothers and sisters, to-wit: James King, a brother of the whole blood; Nancy, a sister of the whole blood, the wife of Connally Finlay in the will mentioned; Samuel King, a brother of the half blood; Hannah, a sister of the half blood, the wife of John Allen; all of which brothers and sisters before named survived the said William King; that another sister of the said William King, of the whole blood, died before him, and was named Elizabeth, the wife of John Mitchell, who is mentioned in the will."

"We agree that William King, the lessor of the plaintiff, is the same William King, the son of James King, brother of the testator, mentioned by him in the will."

"We further agree that William Trigg, in the will mentioned, departed this life on 4 August, 1813, leaving Rachel Trigg, in the will mentioned, his widow, and four sons, the said Rachel having borne them to the said William Trigg, and not having borne any daughter to him the said William Trigg, at any time, which said sons are now living; that Mary, who was the wife of the said William King, is still living, aged forty-three years, and is now the wife of Francis Smith."

"We further agree that William King, the lessor of the plaintiff, is married to Sarah Bekem; that James King had only one daughter, named Rachel Mary Eliza, who is now the wife of Alexander McCall; and that Elizabeth, the wife of John Mitchell, had only two daughters, to-wit Elizabeth, who is now the wife of William Heiskill, and Polly, who is now the wife of Abraham B. Trigg."

"We agree that William King the testator died seized and possessed of the house and lot in the declaration mentioned. We agree the lease entry and ouster in the

declaration supposed,

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and that the defendants are in possession of the house and lot in the declaration mentioned."

"If upon this state of facts, the lessor of the plaintiff ought to recover at this time, we agree that judgment shall be entered for him, and that if the court shall be of opinion that he ought not to recover until after the death of Mary, the wife of Francis Smith, or that he ought not at any time to recover, judgment shall be entered in favor of the defendants. We also agree that the property in controversy is worth more than \$2,000. "

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a writ of error brought to a judgment rendered in an ejectment by the court of the United States, for the Western District of Virginia. The judgment was pronounced on a case agreed. Three questions have been made at the bar:

1. Is the condition on which the testator has devised his real estate in trust to William King a condition precedent or subsequent?
2. If subsequent, at what time does the estate vest in possession?
3. What is the nature of the estate, when vested?

1. Is the condition precedent or subsequent?

The words of the will are

"In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage, and in case such

marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of William and Rachel Trigg that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchel, and to their issue."

It was admitted in argument and is certainly well settled [[Footnote 1](#)] that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause or of the whole will

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shows that the act on which the state depends must be performed before the estate can vest, the condition is of course precedent, and unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.

In the case under consideration, the testator does not in terms give his real estate to William King on his marrying the daughter of William and Rachel Trigg, but at the death of his, the testator's, wife, on condition of his marrying a daughter of William and Rachel Trigg. Whatever doubt may be entertained respecting the lands not given to the wife for life, the testator has expressed clearly his intention that the lands encumbered with his wife's life estate should come to the possession of William King at her death. He gives the estate at that time without requiring that the condition annexed to it should be previously performed. The estate then vests in possession whether the condition on which it was to depend be or be not performed. It cannot be supposed to have been his intention that the devisee should take possession under this devise before the interest vested in him. The interest therefore must have vested previously or at the time. The language of the testator does not indicate the intention that the marriage must take place during the life of his wife; nor do the circumstances of the parties justify us in imputing such an intention to him. The time of her death was uncertain, and it might follow close upon his own. The contemplated marriage could not possibly

take place until the lapse of many years, because one of the parties had not come into existence. William and Rachel Trigg had not at the time, and never have had, a daughter. The testator therefore has fixed a time when the estate is to vest, which might probably precede the happening of the event on which its continuance is to depend. This is clearly a condition subsequent as to those lands in which an estate for life is given to the wife of the testator.

Does any reason exist which will authorize a distinction between those lands in which the wife took a life estate and

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those of which no other present disposition is made in the will?

The testator makes no distinction. In one clause he gives "his whole real estate at the death of his wife to William King, son of his brother James King, on condition," &c.; If, as the language would seem to indicate, the devisee was entitled to possession of the whole property at the same time -- that is, at the death of the testator's wife -- it would follow that the condition on which the whole depends is a condition subsequent. If the devise should be construed, as the defendant in error contends, to give William King a right to the immediate possession of that part of the estate of which no other disposition is made, does this circumstance furnish any reason for the opinion that this part of the state depends on a condition precedent? We think not. The will might then be construed as if it were expressed thus:

"In case of having no children, I then leave and bequeath all my real estate, subject to the devise to my wife for life, to William King, son of my brother James King, on condition of his marrying,"

&c.; This is the most unfavorable manner for the defendant in error in which the question can be presented. It waives the benefit derived from fixing a time for the possession of a considerable part of the estate, which might very probably precede the event on which its continuance is made to depend. Had even this been the language of the will, the estate in the lands would, we think, depend on a

condition subsequent.

It is a general rule that a devise in words of the present time, as I give to A. my lands in B., imports, if no contrary intent appears, an immediate interest which vests in the devisee on the death of the testator. It is also a general rule that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for performance. The result of those two principles seems to be that a devise to A. on condition that he shall marry B., if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marry B. at any time during his life. The condition is subsequent. We have found no case in which a general devise

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in words, importing a present interest in a will, making no other disposition of the property, on a condition which may be performed at any time, has been construed from the mere circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided. [[Footnote 2](#)] We think then that the condition on which the devise to William King depended, was a condition subsequent.

2. The second point is one of more difficulty. Does that part of the real estate which is not otherwise expressly disposed of vest in William King immediately, or at the death of the testator's wife?

The words are, "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition," &c.;

These words certainly import that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be controlled only by a strong and manifest intent, to be collected from the whole will. But the intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary

to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected, or so restrained in their application as materially to change the literal meaning of the particular sentence.

The counsel for the defendant in error insists that the intent to give the real estate not otherwise disposed of immediately to William King is apparent on the face of the will, and must control the construction of the clause under consideration. This proposition has been so fully discussed at the bar that the Court need only restate the principles which have been already advanced in the argument.

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Of the immense estate left by the testator, about one-half, including her dower, was given to his wife and others for her life. The residue was given to William King immediately, on the trust mentioned in the will, or given by implication to the testator's wife, or was permitted to descend to his heir at law.

As the devise to William King was on a condition subsequent, it may be construed, so far as respects the time of taking possession, as if it had been conditional. The condition opposes no obstacle to his immediate possession if the intent of the testator shall require that construction.

We will first consider the supposed implied devise to the wife.

As William King was not the heir of the testator, a devise to him at her death does not necessarily imply an estate in her during life, and the will itself furnishes strong reason for rejecting this construction. His wife, as might well be supposed, was first in his mind, and was kept in mind throughout the will. He notices her legal right to dower, so as to avoid a possible implication that what he gave her was in lieu of dower and to secure her from the necessity of relinquishing all interest in the estate bequeathed to her as preliminary to claiming her dower. She claims her dower under the will, as she does the other large estate bequeathed to her. It is not probable that a person who was careful to notice even that to which she would have been entitled under the law would have omitted totally a very large property

which she could claim only under the will. He even notices the remainder of a small property in the occupancy of his father, and mentions his wife in many other parts of his will in a manner to add to the improbability of his having totally omitted her name when a very large benefit was intended. It seems to us to be contrary to reason and to the ordinary rules of construction to intend that a large estate is given by an unnecessary implication to a wife who takes her dower in the whole, and also a large part by express words. We think it very clear that there is no implicative devise to the wife.

Does the property in question descend to the heir at law

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during the life of the wife? Was it the purpose of the testator to die intestate with respect to it until her death?

We cannot think that such was his purpose or that his will authorizes the Court to say so.

The introductory clause indicates an intention to dispose of all his estate. He says

"I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following."

These words are entitled to considerable influence in a question of doubtful intent in a case where the property is given and the question arises between the heir and devisee respecting the interest devised. The words of the particular clause also carry the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are, "In case of having no children, I then leave and bequeath all my real estate at the death of my wife to William King, son of brother James King," &c.;

It is admitted that if this clause stood alone, unexplained by other parts of the will, the real estate, not otherwise disposed of, would descend to the heir. The law gives to him whatever is not given to others. But if other provisions in the will show an intent that the legal title of the heir should not prevail, those other provisions

must be respected in construing the instrument. [[Footnote 3](#)]

When the will was made, the testator's father was alive, and was consequently to be considered as his heir. He was an old man, and the provision made for him seems to have contemplated only a comfortable supply for the wants of one who had grown up and lived in simple unexpensive habits. The testator gives him for life the houses in which he then resided, with so much land as he might choose to farm, what fruit he might want, and the spring house, subject to the direction of his wife; also the sum of \$200 per annum during his life, and if fire should destroy his Fincastle house, a

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further sum of \$220 per annum while his income from that source should be suspended. This property is given to his wife for life on the death of his father. These moderate provisions for the heir, contemplating only the ease and comfortable supply of the wants of an old man, comport very little with the idea of leaving an immense estate, consisting among other articles of numerous tracts of land, remote from each other, most probably of very difficult management, to descend to him. It is not probable that this estate would be left to descend to him for the life of Mrs. King. Her surviving him was probable, and the testator expected she would survive him. The lands devised to him are given to her for life.

The father, who was the presumptive heir when the will was made, died during the life of the testator. This event is not supposed to affect the construction of the will. But were it otherwise; were it supposed that he might look forward to that event, and contemplate his brothers and sisters as his probable heirs; he will furnish arguments of great weight in support of the opinion that he did not intend them to take anything not expressly devised to them. The heirs of the testator at the time of his death were James King, a brother of the whole blood, Nancy Finlay, a sister of the whole blood, Elizabeth and Polly, the daughters of Elizabeth Mitchel, a sister of the whole blood, Samuel King, a brother of the half blood, and Hannah Allen a sister of the half blood. Each of these persons is noticed in the will. For some of them an ample provision is made. To others, less favor is shown. The legacies to

his brother and sister of the half blood are inconsiderable, while his bequests to those of the whole blood are large. No one of them is omitted. The circumstances that his mind was clearly directed to each and that he has carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate powerfully against the opinion, that he intended to leave a very large property to descend upon them by the silent operation of law.

The whole will proves the primary intention of the testator

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to have been to keep his immense real estate together and to bestow this splendid gift on some individual who should proceed from the union of his own family with that of his wife. In case of having no children, he gives all his real estate at the death of his wife to William, the son of his brother James, on condition of his marrying a daughter of William Trigg and Rachel his wife, in trust for the eldest son or issue of said marriage. If such marriage should not take place, he gives said estate to any child, giving preference to age, of William and Rachel Trigg, who should marry a child of his brother James, or of his sister Elizabeth. William Trigg was the brother of his wife. His primary object then is the issue of a marriage between his nephew William King and a daughter of William Trigg by his then wife, the niece of the testator. His second object was the issue of any marriage which might take place between any child of William and Rachel Trigg and any child of his brother James or of his sister Elizabeth. That both these objects have been defeated by the course of subsequent events does not change the construction of the will. The testator undoubtedly expected the one or the other of them to take place, and his intention respecting the immediate interest of the devisee or the descent to the heir is the same as if a daughter had afterwards been born to William and Rachel Trigg, who had intermarried with William King. The will therefore is to be construed in that respect as if the contemplated marriage had been actually consummated. It was not very probable at the date of the will that the devisee of this immense fortune might come into existence in less than twenty years, nor that the wife might live fifty years. In the meantime, no provision whatever is made for him. To what purpose should the profits of the estate

intended for him be withheld during the lifetime of the testator's wife, since those profits were not to be received by her? Why should her death be the event on which lands in which no interest was given to her, should be enjoyed by the devisee? We perceive at once the reason why the devise of those lands in which she had a life estate should take effect at her death, but there is no reason for postponing the possession of lands from which she could derive no

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benefit, and which were not given to others to the same period.

The devise over, too, has considerable influence in this question. It may be on a contingency too remote to be supported by law, but the testator's intention is not the less manifested on that account. He did not suppose it too remote, and in fact it might have happened in a few years. Had William King, the devisee, died young, or had William or Rachel Trigg died without leaving a daughter, a fact which has actually happened, and any child of William and Rachel Trigg had married a child of James King or of Elizabeth Mitchel, then the whole estate is given to such child, and to the issue of the marriage. Had either of these events taken place, the estate is given from the heirs. It consists very well with the general intention of the testator and his mode of thinking, as manifested in his will, to suppose an intention that the profits should accumulate for the benefit of those for whom the estate was designed; we can perceive nothing in the will to countenance the idea that he contemplated the descent of these lands to his heirs. Nothing could be more contrary to his general purpose than the distribution which the law would make of his real estate among his heirs. This may be the result of a total failure of all the provisions in the will, but cannot be considered as the immediate effect if a contrary intention is perceived and if the words can be so construed as to support that intention.

The words used by the testator show that nothing was further from his mind than a partial intestacy. He says he has thought proper to make his will, "leaving and bequeathing his worldly estate in manner following;" after making a considerable provision for his wife and devising to others during her life, he gives "all his real

estate at her death" to his nephew, on condition, and on failure to perform the condition, gives "the said estate" over. Being about to devise all his estate to his nephew, and knowing that his wife and others would hold a large part of it for her life, it was obvious that his nephew could not take all till her death. But if he devised the whole estate, that which could not be taken by the wife or by others for her life would pass to the nephew

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if a clear intention appears in the whole will to intercept the descent to the heir, although the clause, taken literally, would postpone the possession, even of that part in which the wife has no interest, till her death. To effect this intention, the court will vary the strict meaning of words, and sometimes transpose them. 1 Call. 132. The word "all" may be transposed, so that the clause may read, "in case of having no children, I then leave my real estate, all, at the death of my wife, to William King," &c.; Let the clause be thus read, and no one could hesitate on its construction. The whole estate is devised to William King, but the possession of that part of it which is given to the wife or others for her life, is postponed till her death. The whole will bears marks of being written by a man whose language was far from being accurate, and whose words, if taken literally, would in some instances defeat his intention. That intention, we think, was to devise his whole real estate to William King, in trust, on a condition subsequent, postponing the possession of that part of it which was given to the wife and others for her life, till her death.

3. The third point is one of great interest to the parties. Did William King take an estate which, in the events that have happened, enures to his own benefit, or is he in the existing state of things to be considered as a trustee for the heirs of the testator?

This question cannot properly be decided in this cause. It belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust. We do not mean to indicate any opinion upon it. The legal title is, we think, in William King, whoever may claim the beneficial interest, and

the judgment is therefore

Affirmed with costs.

[[Footnote 1](#)]

Willis 156; 2 Bos. & Pul. 295; 1 D. & E. 645.

[[Footnote 2](#)]

2 Atk. 18; Cases T.T. 164, 166; 2 Pow. on Dev. 257; 1 Salk 170; 4 Mod. 68; 2 Salk. 570.

[[Footnote 3](#)]

Cases, T.T. 157; 1 Coke 1; 3 P.Wms. 295; 1 Wils. 333; 1 Ves. 225; 1 Wash. 97, 107; 1 Call. 132; 1 Munf. 143, 145.

MR. JUSTICE JOHNSON dissenting.

The defendant here was plaintiff in ejectment in the court below, in a suit to recover certain lands, part of the estate of William King the elder.

The cause comes up on a case stated according to the practice

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of Virginia, and upon which judgment was rendered for the plaintiff.

The right to recover depends upon the will of William King the elder and the events that have occurred to defeat or give effect to the provisions of that will.

The operative words of the will are these.

"In case of my having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, in trust for the eldest son or issue of such marriage, and in case such marriage should not

take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James or of my sister Elizabeth, wife to John Mitchell."

The testator died without issue, and none of the devisees intended to be provided for came within the description of heir at law.

As Mrs. Trigg died without having had issue female, the marriage contemplated for William the defendant never became possible; neither has any one of the marriages contemplated in the alternative taken place between the issue of the Triggs and the issue of testator's brother or sister; but from the case stated, it appears that, although remote and improbable, the event of one of the contemplated marriages is not impossible.

These however appear to be immaterial facts in the present case, since it has not been contended in argument that the limitation over depending upon the failure of William's marriage with a daughter of the Triggs, is limited by the will to take effect within the term prescribed by the law of executory devises. Unless it could be confined to the life of Mrs. King on the failure of William's marriage, it is obvious that the object of that devise over might not come *in esse* until after every life in being had terminated, and might not marry for more than twenty-one years afterwards.

Without committing myself, however, on this point, I shall pass it over, considering it only as assumed for the purpose

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of the present argument. After the most diligent attention to the questions in this cause, I cannot help coming to the conclusion that its difficulties are rather artificial or factitious, and that the true legal view of it is that which is most simple and most consistent with the truth of the case, to-wit, that as to the mass of his estate comprised in this clause, the testator's views had been wholly baffled by events; that the devise in favor of the offspring of certain marriages in his own family having altogether failed, the law must dispose of his property, he having made no

ulterior disposition of it; and this at last will probably come the nearest to a correct view of the testator's intentions, for we are at liberty to conclude, in the absence of such ulterior disposition, that unless the estate should vest in the manner in which he had proposed to vest it, he was indifferent as to what became of it, or could do no better than leave it to the law. If he had felt that strong predilection for his supposed favorite nephew, the present defendant, which was so much insisted upon in argument, it may be presumed that the interests of that nephew would not have been forgotten.

Much use has been made of this assumed predilection in order to establish an inference of intention in William's favor.

To my mind the will seems calculated to induce a contrary conclusion, for there is not a provision in the will made in his favor individually. He takes, if at all, in trust for his own issue, and even that issue is only conditionally an object of favor; unless mingled with the blood of the Triggs, it is rejected, and the blood of the Triggs is followed up into other connections, to William's entire exclusion. Nor is the offspring of his brother sister admitted to higher favor unless they be connected with the offspring of the Triggs.

I think it clear, then, that the primary objects of testator's bounty were the children of the Triggs or their offspring, and not William or his offspring.

At the close of the argument at the last term, I intimated to counsel my impression that the cause had not been argued on its true grounds. I considered it a case of conditional

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limitation, whereas it was argued exclusively with reference to the law of conditions, the one party maintaining that the marriage of William was a condition precedent, and therefore, as it never took place, nothing ever vested in him, the other that the marriage was a condition subsequent, and having become, without default in him, impossible, he took the estate discharged of the condition, but both conceding that the cause must be disposed of on the law of conditions.

It is clearly a case of conditional limitation; but if it is to be decided on the law of conditions, instead of the law of contingencies, I think there is abundant reason for maintaining that it is a case of condition precedent, not subsequent. Were this a common law conveyance, I should think differently, for reasons well known to the profession; but in a will there is not one case in a thousand in which it would ever enter the mind of a testator, when he gives upon condition generally, that any interest vests until performance. I feel no hesitation in laying it down as the ordinary import of words of condition in a will that they impose a condition precedent unless accompanying words or the general purpose for imposing the condition suggest the contrary. In the present instance, there cannot be a reason consigned why any interest should vest in William prior to that marriage which was to give birth to the issue that was the sole object of the testator's bounty. It was not William for whom any beneficial interest was intended, but the issue of a particular marriage, in which the will distinctly shows that the blood of the Triggs was the favored object. We must force the words of the testator from their simple and natural meaning before William can in any event become more than a mere trustee in interest. And why create him trustee? At his tender age, too, for an event so remote and uncertain, for persons whose coming *in esse* depended upon so many contingencies must necessarily be so long deferred, and whose interests would by operation of law be committed into hands so much more competent. Why make him a trustee who would need himself a guardian?

It has been urged that the testator has declared he did not mean to die intestate as to any part of his property,

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and that marriage being a valuable consideration, William must be considered a purchaser.

As to the first of these arguments, it is clear that the testator never lost sight of his avowed intention, and actually did dispose of all his property, though not of all his estate in it, and with so many alternatives and precautions as might well have satisfied an ignorant man, if not any man, that he could not die intestate as to any

part of it. And as to William's being a purchaser, although it might well be denied before the event of his marriage, yet if it be admitted, the consideration in view was not his own advancement, but that of his issue. That was to him a legal and adequate consideration, either for marrying or waiting for the marriage. A purchase made for a child is a case excepted from that class of resulting trusts which arise when one individual pays the consideration and another takes the title. The natural feelings imputed to the parent are held sufficient to take the case out of the general rule. 2 Mad.Ch. 116 *et passim*.

If this will is to be adjudged to vest a present interest in William, subject to be defeated by breach of the condition, or rather waiting to be rendered absolute by the performance of the condition; in other words, if it is to be construed to create a condition subsequent, it must be for the purpose of carrying into effect this will or some purpose of the testator expressed in it. But if it can be shown that it would be nugatory as to William and unnecessary as to all other interests, the argument fails.

I can conceive of no interests that can be involved in this question unless it be 1. the interests of the devisees over; 2. those of the heir at law; or 3. those of William himself.

Now as to the first, it would be contrary to the most express terms of the will to give William a continuing interest or any present interest. On a question of intention, it is immaterial whether the devise over be too remote or not too remote. The argument is the same, and as to them, the devise creates a legal interest; they are not to take under the trust to William, but in the event of his marriage's failing, the devise

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over is of a legal interest, so that the trust is expressly restricted to the object of its creation, which object arises only upon the marriage of William. The words are "and in case such marriage should not take effect, I leave and bequeath such estate to any child," &c.; So that upon the failure of the marriage, the trust was

intended to be, as to the devise over, as though it never had been mentioned.

This is expressly limiting William's interest to the purposes of its creation, and rendering it idle and useless, except in the event of the marriage.

And why should the heir at law ask to invest William with an existing interest? He has no need of a legal estate in William to maintain his right. His claim, as of an undisposed residue, is better than of a resulting trust under the devise to William.

Or why should the court adjudge this a condition subsequent in behalf even of William himself? The law is clear that he can take no beneficial interest under this will; his case is one of the strongest possible against the arising of any implication in favor of a devisee. In the case of *Wheeler v. Sherval*, Mosely 301, case 165, in which the executors claimed a beneficial interest in the residue of property given them in trust, the court declares it to be the strongest case possible against them that they take expressly in trust.

And in the case of *Milnes v. Slater*, 8 Ves. 308, where a similar claim was preferred, it was held to be conclusive against it that one of their number was created trustee. The heir is not to be precluded or postponed except upon express words, or strong, if not unavoidable implication. Here the implications are all against him who would preclude the heir at law.

If, then, the purpose and the words of the will point to the marriage of William for the initiation of the testator's bounty, and no interest or object whatever will be subserved by vesting in William a present interest, it follows that the marriage, which is the condition, should be held a condition precedent.

Nor can I feel the force of that argument in favor of a present or beneficial devise to William, which is deduced

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from the circumstance that no provision is made by the will for the application of the income during the interval that must ensue between the marriage of William and birth of issue, an interval which by possibility might last many years.

If this were an application for a maintenance out of that income, such an implication might have weight; but it certainly goes no further, and even to that point the inference is not unavoidable, since it is perfectly consistent with the character and duties of a trustee to receive and invest the rents and profits of the trust estate in expectancy of the event which is to appropriate them. And where no specific instructions are given him, a prudent man will claim and receive the directions and protection of a court of equity in applying such income; it is every day's practice.

If, then, neither does the will give nor the law imply any beneficial interest to William, there can be no reason for vesting anything in him before the marriage.

Believing as I do that if the case must be disposed of upon the question whether the condition, if a case of condition, be precedent or subsequent, it ought to be adjudged a condition precedent. I should here conclude. But as the case has been laid over and there is no knowing on what point it may go off, I must proceed to examine it in other points of view.

I will then next examine the rights of William upon the hypothesis that it is a condition subsequent.

If a condition subsequent, he can only, in the most favorable view of his interests, be placed in the same relations and acquire the same rights by its becoming impossible that would have resulted from the performance of the condition.

Suppose, then, the condition performed, and what would have been the character and extent of his rights? On what principle could he be discharged from the trust on which everything is given to him that the will gives? Would he have held to his own use or to that of his issue? He would not have acquired an estate tail under the Rule in

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Shelly's Case, because he was a mere trustee; his legal estate could not unite with the use to his issue so as to make one estate. And if he would have held in

trust for his issue by that marriage, what would have been the consequence of his dying without issue? The question is easily answered.

The reversion of the use in the event supposed never passed from the testator. The disposition of the law was this: upon the death of testator, the whole descended upon the heir, to await the event of William's marriage. Upon his marriage, he would have become entitled to take and hold in trust for the issue of that marriage. But what is the rule of law when a trust is created for an object that never comes into existence or a purpose that fails? It cannot be questioned that the trustee then holds to the use of the heir at law. I will not say it is absurd, but it does appear to me irreconcilable with any principles that I am acquainted with that a trust should be converted into a beneficial interest by the occurrence of an event which makes the trust idle and without an object, and it is not easily reconcilable with reason or with the views of the testator that an interest which the heir at law would unquestionably have retained even after the marriage should be divested by the impossibility that the marriage should ever take place.

There is not wanting legal authority for maintaining, on the contrary, that had the marriage taken place and the wife died without issue, so as to render it impossible that the object of the trust should ever come *in esse*, the estate would immediately have returned to the heir at law. I allude to the case of *Mansfield v. Dugard*, 1 Eq.Ca.Abr. 195, 1 Fearn 372, in which the devise was to the wife until the son attained his age of twenty-one years. The son died at thirteen, and it was ruled that the wife's estate determined on the son's decease.

But it is with reluctance I bestow time upon examining these questions, so thoroughly am I satisfied that this case does not turn on the doctrine of conditions. It is a case of conditional limitation, and therefore to be disposed of upon very different principles. Cases of conditional limitation

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partake of the nature of conditions, but they are cases of contingency, and to be adjudged upon the principles applicable to contingent estates. Their distinguishing

characteristics are that they contain a condition either to divest an estate vested or to prevent the vesting of an estate contemplated, and to carry over the interest to another party or to some other purpose, not to the heir. Whereas it is indispensable to the legal idea of a condition that it should enure to the benefit of the heir, that he should enter, and that the effect of entry should be the restoration of the original estate, not the creation of a new estate. A conditional limitation is comprised among executory devises, and therefore can be created by will alone; but estates on condition may be created by deed or will. As to the estate to be created or carried over, as well as in those instances in which it anticipates or prevents an estate from vesting, it is obvious that conditional limitations must be assimilated to conditions precedent. But as the contingency may also operate to divest an estate taken presently, it is equally obvious that it then approximates to a condition subsequent in one of its effects. In either case, however, it is regarded as a contingency, and the law of conditions is not applied to it to any purpose that would defeat the estate of the second taker. It is, on the contrary, so moulded and applied as may give effect to the devise over.

The question whether this is a case of condition or of conditional limitation is easily decided by subjecting it to a very simple and obvious test.

Let us assume for argument that the devise over on failure of William's marriage is not too remote, that he took under a condition subsequent, and committed a clear breach of the condition. In that event, if this is a case subject to the law of conditions, the heir alone could enter, and his entry would restore the original estate, not carry over an estate to another, for it is a canon of the law of conditions that although entry for condition broken may defeat one estate, it cannot create a new one or carry over another estate; it may restore the estate of him who imposed the condition, but does no more.

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What then would become of the devise over? of the will? and of testator's intention? They would be defeated, and hence words of condition in such cases

are construed words of limitation, and the condition converted into a contingency upon the happening or failure of which the estate devised in the alternative goes over and vests without entry. There is no other mode of carrying into effect the intention of the testator but by giving to his language a meaning that will comport with that intention. The only difficulty in this cause, and that which probably preoccupied the attention of counsel with the law of conditions, has resulted from mere casualty. By a series of unanticipated events, the heir at law is at this time actually thrown into the same relation, with regard to the defendant here, in which he would have stood had the case been one purely of condition. That is, if the devise over be put out of the will as too remote in its creation, then, in effect, the entry of the heir, if he has a right to enter, would enure to his own benefit.

But this can make no change in the law of the case. Whatever was the legal character of the right of the parties, it was the effect of the testator's intention as deduced from the will. His intention remains the same, although the arbitrary rules of law may prevent that intention from being carried into effect. The rule of law which converts words of condition into words of limitation in certain cases proceeds upon intention, and cannot be affected by the occurrence of incidents which defeat the execution of that intention. The present is one of the most frequent and familiar occurrence in the books of those instances in which that rule of construction prevails. Neither the first taker nor the devisee ever was heir at law, and in that case Lord Hale has said, *Fry's Case* in Ventris,

"that it is a rule which has received as many resolutions as ever point did that although the word 'condition' is used, limiting the estate over to a stranger makes it a limitation."

For these reasons, I am clearly of opinion that the rule of law applicable to conditions subsequent, when become impossible, is not to govern this case. That it must be disposed of on the law of conditional limitations, and William's

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marriage is to be regarded as a contingency, not a condition.

I have already given my reasons for holding this to be a condition precedent, or rather a contingency which is to vest, not to divest an interest, and this is always a question of intention to be deduced from the views of the testator in imposing conditions. If a condition precedent, then it is one of those instances in which the first estate is anticipated and never vests; the case becomes a very plain and simple one, and the will must operate as if it read thus, "if W. K. shall marry a daughter of the Triggs, then I give the residue to him in trust, &c.; if such marriage shall not take place, then I give it over." And thus construed, there can be little doubt that the will comes nearest to the good sense of the case and the views of the testator. Nor can there be any ambiguity in the law of the case if so construed. William would take nothing, because he never married, and the devise over being too remote, there is no first taker to carry the estate. It is then an undisposed residue, and to be distributed according to the *lex loci*. Under this view of the case, the judgment must certainly be against William King.

But if he took a present interest, defeasible upon the condition or contingency of refusing to marry a daughter of the Triggs, then the inquiry is what effect has it upon the state of right in a case of conditional limitation that without his fault such condition or contingency becomes impossible? On this point, which is very much of an authority question, it must be acknowledged there is a great dearth of adjudged cases as well as of learning in elementary writers.

If it may be decided with analogy to trusts, the objects of which have failed or never come *in esse*, then they are considered as determined in favor of the heir at law, as in the *Bishop of Durham's Case*. If it may be determined by analogy to the case of estates to endure until the happening of an event that has become impossible, then I have showed that it determined presently in favor of the devise over, the court declaring in the case of *Mansfield v. Dugard* that he may wait forever if his right is to be suspended on an impossible event.

And if in the absence of any other established rule we may be guided by the polestar of devises, the testator's intention, certainly nothing could comport less with his views than to permit an event which he looked forward to as the certain cause of divesting William of even his fiduciary interest, to have the effect of vesting in him an absolute beneficial interest, or any other interest which could stand in the way of the claim of his own legal representatives.

If we submit the question to the plainest test of reason as applied to the law of limitation and contingencies, then it seems incontrovertible that when a limitation over is made to depend upon the failure of a certain event, the limitation ought to take effect whenever it is ascertained that the event must fail, as when it has become impossible; and equally so that when a previous interest, although passing presently into possession, awaits its confirmation from the happening of a certain event, that there is no reason for continuing that estate when it is definitively established that the event on which it depends for confirmation can never happen. These were the principles recognized in the case of *Mansfield v. Dugard*, and I think the reasonable result of all the doctrine of conditional limitations considered under the three heads into which the cases are usually distributed. There was a case cited in argument to sustain the judgment below on which so much reliance was placed that I shall not pass it over unnoticed. It is the case of *Thomas v. Howel*, reported in Salkeld and Modern, 1 Salk. 170; 4 Mod. 66, and very defectively reported in both. The report in Salkeld does not give the half of the case, and that in 4 Mod. gives a very unsatisfactory account of the reasons which governed the court. An attentive examination of the facts, however, will enable us to understand the case and to explain it in perfect conformity with the principles which govern my opinion.

It was a curiously mixed case in which the law of conditions and conditional limitations were so blended as to have been scarcely severable. It was the case of a father, tenant in fee, and his three daughters, constituting his heirs at law. The father devises to one of the daughters a messuage called

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"upon condition that she marry T. T., and if she refuse to marry him, then over to trustees in trust to be divided among the three co-heiresses, equally or otherwise as they please."

The marriage became impossible by the death of T. T. under twelve, and the question was which to apply to it, the law of conditions or the law of limitations. The majority of the court, three out of four, decided that it came within the law of conditions. One held it to be a conditional limitation. On this case I would remark,

1. That it was well disposed of upon the law of conditions, for the devise over was in effect to the heir at law, so that the entry for condition broken would not have defeated the will, but have carried it into effect; the reason, therefore, for construing words of condition into words of limitation did not exist, especially as it is presumable that there was nothing to prevent the operation of the statute of uses in favor of the devisee over under the trust in the will, but

2. There was room for a doubt on the question arising from the effect of interposing the trust, especially if the power of making an unequal distribution was well given to the trustees, for then the entry of the heirs would have defeated the testator's views, and it ought to have been held a limitation, according to the opinion of the dissenting judge.

3. I think it very clear that the case alluded to was argued and decided under a general admission of bench and bar that if held to be a case of condition, the effect of the condition's becoming impossible would be in favor of the first taker, but if held to be a case of conditional limitation, that it would be in favor of the party claiming under the devise over. If the effect had been held to be the same in both cases, it would have been utterly idle to raise a question upon the will.

And lastly that when the judges in that case come to the conclusion that it was a case of condition, and not of limitation, they proceed to examine the question whether a condition precedent or subsequent, with a view to the leading motive of the testator, little regarding any particular phraseology. And certainly with a view to

induce T. T. to address

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the daughter, the more beneficially the will operated in her behalf, the greater would be the inducement held out, and accordingly they make it a condition subsequent. But a contrary reason operates here, for the leading motive is not the establishment of William King, but the formation and advancement of a particular family connection. It would then have comported best with this testator's views to superadd the inducement of necessity in order to incline William King to the proposed matrimonial connection.

There could have been no reason for giving it to him until the marriage took effect; it would have been better to let it accumulate in the hands of the executors, especially considering his tender age at the date of the will.

Upon the whole, I am satisfied that if this case is to be disposed of on the law of conditions, there is nothing in the will or the views of the testator that should make it a condition precedent, and nothing certainly has occurred since to make it necessary to give it that character, for had he married, there would have been a resulting trust in favor of the heirs if the marriage failed to produce issue, and that would only have left the heir at law where he is now, without owing anything to the aid of a trust. Whence it results that it would have been useless and idle to have vested any interest in William at any time.

But I am perfectly satisfied that the case is one to which the law of limitations and contingencies alone is applicable, and that according to the principles that govern that class of cases, the impossibility of the contingency does not confirm the estate in the first taker, but defeats it.

I am therefore of opinion that the judgment below should be reversed.