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dispose of the immediate beneficial enjoyment of it; whereas if dealing with the reversionary moiety reserved to him by the settlement he was not in a position to do so. Still, this is no more than a neutral fact, and the words of the will are wide enough to cover a reversionary interest. I hold that the property in question passed under the devise.

Solicitor for the plaintiffs: *A. St. George.*
Solicitors for Elizabeth Adelaide Green: *White & White.*
Solicitor for George Garrow Green: *C. Ambrose.*

R. W. L.

Appeal. 1892. Dec. 13, 14. 1893. Feb. 27.

BEVAN *v.* MAHON-HAGAN (1).

(1891. No. 12,532.)

Will—Condition precedent that legatee should assume testator's name and arms—Voluntary assumption of surname—License from Crown to quarter the testator's arms—Gift over—Rule against perpetuities—Impossible condition—Descent of right to bear arms—"Heiress."

A testator bequeathed to the son of his daughter A., who should first attain the age of twenty-one years, and should before attaining that age have taken and borne the surname of H., and the arms of the testator, certain articles therein specified; and in case there should be no son of A. who should attain that age and have previously assumed the said name and arms, then to the son of the testator's daughter R. who should first attain that age, and before attaining same should have assumed the said name and arms; and the testator devised and bequeathed his residuary estate upon trust to convert and invest the same, and to pay the income thereof to his widow for life; and after her death, in case the eldest son of his daughter A. should then have attained the age of twenty-one years, and should have taken and borne the surname of H. and the arms of the testator, to pay and transfer the said residuary fund, and the accumulations thereof, to such eldest son; but if such eldest son should have attained the age of twenty-one years, but should not have taken the said surname and arms, then to the younger sons of A., according to seniority of birth, subject to like conditions; and in case there should be no son of A. who fulfilled these conditions, then to such son of the testator's daughter R., or the

(1) Before PORTER, M.R., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.

eldest, if more than one, as should attain twenty-one, and should before attaining that age have taken and borne testator's said surname and arms, with a gift over, as to the chattels specifically bequeathed, to A.'s daughter who should first attain twenty-one; and as to the residuary estate to all the daughters of the testator's daughter A. who should attain the age of twenty-one years or marry. A. had five daughters, all of whom attained twenty-one years, and one son, who died before attaining twenty-one years. R. had issue two daughters, who died before attaining twenty-one, and one son, who attained his age of twenty-one years some time after the death of the testator's widow. In an action brought by the daughters of A., claiming the property under the gift over, on the grounds that R.'s son had not assumed the testator's name and arms before attaining twenty-one years, the Vice-Chancellor held that the evidence, satisfied him that the defendant had complied with the conditions so far as taking the testator's name, but that as the defendant had not obtained the Royal License to quarter the testator's arms till after he had attained twenty-one, he had failed to comply with the latter part of the condition, and that the property vested in the plaintiffs:—

Held (on appeal), that there was evidence on which the Court might act that the defendant had assumed the name before attaining twenty-one; but that the testator's arms had not been in fact assumed or borne by the defendant before attaining that age, and that therefore he had not complied with the condition.

Held, also, that the application to other purposes by the testator of a fund originally intended by him to defray the expense of obtaining the Royal License, did not render the performance of the condition impossible so as to excuse the defendant from complying with it.

APPEAL from so much of the judgment in this action of the Right Hon. the Vice-Chancellor as declared the plaintiff, Isabella Mary Bevan, entitled absolutely, to the plate, plated articles, swords, and other articles specifically bequeathed by the will of Sir Robert Hagan, deceased, and the plaintiffs entitled to the residue of the testator's real and personal estate.

The terms of the will and codicil of the late Sir Robert Hagan on which the questions argued in the case turned are set out in the report of the case in the Court below, 27 L. R. Ir. 399.

The testator died on the 25th April, 1863, and probate of the will and codicil was on the 11th June, 1863, granted to the executors therein named. The testator left him surviving his widow and his two daughters, Anna Maria Bevan and Rosa Elizabeth Hagan.

Previous to his death the testator had entered into an agreement for a lease of a plot of ground at Raglan-road, in the county

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of Dublin, and for the erection of a dwelling-house thereon; and in pursuance thereof, by indenture dated the 9th June, 1863, all that plot of ground therein particularly described was demised to the executors and trustees of the testator's will for the term of fifty years. The said executors and trustees completed the erection of the dwelling-house.

After payment of the testator's debts, funeral, and testamentary expenses, in order to raise the sum of £6000, which the defendant took under the will, the trustees mortgaged the house for £750. This mortgage was paid off by the trustees out of the rents received from the tenant of the house some years before the defendant came of age. The house represented the entire residuary fund.

Anna Maria Bevan, the eldest daughter of the testator, married Dr. Bevan, and died 20th September, 1866. There was issue of the marriage of the said Anna Maria Bevan one son, who died under the age of twenty-one years, and five daughters, the plaintiffs in this action, all of whom attained the age of twenty-one years.

In the year 1865 Rosa Elizabeth Hagan married Charles George Mahon, and there was issue of this marriage one son, the defendant, Charles Patrick Mahon, afterwards called Mahon-Hagan, and two daughters, both of whom died before attaining the age of twenty-one years, and without having married. Rosa Elizabeth Mahon died on the 13th November, 1868. Lady Hagan, the widow of the testator, died 21st July, 1870. Charles George Mahon died 6th May, 1882.

The defendant was born on the 14th of May, 1867. The plaintiffs alleged that when any of them met him or heard of him he passed under and used his original name of Mahon until after he had attained the age of twenty-one years. Mr. Hartley, one of the professors of the Royal College of Science, deposed that during the latter part of the year 1887, and part of the year 1888, the defendant had been a student attending the lectures delivered in that college; that while a student there he had never used or been known in the college by the name of Mahon-Hagan or by any name but Mahon; that on four occasions, 8th December, 1887; 10th February, 1888; 14th February, 1888; and 13th November, 1888, he had signed his name in the college books as Charles

Mahon: these were the only occasions on which he was required to sign his name in the said college.

The defendant swore an affidavit to the following effect:—"I say that Robert Hall Bevan, my cousin, died in the month of August, 1880, and immediately afterwards his father, Dr. Bevan, intimated to my father, as I have been informed, and believe, the fact of his death, and that in consequence I became entitled in remainder to certain property under the will of Sir Robert Hagan, and that I was to take over and assume the name of Hagan and the arms of Hagan. I accepted and used the name of Hagan, and was known by the name of Mahon-Hagan during my minority. I say that in the winter of 1887 I came to reside with my step-mother, widow of my father, at Haddington-road, Dublin, and I was known in Dublin, and introduced by the name of Mahon-Hagan. I say that during my minority no steps were ever taken by the trustees of my grandfather's will, as directed by said will, to procure for me the Royal License to bear and use the name and arms of Hagan; and I have been informed by Sir Bernard Burke, the Ulster King of Arms, or by some person in his office, Dublin Castle, that as an infant under the age of twenty-one years I could not petition for or obtain a license to bear and use the name and arms of Hagan. And I say that even if I could have obtained the Royal License during my minority I had not money to enable me to pay the fees and duties incidental to the obtaining of such license, which amount to £160. I say that on attaining my full age of twenty-one years I proceeded to borrow money, and having done so, applied for and obtained a Royal License to use the name and arms of Hagan, for which I paid £160." The defendant then referred to a copy of the *Dublin Gazette*, in which the license was published. The defendant then dealt with the period during which he was a student at the Royal College of Science, and with Professor Hartley's affidavit, in reply to which he said: "I have no recollection of having signed my name in the books it refers to, and if I signed it as Mahon after I had obtained the Royal License I may have done so to prevent a confusion, as my name had previously appeared in the books as Mahon. I say, positively, that I had assumed the name of Hagan, and was known by that name prior to attaining the age of twenty-one

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years. Lieut.-Col. Massy deposed:—"I know the defendant in this action, Charles Patrick Mahon-Hagan. I was first introduced to him as Mr. Mahon-Hagan in the first week of April, 1888, and since then I have been in the habit of meeting him constantly, and addressed him, and heard him addressed as Mahon-Hagan. The said defendant is now a lieutenant in the Clare Regiment of Artillery, in which I am second in command. He entered the artillery under the name of Mahon-Hagan, and has been constantly addressed, and has constantly conversed, as Mahon-Hagan; and I never knew him to be addressed or known by any other name." Miss O'Gorman swore:—"I know the defendant, Charles Patrick Mahon-Hagan, who is my cousin, and I met him frequently in the winter of 1887 and spring and summer of 1888, when he was residing with Mrs. Mahon his stepmother. He was known and generally addressed as Mahon-Hagan, and I introduced him to several persons as my cousin Mr. Mahon-Hagan. I wrote him a note on the 3rd of April, 1888, enclosing him an invitation for the 6th April, and addressed that letter to C. Mahon-Hagan, Esq. I say, amongst others, I introduced him to Mrs. Butler at No. 11, Herbert-road, Dublin, in February, 1888, at an afternoon party, as my cousin Mr. Mahon-Hagan, and I introduced him to Colonel Massy of the Clare Artillery, and to Mr. Arthur Lloyd, in the first week of April, 1888, as my cousin Mr. Mahon-Hagan, I knew him to be addressed in the winter of 1887 and in the spring and summer of 1888 as Mr. Mahon-Hagan." The Mr. Lloyd mentioned in Miss O'Gorman's affidavit deposed as follows:—"I know the defendant Charles Patrick Mahon-Hagan. I met him for the first time in my own house at Pembroke-road, at a small party, on or about the 6th day of April, 1888. He was then introduced to me by Miss O'Gorman as her cousin Mr. Mahon-Hagan. I have since then occasionally met him and known him by the name of Hagan or Mahon-Hagan, and by no other name, and I believe that he uses that name in all his conversations." There was also filed on behalf of the defendant affidavits by his stepmother, and Mr. Butler, the surviving trustee of the will. These affidavits contained no further evidence as to the defendant's having taken the name and arms.

Affidavits by Sir Bernard Burke, the Ulster King at Arms,

and Mr. Farnham Burke, Somerset Herald at Arms, stated that a minor might, during his minority, obtain a license from the Crown for the assumption of the name and arms of a testator whose will contained a clause directing him so to do. None of the persons who made affidavits were cross-examined.

The grant of arms originally made in 1823 to Sir Robert Hagan, was a grant of arms "to be used and borne by the said Captain Robert Hagan and his issue for ever hereafter according to the laws of arms."

The Royal License obtained by the defendant was dated 11th August, 1888. It set out a memorial presented by the defendant, representing amongst other things that he was desirous of carrying out the injunctions contained in the will of Sir Robert Hagan, by assuming, and taking, and using the surname of Hagan in addition to and after his own surname of Mahon, and bearing the arms of Hagan in the first and fourth quarters, and the arms of Mahon in the second and third quarters, and granted leave and authority to the defendant that he and his issue might assume, take, and use the surname of Hagan in addition to and after that of Mahon, and bear the arms of Hagan and Mahon quarterly.

The defendant had inserted in the daily papers of 15th May, 1888, an advertisement, stating that he had assumed the name and arms of Hagan in compliance with his grandfather's will. These advertisements and the original grant of arms to Sir Robert Hagan were produced in the Court of Appeal, but were not given in evidence before the Vice-Chancellor.

Piers F. White, Q.C., and *Price, Q.C.* (with them *W. F. Kenny*), for the appellant:—

The evidence shows that the defendant has complied with the condition so far as it requires him to have taken the name of Hagan before he attained twenty-one.

Next as to the arms. In 1823 Sir Robert Hagan obtained a grant of arms to be used and borne by him and his issue for ever thereafter. This gave him and his issue the right and power to bear those arms. His two daughters, Mrs. Bevan and Mrs. Mahon were *heiresses*, and entitled to bear his arms; and the right to bear these arms descended on the defendant: Boutell, Heraldry, pp. 136–7;

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Co. Litt. 27 A, sect. 31. The testator no doubt thought it was necessary for his grandson to apply to the Crown for a grant; but this was a mistake; the defendant fell into the same mistake, and actually procured a grant, though too late to fulfil the condition if it had to be fulfilled by obtaining a grant. But procuring the grant was mere idle form. The defendant in fact bore the arms of Hagan before he attained twenty-one, by virtue of descent. This part of the condition was therefore complied with by the defendant.

The direction to apply for a grant need not have been complied with. The case comes within that class of cases where testators through ignorance have required acts to be done that have been already performed. In such instances as the conditions are impossible, the legatees take their legacies pure and unqualified: Roper on Legacies, p. 756.

The defendant here was a minor: the Court will not be strict in binding him by the exact terms of the condition: *Tanner* v. *Tebbutt* (1). The defendant has substantially complied with the condition: *In re Smith; Keeling* v. *Smith* (2).

By the investment of the residue mentioned in the codicil the testator made it impossible to fulfil the condition by taking away the fund which he had provided to bear the expense: *Gath* v. *Burton* (3); *Walker* v. *Walker* (4). The testator by his own conduct practically prevented the performance of the condition: Cruise's Digest, Vol. ii. p. 28. The codicil amounts almost to a revocation of the condition.

Serjeant Campion, Q.C., and *Serjeant Jellett, Q.C.* (with them *G. Y. Dixon*), for the respondents:—

The condition in the will is a condition precedent followed by a gift over; it must therefore be strictly complied with: *Hollinrake* v. *Lyster* (5). As between persons taking the primary or ultimate gift under the will no preference is shown by the Court: *In re Hodges' Legacy* (6); *Powell* v. *Rawle* (7); *In re Hartley; Stedman*

(1) 2 Y. & C. C. C. 225.
(2) 44 Ch. Div. 654.
(3) 1 Beav. 478.
(4) 2 De G. F. & J. 255.
(5) 1 Russ. 500.
(6) L. R. 16 Eq. 92.
(7) L. R. 18 Eq. 243.

v. *Dunster* (1). These cases show that the Court will regard the time limited for the performance of the condition. To extend the time limited in this case by even a single day would violate the rule against perpetuities. The time allowed by the testator is *ex necessitate rei* the longest time the law allows. *Tanner* v. *Tebbutt* (2) and *In re Smith; Keeling* v. *Smith* (3) are distinguishable, because there the conditions were substantially complied with. Here the time was of the essence of the condition, and once it expired the condition could not be fulfilled: *Fry* v. *Porter* (4). Neither ignorance of the condition nor the fact that the legatee was a minor afford any excuse: *Fry* v. *Porter* (4); *Ashley* v. *Essex* (5).

In *Gath* v. *Burton* (6) and *Walker* v. *Walker* (7) the conditions were held to be discharged, because the act of the testator himself rendered the performance of them impossible. There was no impossibility in performing the condition here. The appellant's contention amounts to saying that the condition was revoked: this could only be done by some testamentary act: *Davis* v. *Angel* (8).

The condition involves two acts to be done by the appellant before attaining twenty-one—the assumption of the testator's name and the assumption of the testator's arms. The first branch of this condition was not fulfilled. The condition was to "take, bear, and assume, and use upon all occasions the surname of Hagan": this would not be satisfied by the fitful and casual assumption of the name shown by the evidence here; the assumption of the name should have been public and notorious: Davidson, Conveyancing, Vol. iii., Part I., p. 357, note (*m*); the proper evidence of a change of name would be something like what was proved in *Hawkins* v. *Luscombe* (9). In order to comply with the second part of the condition the respondent should, before attaining twenty-one, have obtained the Royal License to bear the arms: *Austen* v. *Collins* (10). The respondent took no step here, before attaining twenty-one, which can be called bearing the testator's arms. The advertisement in the newspapers was late.

(1) 34 Ch. D. 742.
(2) 2 Y. & C. C. C. 225.
(3) 44 Ch. D. 654.
(4) 1 Mod. 300.
(5) L. R. 18 Eq. 290.
(6) 1 Beav. 478.
(7) 2 De G. F. & J. 255.
(8) 4 De G. F. & J. at p. 527, *per* Lord Westbury.
(9) 2 Swanst. 375.
(10) 54 L. T. (N. S.) 903.

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The contention that the right to bear the testator's arms descended on him confounds the right to do a thing with the doing of the thing itself. In any event, the right to *bear* the testator's arms did not descend on the respondent here. It appears from the Royal License that his father too had arms; *prima facie*, therefore, he would bear his father's arms, and though his father married an heiress, the line of descent was broken. The respondent had the right only to *quarter* not to *bear* the testator's arms: Boutell on Heraldry, p. 175. The condition imposed by the testator was to *bear* his arms; the Royal License only permits the respondent to quarter them along with his father's arms: this is not sufficient to satisfy the condition.

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PORTER, M. R.:—

[Having read the material parts of the will, and stated the facts, His Lordship said]:—

The condition, which may be treated as substantially the same in respect of the heirlooms and the residue, involves taking the name and bearing the arms of Hagan. In both cases it is a condition precedent. In each the condition was to be complied with before the person taking under it had attained the age of twenty-one years. It is not disputed that the condition, being a condition precedent, must be strictly fulfilled; but the defendant's case was presented to us in this way: it was alleged that as a matter of fact on the evidence he had assumed the name of Hagan before attaining twenty-one; but as regards the arms, while it was admitted that there was no such evidence, it was argued—(1) that the testator himself had absolved the defendant from complying with this part of the condition by rendering its performance impossible; (2) that inasmuch as Sir Robert Hagan had by grant from the Crown the right to bear these arms, and as they were by the express terms of the grant limited to him *and his descendants*, the defendant, as one of the descendants, had the right to bear the arms, and that to have the right to bear the arms is very much the same thing as actually to bear them. No doubt, as Mr. White contended, it is not now-a-days necessary in order to fulfil such a condition for a man to array himself in the full panoply of a knight errant, and go forth to the world having them blazoned on his

shield, as in the days of chivalry. But arms in the modern sense may be borne in many ways, for instance, by having them painted on the panel of a carriage, cut upon a signet ring, engraved on household plate, or even stamped at the head of a sheet of note paper. Proof of any such step being taken by the defendant would have been *evidence* of the fulfilment of the condition imposed by the testator. However, none of these things nor anything else of the kind was done by Mr. Mahon-Hagan before he attained the age of twenty-one years, although on the grounds I shall presently mention he had in my opinion the right to bear and use the arms of Hagan.

Shortly before he came of age he and his stepmother (his father and mother were dead), appear to have become uneasy about his position under the will, and they consulted his solicitor as to what steps he ought to take. They received the most extraordinary advice it is possible to conceive. The advice apparently was that the young gentleman should do nothing till he came of age: that is, till it was too late. A day or two after attaining his majority he inserted an advertisement in the newspapers, to the effect that he had assumed the name and borne the arms of Hagan. Shortly afterwards he took steps to obtain a license from the Crown to bear the name and the arms of his grandfather. He obtained the Royal License giving him permission so to do, at the cost of £160. The Letters Patent so obtained are dated 11th August, and were gazetted on the 25th August, 1888. If this had been done while the defendant was a minor the condition would have been fulfilled. But at the date at which it was done it was obviously late, for the condition was then broken. No doubt it was in time, so far as concerned the devise of the Ballingarry tithes, for the condition annexed to that gift allowed the devisee six months from attaining age for the purpose. But with regard to the heirlooms and residue it was different, for in their case the condition must have been either performed or broken by the defendant before he came of age.

The evidence in the case is mainly pointed to the question whether the defendant had adopted the name of Hagan before he attained the age of twenty-one. On the affidavits the Vice-Chancellor came to the conclusion that in that respect the defendant

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had fulfilled the condition of the gift; and upon the evidence, and above all having regard to the absence of cross examination, I am not prepared to differ from that conclusion, but should rather say that this particular part of the condition has been performed.

In *Doe* d. *Luscombe* v. *Yates* (1) a testator devised lands upon certain limitations, and directed that every person who might take the lands under the limitations in the will should take and use the surname of "Luscombe." The will contained a proviso that every person claiming the lands so devised, "and not bearing the surname of Luscombe," should within three years after being let into possession procure his own name to be altered by Act of Parliament into the testator's name of "Luscombe." A person whose original name was John Luscombe Manning, but who without any Act of Parliament had assumed the name of Luscombe, entered into possession of the lands. In an action of ejectment in the Court of Queen's Bench his title came in question and was upheld. Abbott, C.J., pronounced the judgment of the Court. He said (p. 553):—"It appears by the case that John Luscombe Manning took no estate in the lands devised until he came of age; and it is found that before he came of age and before he was let into possession he took upon himself the surname of Luscombe, and has ever since borne and used the surname of Luscombe and no other; so that he has undoubtedly in this respect complied with the words of the direction contained in the clause whereby the lands were given to him, and has in substance complied with the desire and intention of the testator, which was that the person who enjoyed his lands should bear his name. But it is said that he did not comply with the terms of the proviso, because although he had taken and used the surname of Luscombe before he came to the estate, yet he did not within three years after he took possession of the estate take that name by virtue of an Act of Parliament." The learned Chief Justice then points out that, on the strict construction of the proviso, it only applied to such persons as did not *de facto* bear the surname of Luscombe, and shows that it did not therefore apply to John L. Manning Luscombe. "For," he proceeds, "a name assumed by the voluntary act of a young man at his

(1) 5 B. & Ald. 544.

outset into life, adopted by all who know him, and by which he is constantly called, becomes for all purposes that occur to my mind, as much and effectually *his* name, as if he had obtained an Act of Parliament to confer it upon him. We would not be understood to say that where a testator expressly requires a name to be taken by Act of Parliament or other specified mode, any mode falling short of the specified mode may be substituted for it, or to say that under this particular will a voluntary assumption of the name after the party became possessed of the estate would be sufficient. All we mean is this, that as the testator has annexed no express qualification to the words "bearing the surname of Luscombe" and the word "surname" is not used in this will to denote a name inherited from the father, and as a bearing *de facto* answers every useful purpose that could be obtained under the authority of an Act of Parliament, a bearing *de facto* though by voluntary assumption is sufficient to satisfy the general and ordinary meaning of the words 'bearing the surname.'"

It appears that the question involved in the ejectment had previously been mooted before Lord Eldon in the case of *Hawkins* v. *Luscombe* (1), which, however, did not result in any decision that I can find. Still the report is instructive as showing what the facts were on which the defendant J. L. M. Luscombe relied as proving, in a case curiously resembling the present in some of its features, that he had assumed the required surname. His answer stated that when he was of the age of fifteen or sixteen years, and at school, he took and used the surname of Luscombe, instead of his own surname of Manning, and had ever since used the name of Luscombe only upon all occasions, and in April, 1791, when he was of the age of eighteen years he was entered a commoner, and afterwards admitted a gentleman commoner at Pembroke College, Oxford, under the surname of Luscombe; and in 1794, when he came of age, he settled the accounts of the trustees of the devised estates, and gave all receipts and vouchers in respect thereof under the surname of Luscombe only; and that he had since held in the surname of Luscombe only a lieutenant's commission, and afterwards a captain's commission in His

(1) 2 Swanst. 375.

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Majesty's North Devon regiment of Militia, and also a commission as a deputy-lieutenant in the county of Devon; and that in April, 1796, a parish apprentice was bound to him under the name of Luscombe; and in June, 1813, he obtained His Majesty's license for him and his issue to continue to use the name of Luscombe only; and that license was in June, 1813, recorded in the College of Arms; and that since he was of the age of fifteen or sixteen years in all his correspondence he had signed and used and received letters under the surname of Luscombe only. The evidence before us falls very far indeed short of that, and may even be contrasted with it. It appears that after the death of his father, Mr. Mahon-Hagan stayed for a time in the South with a Mr. Walter Butler, who was a relation of his stepmother, and one of the trustees of the will. It was suggested that during his sojourn in the South the defendant bore the name of Hagan. Now Mr. Butler has made an affidavit in this case in support of the defendant, and he has not said a single word in it as to this young man being known by the name of Hagan. It appears in the affidavit of Mr. Hartley, Professor of Chemistry in the Royal College of Science, Stephen's-green, that Mr. Mahon-Hagan entered as a student in that College in 1887, a year before he came of age, and entered his name in the books of the College as Charles Patrick Mahon. On three formal occasions, at least, he signed his name as Mahon in the College books: first in December, 1887, next in February, 1888, and, lastly, on November 14, 1888, the last occasion being six month's after he had attained twenty-one. That affidavit is undoubtedly true; the books in which the entries were made were produced, and there can be no question as to the fact. But then it is only fair to observe that possibly the defendant may have signed the name of Mahon in 1887 at a time when he had not conclusively made up his mind to adopt that of Hagan, and that having once signed his name in the College books as Mahon he thought it better to continue to sign it in those books in the same way.

But indeed the evidence as to the name by which this young gentleman was known in the College of Science is an attempt to prove a negative. The *onus* of proving the affirmative lies on the defendant. In his own affidavit he says that he accepted and

used and was known by the name of Hagan during his minority; that in the winter of 1887 he came to reside with his stepmother in Haddington-road in Dublin, and was known and introduced in Dublin by the name of Mahon-Hagan. Colonel Massy, who is an Honorary Lieut.-Col. in the Clare Artillery, says that he was first introduced to the defendant as Mr. Mahon-Hagan in April, 1888, and since then has been in the habit of meeting him and hearing him addressed by that name. Another piece of positive evidence is supplied by the affidavits of Miss O'Gorman and Mr. Lloyd. From these it appears that at two parties in Dublin —one in February and the other in March, 1888—the defendant was introduced by Miss O'Gorman to a Mrs. Butler, and to Mr. Lloyd, as her cousin, Mr. Mahon-Hagan. His stepmother also says that for some time previous to his coming to Dublin he resided at Killarney, and was known there as Mr. Mahon-Hagan. That is the whole of the evidence offered as to the adoption of his name. All it attempts to prove is that on two or three occasions just before or immediately after his coming of age, the defendant was introduced or addressed by the surname of Hagan, a state of facts which, as I have said, falls very far short of what was proved in *Hawkins* v. *Luscombe* (1). While this is some evidence of his having taken the name of Hagan, it is very slender and unsatisfactory; but I do not think it necessary to differ from the view of it taken by the Vice-Chancellor.

It will be observed that the evidence to which I have referred does not touch the question of arms at all; and I venture to think that if there were any degrees of importance as to the need of compliance with the various parts of this condition, this particular testator would have attached more importance to that part which dealt with the arms than to that which prescribed the assumption of his name. He was undoubtedly proud, and justly proud, of the handsomely emblazoned coat-of-arms, which had been granted to him in recognition of his distinguished services. His desire was that the memory of these services should be perpetuated by always having some one to bear the arms which were their recognition and reward. However, it has been argued that the

(1) 2 Swanst. 375.

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testator by his own act has absolved the defendant from the performance of this part of the condition. No doubt by his will he had provided a fund out of which the expenses imposed by this part of the condition could be defrayed; and by building the house mentioned in the codicil he seems to have practically revoked this provision. But did that render it impossible to assume the arms? At most it only took away a fund which the bounty of the testator had himself provided for supplying the means of satisfying the condition in a particular way, but it did not revoke the condition. Even if the defendant had not the means to procure a Royal License, why did he not endeavour to comply with the condition in some less expensive way? *Doe* d. *Luscombe* v. *Yates* (1) shows that a name may be voluntarily assumed, and I know of no authority for saying that arms also may not be voluntarily assumed by a person entitled to bear them.

Some cases were cited to show that the conduct of the testator had freed the defendant from the condition. In *Walker* v. *Walker* (2) the testator, who was tenant for life of the Brookend estate, by his will gave his son John a sum of £500, on condition that he would convey all his interest in the Brookend estate to the testator's son Edward. After the execution of this will the testator bought out John's reversion in the estate himself, and it was held that John was entitled to the £500, discharged from the condition. That was a case where the testator had by his own act, subsequent to the will, rendered impossible the performance of the condition imposed by the will, and it was held that the condition had been discharged by the testator himself. In *Gath* v. *Burton* (3) the condition was that if the legatee should pay a debt due to the testator to the executors immediately after the death of the testator, he should receive the legacy, "but not otherwise." The testator, before his death, accepted a composition in bankruptcy from the legatee in discharge of the debt, and the Court held that the legacy was payable, as the debt had been forgiven and abolished by the act of the testator himself. Here again the *ratio decidendi* was, that owing to what the testator had himself done,

(1) 5 B. & Ald. 544. (2) 2 De G. F. & J. 255. (3) 1 Beav. 478.

the performance of the condition would have involved an impossibility. In the case before us, however, there was no impossibility in the way of assuming the testator's arms. It is absurd to say that by not giving money to do the act he rendered it impossible.

We were also referred to *In re Smith* (1). There the question was whether a marriage had been consented to by trustees, and it was held on the facts that their consent had been substantially given. Similarly in *Tanner* v. *Tebbutt* (2) there was a condition that the legatees should appear personally before the executors, and prove their identity, and the condition was held to be substantially satisfied by the legatees appearing personally before the solicitor of one executor and the partner of the other acting for them, and establishing their identity to them, on the ground that the word "personally" only applied to the legatees and not to the executors. Whether rightly or wrongly, these two cases were decided simply on the ground that the conditions imposed on the legatees had been substantially performed. They have, therefore, no bearing on the question we have to consider.

It has also been argued that since the defendant had the right under the grant of the Crown, as one of the descendants of Admiral Hagan, to bear the arms of Hagan if he had chosen, he must be treated as if he had borne the arms by merely existing: in other words, that the arms were cast upon him by descent, so as to fulfil the condition, without his actually using them. It appears that his father also had family arms; and a good deal of heraldic lore was exhibited in the attempt to show that the defendant, if he had borne his father's arms, would have been, as the son of a *co-heiress*, entitled also to quarter the arms of his maternal grandfather. If it were necessary to decide this abstruse point, I for one am of opinion that under the ordinary rules of heraldry, the defendant, taking his father's arms, would have been entitled also to quarter along with them those of his mother; and if he actually had done this before attaining twenty-one, as at present advised, though not actually deciding the point, I should think the condition would have been satisfied. On this point it is satisfactory to me to

(1) 44 Ch. D. 654. (2) 2 Y. & C. C. C. 225.

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know that the supreme authority which we are accustomed to recognise in such matters takes the same view. For it appears by the grant from the Crown which the defendant obtained that the Queen and Council looked upon this bearing the arms of Mahon and Hagan quarterly as the proper mode of fulfilling the direction in the testator's will; and Sir Bernard Burke, Ulster King of Arms, was of the same opinion. Therefore, if the defendant had in fact borne these arms quarterly before he had attained the age of twenty-one, I should have been of opinion that the condition was fulfilled. But from the beginning to the end of the case there is no suggestion that he on any single occasion used or assumed Sir Robert Hagan's arms, or indeed any arms whatever, before he came of age.

I think the whole frame and wording of this condition presuppose the doing of some positive act. It would be dangerous to define what that act should be, as it might be relied upon and mislead in directing proofs in some future case. But I found my judgment upon this: whatever the assumption and bearing of arms may really involve, there is not one scrap of evidence that this young man before coming of age did anything which can be construed as assuming or bearing arms. He could not help being born the son of his mother: the law gave him the right to adopt the arms of the testator (whether quarterly or otherwise): that was a right he could have acted upon; but as a matter of fact he simply did nothing to exercise it before attaining the age of twenty-one. We must therefore hold that he has not fulfilled the condition imposed by the will of the testator. I regret that I am forced to come to this conclusion; but the misfortune has been brought upon the defendant by bad advice, and the neglect of a plain and obvious precaution, distinctly brought to his mind. The appeal must be dismissed, with costs.

PALLES, C.B.:—

I concur with the conclusion arrived at by the Vice-Chancellor and the Master of the Rolls, and I do not think it necessary to add anything to what they have said.

FITZ GIBBON, L.J. :—

I concur with the Master of the Rolls, though I confess that any regret which I feel for the conclusion at which we are constrained to arrive results from a feeling that the ground of the litigation is one where, usually, "All is vanity." Yet, if in any case a "name and arms clause" can justly be treated as a matter of substance, it is in the present case, and what I add to the judgment of the Master of the Rolls is rather by way of apology for the testator and his conveyancer.

The arms in question had been earned by the testator himself; and with his title were the reward of personal services, of which the whole device was a symbolic record which the old admiral might rightly desire to perpetuate, as a condition of enjoying his bounty.

The conveyancer, under the circumstances of the case, was compelled to make the condition of bearing the name and arms which the testator wished to impose, a condition precedent to be fulfilled before the legatee should attain the age of twenty-one. Any longer period for its fulfilment would have rendered it void, as transgressing the rule against perpetuities. The peremptory form of the condition, therefore, was rightly adopted by the conveyancer, and could not have been escaped.

The withdrawal, by the codicil, of the fund which the testator had by the will provided to meet the expense of taking the arms, did not do away with the effect of non-compliance with the condition. The testator had spent the money on his house, and having done so, he left the person who was to take his property to perform the condition at his own expense. He by no means relieved the legatee from the obligation to comply with the condition. He only took away a fund which might have facilitated compliance with it.

As regards the condition of taking the name of Hagan before attaining the age of twenty-one, I should have felt great difficulty in finding the fact, as the Vice-Chancellor has done, that it was complied with by the defendant. However, there is some slight and unsatisfactory evidence to support the finding, and therefore I concur with the Master of the Rolls so far as to say that I do not think it necessary to differ from the finding of fact arrived at on this part of the case in the Court below. At the same time,

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the evidence offered on behalf of the defendant falls very far short of what, if I were a juror, I should require to see. It contrasts remarkably with what was proved in *Hawkins* v. *Luscombe* (1), where a young man had to fulfil a very similar condition. There the devisee, when he attained his fifteenth year, adopted the new name, registered himself by that name when entering college, constantly used it, and was never afterwards known by any other. Here the defendant failed to take his new name when entering the College of Science, and even after the date to which the evidence of using the new name refers, he officially registered himself under his old name. Having searched the affidavits for some definite occasion, before he attained twenty-one, on which he was known by the name of Hagan, I can find no definite instance of the kind which is not traceable to the action of Miss O'Gorman. In fact, the defendant rather seems to have had the name of Hagan put on him by her than to have assumed or used it himself. The affidavits are uncandid and misleading, notably the colonel's affidavit, for they are so drawn as to seem to speak of one period when they really refer to another. The only occasions, prior to his twenty-first birthday, on which the defendant appears to have been addressed as Mahon-Hagan, were the parties where he was introduced under that name by Miss O'Gorman. There is no evidence of his having once himself written or spoken or used any name but Mahon, until after he was of age; and if it was my duty to find as a matter of fact whether before attaining twenty-one he assumed the name of Hagan, I should have been unable to find that the defendant had discharged the *onus* resting upon him in this respect. However, in this Court of Appeal, I think there is some evidence to support the finding that the defendant had assumed the name of Hagan before attaining twenty-one, and having regard to the fact that the defendant and his witnesses were not cross-examined, I am willing to leave the Vice-Chancellor's finding undisturbed, especially as it does not effect the result.

There still remains the question whether the condition has been

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fulfilled so far as it required the defendant to take and bear the arms of his grandfather before attaining twenty-one. The conclusion which we have been asked to adopt by his counsel practically amounts to this, that if a man is *entitled* to take and bear any particular arms, it follows *ex necessitate* that he has taken and borne them. This is contrary to what the defendant and his advisers thought when he took out the grant of arms, and qualified himself to claim the heirlooms and residuary fund, and with a very rudimentary notion of heraldry, it seems to me that argument after argument must be got over before we can come to any such conclusion.

Heiresses, no doubt, are entitled to bear their paternal arms, but with a peculiar "difference." When an heiress marries a husband who bears arms of his own, the arms of her son, at least *prima facie*, are not the arms of his mother but those of his father. It seems that the son of an heiress may, if he likes, quarter the arms of his maternal grandfather, but he is at least equally entitled to bear the arms of his father alone—the latter is the course usually adopted—and in the absence of some affirmative act of "taking" other arms, I should say that the arms borne are those of the father only. Here it has been assumed rather than proved that the defendant was entitled to bear the arms of 'Mahon.' Furthermore, even if the defendant had quartered his maternal grandfather's arms, his father's arms should have occupied the principal place, and if we treat the defendant as having the right to adopt this course, as his counsel argued, then the difficult question would arise, whether quartering the Hagan arms in this fashion, putting them in the second place, would have been a compliance with the admiral's will, which directs not that his arms should be *quartered*, but *borne*. Again, if we treat the defendant as having taken and borne the Hagan arms only, a new difficulty arises. Can the right to bear maternal arms unaltered be reconciled with first principles? If the father bore arms, these should be quartered in the first place. But if an heiress marries a man who is not entitled to bear arms, can she transmit the arms which her father bore to descendants who otherwise would not be entitled to bear arms at all? If the object of this elaborate system and science of heraldry is to preserve a record of family lines and genealogies, and to distinguish certain

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families, it seems strange if every "heiress" who marries transmits to her issue the right to bear the arms of her father. Every authority to which we have been referred, or which I have been able to find, falls far short of the proposition that the defendant here was entitled to bear Sir Robert Hagan's arms, quarterly or otherwise, without a special grant.

But if we treat the question as one of fact or of action on the defendant's part the evidence is all one way. There is not a shred of evidence that the defendant, before attaining twenty-one, bore the old sailor's arms in any shape or form; the defendant's own action is perhaps the most conclusive thing in the case. The day after he came of age he published an advertisement that he had taken and borne the testator's arms, and the terms and circumstances of this first declaration of his intention indicate that he then bore them for the first time. For the conveyancing reason which I have already referred to, this step was taken too late to be a compliance with the condition, and while we may regret that by delaying this advertisement the young gentleman may have lost the property, yet we must remember that the persons to whom it now goes are equally with him objects of the testator's bounty, which they take by express gift, in the event which the dilatoriness, or unwillingness, or mistake of the defendant has brought about. We give the legacy as the testator gave it, upon the defendant's non-compliance with the testator's will.

BARRY, L. J.:—

While I regret the result of the case, I concur in the judgments that have been pronounced. It is a deplorable thing that this young man should, owing to the apathy or ignorance of himself, or his advisers, have lost this valuable property. In a most extraordinary manner he overlooked, or forgot, or disregarded the condition in the will, which was as plain as could be put upon paper, namely, that before attaining the age of twenty-one years he should assume and bear the name and arms of Hagan.

As to the assumption of the name before the defendant attained twenty-one the evidence is extremely meagre, and I am very much disposed to agree with my brother Lord Justice FitzGibbon, that for

the only vestige of evidence which this young man can now put forward to support his case he is indebted to the feminine quickness and sagacity of his cousin, Miss O'Gorman. For, with the exception of those parties at which he was introduced by the name of Hagan, I can see no evidence of his having made any pretence of complying in this respect with the directions of the testator's will. On the other hand, I see a great deal pointing the other way. A few months before he attained age he entered the College of Science, and wrote his name in the books of that institution as Mahon. It seems almost incredible, if he intended to comply with the testator's directions, that he did not take this opportunity—almost the first public act of his life—for deliberately signing his name as Hagan. On the facts proved, I should have had great difficulty in concluding that this young man did, as a matter of fact, assume the testator's name before attaining twenty-one; but as there is some evidence on which the finding may stand, I concur in the opinion of the other members of the Court that we ought to leave undisturbed the Vice-Chancellor's decision, that in this respect the condition has been fulfilled.

We have heard a great deal during the argument on the abstruse and mysterious topic as to what may have been the defendant's rights, apart from Royal License, to bear or quarter the arms of Hagan. What these rights were, if they existed at all, we do not decide. But whatever they were there is no evidence that they were ever exercised. For, from the beginning to the end of the affidavits filed in this case, there is nothing whatever to prove that the defendant directly or indirectly took any step whatever, before attaining the age of twenty-one, to show that he took and bore the arms of Hagan.

Some remarks have been made as to the motives which influenced the testator to impose this condition on the grandson taking under these bequests. These arms were granted to him as a reward for his honourable services, and I think it was only natural that he should conceive a desire that his grandson should keep alive the memory of his name, and bear these arms as a record of his distinctions.

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