

# REPORTS OF CASES

ADJUDGED IN THE

## High Court of Chancery,

BEFORE

THE RIGHT HON. SIR JAMES WIGRAM, KNT.

VICE-CHANCELLOR.

COMMENCING IN

EASTER TERM, 6 VICT. 1843.

VANDERPLANK v. KING.

RICHARD HANWELL, by his will, dated in 1792, devised all his freehold messuages, closes, meadows,

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Ord, 5th, 6th,  
6th, and 11th  
May.

Devises to A.,  
the daughter of  
the testator, for  
life, and after

her decease to all and every the child or children of A., male or female, begotten or to be begotten, and their assigns, for their respective lives; and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., male or female, to be begotten, and the heirs of his, her, and their respective body and bodies, as tenants in common; and in case of the death of any of the said children of such child or children of A., and failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors and survivor, others or other of them, as tenants in common, if more than one; and for default of such issue, over. A. had three children born in the lifetime of the testator, and living at his decease, and one born after the testator's death. One of the three born in his lifetime died during the life of A. without issue:—*Held*,

That the children of A. took as tenants in common, and not as joint tenants.

That, inasmuch as the children of the after-born child of A. could not take as purchasers, the devise would be supported according to the rule of *cy près* or approximation, by giving an estate tail to the after-born child of A.

That the rule of *cy près*, being an arbitrary principle of construction, introduced to effect the intention of a testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it; and that therefore, although the devise was to the children of A. as a class, the children of A. born in the testator's lifetime would take estates for life, and the estates devised to the children of the after-born child would alone be altered.

That cross-remainders were to be implied between the children of A., and therefore that the three children of A. who survived or left issue took, according to their respective estates, the share of the child of A. who died without issue; and that the inequality among the devisees, some of them being tenants in tail, and others tenants for life with remainder to their issue in tail, was no objection to the implication of cross-remainders among them.

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tithe, rents, hereditaments, and real estates situate in the town fields, and parishes of *Long Buckley, Walford, Guilsborough*, and elsewhere, in *Great Britain*, not therebefore otherwise disposed of, unto his daughter, *Jane King*, and to her assigns, for and during her life, without impeachment of waste; and from and after any determination of that estate in her lifetime, to the use of trustees and their heirs, to preserve the contingent uses and estates thereafter limited; and from and immediately after her decease, to the use of all and every the child or children of the body of his said daughter *Jane King*, whether male or female, lawfully begotten or to be begotten, and of his, her, and their respective assigns, for and during his, her, and their respective life and lives; and from and after any determination of that estate in the lifetime of the said child or children of his said daughter, to the use of the same trustees, to preserve, &c.; and from and after the decease of any such child or children of the body of his said daughter *Jane King*, and the respective deceases of all and every such child or children, and as they should severally and respectively depart this life, to the use and behoof of all and every the child or children of the body and bodies of all and every such child or children of his said daughter *Jane King*, whether male or female, lawfully to be begotten, and the heirs of his, her, and their respective body and bodies, such children to take in equal shares as tenants in common, and not as joint tenants. And in case of the death of any of the said children of such child or children of his said daughter *Jane King*, and failure of issue of his, her, or their body or bodies respectively, then the testator devised and bequeathed as well the original part or share of each of them so dying, and of whom there should be a failure of issue as aforesaid, as also such other part or share as should have vested in him or her or his or her issue by way of survivorship or accruer upon the death and failure of issue

of any other or others of the said children, unto the survivors and survivor or others or other of them, such survivors or other children to take as tenants in common and not as joint tenants. And in case all such children of such child or children of his said daughter *Jane King*, but one, should die without issue, or in case there should be only one such child, then the testator devised and bequeathed the same unto such only child, and the heirs of his or her body: and for default of such issue, he devised all the said freehold messuages, closes, meadows, tithes, rents, hereditaments, and real estate unto his grandson *William Hansell Lucas* and his assigns for his life, without impeachment of waste, with remainder to the use of all and every the child or children of his said grandson, whether male or female, lawfully to be begotten, and the heirs of his, her, and their respective body and bodies, in equal shares. And in case of the death of any of the said children, and failure of issue of his, her, and their body or bodies respectively, then the share or shares which should so fail to go to the survivors of such children as tenants in common, if more than one; and for default of such issue, the testator devised two third parts of the said hereditaments and real estate unto his two sisters, *Sarah* and *Elizabeth*, severally, and to their several heirs and assigns, and the remaining third part unto his nephews and nieces therein named, equally, as tenants in common.

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The testator died in 1792.

*Pedigree.*

At the time of the death of the testator, his daughter *Jane King* was living, and had three children: *Elizabeth*, born in 1785; *John*, born in 1787; and *Jane*, born in 1790: *William Hansell Lucas*, the son of a deceased daughter of the testator, and *John*, the son of the daughter *Jane King*, were his co-heirs.

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In 1793, after the death of the testator, *Matilda*, another child of his daughter *Jane King*, was born.

The testator's daughter *Jane King* died in February, 1831.

Of the four children of *Jane King*, *Jane* died in 1799, without having been married: *Elizabeth*, in 1821, married *Samuel Vanderplank*, and died in 1824, leaving the Plaintiff *Elizabeth Jane Vanderplank*, born in 1822, her only daughter surviving: *John* married in 1813, and had three daughters, born in 1814, 1815, and 1817, respectively; and *Matilda* married in 1819, and had three children, born in 1822, 1823, and 1826, respectively.

*William Hanwell Lucas* died in 1810, having devised his real estate upon trust for his wife for life, with remainder to his children, remainder to the right heirs of his father. The widow afterwards married *D. Bishopp*. The heir-at-law of his father was *T. F. Lucas*, who became bankrupt.

*Bill.*

After the death of *Jane King*, *John King*, her son, entered into the receipt of the rents and profits of the estate. The bill was filed in 1836 by *Elizabeth Jane Vanderplank*, the infant daughter of the daughter *Elizabeth*, against the said *John King*, who was the surviving co-heir of the testator,—the devisees of the deceased co-heir, *William Hanwell Lucas*,—the daughter *Matilda*, and her three children, and *Samuel Vanderplank*. The bill suggested that *John King* had brought an ejectment against *Samuel Vanderplank*, who was the Plaintiff's natural guardian, and was in the occupation of part of the premises; that *Samuel Vanderplank* would have no defence to the action, inasmuch as he had for several years paid rent to *John King* in respect of the premises;

and that as to the Plaintiff's share of the estate, *John King* must be deemed and treated as having entered thereon in the character of guardian and trustee for the Plaintiff (a). The bill prayed that *John King* might be ordered to account to the Plaintiff for one-third of the rents and profits of the estates received by him since the death of *Jane King*, his mother, including the produce of timber felled, and that one-third of the future rents and profits might be secured for the Plaintiff's use; that if there was any question of the validity of the devise to the Plaintiff, an issue at law might be directed; that in the mean time the title-deeds might be deposited in Court, a receiver appointed, and the Defendant *John King* restrained by injunction from proceeding in the ejectment or committing waste.

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Inquiries of the state of the families were directed by the decree, and the cause came on for further directions on the report; but it appearing that the three daughters of *John King* were not before the Court, the case stood over for the purpose of making them parties to the suit; which being accordingly done,—

April 28th.

Mr. *Tinney* and Mr. *Malins* were heard for the Plaintiff.

May 3rd.

The limitation to the children begotten and to be begotten, includes not only those living at the testator's death, but those born afterwards, one of the children (*Matilda*) being in the latter predicament. As the limitation to the children of unborn persons, as purchasers, would be obnoxious to the rule against perpetuities, the limitation in this case cannot take effect in the form which the testator has expressed: if the purpose were not aided by another principle of law, the devise would

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(a) Vide 1 Hare, 602, n. (a).

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therefore in this respect be void: *Routledge v. Dorril* (a), *Mogg v. Mogg* (b). The general intention of the testator, manifest upon the will, however, is, that all the children of his daughter *Jane King* shall take under the devise. In the construction of the will, the Court will give effect to the intention, and regard the mode by which the testator has sought to accomplish it as the result of a mistake or inadvertence to the rule of law which the devise would infringe; and accordingly the object will be effectuated, not precisely in the manner contemplated, but *cy près*: *Humberston v. Humberston* (c), *Hopkins v. Hopkins* (d), *Chapman d. Oliver v. Browne* (e), *Robinson v. Hardcastle* (g), *Pitt v. Jackson* (k), *Nicholl v. Nicholl* (i). In the application of the *cy près* doctrine to this case, estates tail will be given to all the children. The devise being to a class, the same rule must be applied to all the members of that class: *Leake v. Robinson* (h). The result is, that the four children of the testator's daughter became originally tenants in common in tail, in remainder expectant on the decease of *Jane King*, their mother, the tenant for life. On the death of *Jane*, the daughter of *Jane King*, without issue, in 1799, the three surviving children became tenants in common in tail. There is no longer any presumption or inclination of the Court against implying cross-remainders between more than two persons: *Watson v. Foxon* (f), *Doe d. Gorges v. Webb* (m), *Green v. Stephens* (n), *Cursham v. Newland* (o). And

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|---|---|
| (a) 2 Ves. jun. 357.  | (g) 2 T. R. 241.                                  |
| (b) 1 Mer. 654.   | (h) 2 Bro. C. C. 51. See                          |
| (c) 1 P. Wms. 332; 2 Ves. 737; Prec. Chan. 455; Gilb. Eq. Ca. 128; 1 Eq. Ca. Ab. 207, pl. 8.            | <i>Smith v. Lord Camelford</i> , 2 Ves. jun. 698. |
| (d) Ca. temp. Talbot, 44; 1 Atk. 581; West. Ca. temp. Hard. 606; Co. Lit. 272. a. (Butler) note vii, 2. | (i) 2 W. Bl. 1159.                                |
| (e) 3 Burr. 634.  | (k) 2 Mer. 363.                                   |
|   | (l) 2 East, 36.                                   |
|   | (m) 1 Tannt. 234.                                 |
|   | (n) 17 Ves. 64.                                   |
|   | (o) 2 Beav. 145.                                  |

therefore on the death of *Jane King*, in 1831, the Plaintiff and the two surviving children of *Jane King* became tenants in common in tail in possession, the cross-remainders between the several families being implied: 1 Powell on Devises, by Jarman, p. 409, et seq.

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Mr. *Russell* and Mr. *Stinton*, for the Defendant *Matilda* and her children.

*Matilda*, as the after-born daughter of *Jane King*, according to the words of the will, literally taken, is tenant for life of one share of the estate, and the devise to her would so far be valid; but as the consequence of restricting her interest to a life estate would be to render the devise to her children void for remoteness, the Court, on the cy près doctrine, will enlarge her interest to an estate tail, whereby the children will not be excluded. These Defendants therefore adopt the argument of the Plaintiff, to the extent of insisting upon the cy près construction of the will.

Mr. *Tillotson*, for the three daughters of *John King*, claimed, under the strict words of the limitation, the first estate tail in remainder as tenants in common, with cross-remainders between them, in one-third of the estate, in the events which had happened, and on the principle of implying cross-remainders between the grandchildren of the testator and their respective families.

Mr. *Kenyon Parker*, for the Defendant *Samuel Vanderplank*.

Mr. *Cooper* and Mr. *Metcalfs*, for *John King*.

The Defendant, as a co-heir-at-law of the testator,

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insists that the limitations, beyond the life estates, are void for remoteness,—that there are no cross-remainders to be implied between those life estates, and that consequently the Plaintiff has no interest in the estate,—the Defendant *Matilda* has no interest after the expiration of her own life estate, and the other Defendants have no interest whatever. The gift is to a class, and the Court cannot, under the same expression in the will, give one kind of estate to one child, and a different kind of estate to the others: *Leake v. Robinson*. The whole must be good or none. The argument in fact has been, not that the three children born during the testator's life take life estates, with remainder to their issue in tail, and that the after-born child alone takes an estate tail; but it has been argued that all the four children take estates tail: an alteration of the general effect of the devise, which cannot be effected on the notion of sustaining the general intention. The cases in which the *cy près* doctrine has been applied are chiefly cases of executory trusts, or cases of the execution of powers, in which the Court has looked upon the will as rather a manifestation of what the testator desired should be done, than as an instrument itself effecting the object. There is here nothing executory: it is a devise to uses, and is therefore a purely legal question. The tendency of the cases has been to confine the *cy près* doctrine within the strictest limits: it is not applicable to a deed: *Adams v. Adams* (a), *Brudenell v. Eboes* (b); nor where the limitation to the children of the unborn persons would give them an estate in fee-simple: *Bristow v. Warde* (c), *Jesson v. Wright* (d), 1 Jarman on Wills, p. 263; Fearne, Contingent Remainders, p. 208, n., ed. 9; 2 Sugden on Powers, 60, et seq.

(a) Cowp. 851.

(c) 2 Ves. jun. 336.

(b) 1 East, 442; S. C. 7 Ves.

(d) 2 Bligh, 1.

There are two objections to the construction of the Plaintiff with respect to the cross-remainders. First, that cross-remainders are actually limited, in some events, in the families of the children, as among themselves, and that limitation repels the attempted implication of cross-remainders upon other events: *Clache's case* (a). Secondly, supposing some of the children of *Jane King* to take estates for life, and others estates tail, there is no reciprocity between the two estates: the interests are unequal. The party having an estate tail has not an equal chance with another having only an estate for life; he may lose an estate tail, but he cannot in any event acquire one from the other remainderman (b).

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Mr. Temple and Mr. Messiter, for the Defendant Mrs. *Bishop*, one of the devisees of *William Hanwell Lucas*, in support of the argument against the application of the *cy près* doctrine and the implication of cross-remainders, cited *Seaward v. Willock* (c), *Mortimer v. West* (d), *Doe d. Gallini v. Gallini* (e), *Parr v. Swindels* (g), *Pery v. White* (h), *Prior on Limitations to Issue*, &c., pp. 60, 167; *Hayes' Introd. to Conveyancing*, p. 425 (i); *Walters' Essay on Cross-remainders*, pp. 70—73.

Mr. Smythe, for the assignee in bankruptcy of *T. F. Lucas*, one of the devisees of *William Hanwell Lucas*, the co-heir of the testator.

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|---|---|
| (a) <i>Dyer</i> , 330, b.   | (h) <i>Cowp.</i> 777.   |
| (b) See 2 <i>Jarman on Wills</i> , p. 480.                                | (i) See <i>Lewis on Perpetuities</i> , p. 426, n. (n), where he distinguishes the use of the terms "general and particular intention," in reference to the <i>cy près</i> doctrine, from its use in a different class of cases. |
| (c) 5 <i>East</i> , 108.  |   |
| (d) 2 <i>Sim.</i> 274.  |   |
| (e) 5 <i>B. &amp; Adol.</i> 621; 5 <i>C.</i> 3 <i>Ad. &amp; Ell.</i> 340. |   |
| (g) 4 <i>Rum.</i> 283.  |   |

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The testator has plainly intended to give precisely similar interests to all the children of *Jane King*, as one class, and precisely similar interests to all her grandchildren, as another class. It was not his intention that any of the grandchildren should take an interest in possession in any part of the estates during their parent's lifetime. The estates to the children of *Jane King* are joint estates, and *John*, *Elizabeth*, and *Matilda* taking jointly for life, no interest in the estate goes over so long as any of the tenants for life is alive. The Plaintiff therefore has not acquired any interest in the estates, inasmuch as two of the tenants for life are still living: *Fearce v. Edmeades* (a). In further support of the argument against the application of the *cy près* doctrine, he cited *Griffith v. Harrison* (b); and against the implication of cross-remainders, *Doe d. Blandford v. Appin* (c).

VICE-CHANCELLOR:—

*Judgment.* The parties having desired that I should give my opinion on this case, without requiring the decision of a court of law, I shall accede to that request; although it would have been far more satisfactory to have had the judgment of a court of law.

I have considered the question during the argument, with reference to the *cy près* doctrine, and upon that part of the case I do not think that I am at liberty to exercise any discretion. That doctrine is now sufficiently simple, and is well established, though sometimes of difficult application. If an estate is given to a person for life, or indefinitely, and after failure of issue of such person, it is given over, the Court implies an estate tail

(a) 3 Y. & Coll. 240. (b) 3 Bro. C. C. 41D. (c) 4 T. R. 82.

in the first taker, sacrificing only, in that simple case, the life estate, in order that all the issue may be embraced in the limitation. The next case which may be noticed is where a testator, after giving a particular estate to the first taker, has gone on to direct that it shall go to unborn persons in a way which would create a perpetuity, with a limitation over on failure of issue of the first taker. The Court, in such a case, is embarrassed with the fact, that, besides the gift over, which, in the simple case first stated, would create an estate tail, there is a direction that the estate shall devolve in a manner not allowed by law, but which in common cases, previously to *Pitt v. Jackson (a)*, would, so far as respected the order of succession, only be consistent with and included in an intention to give an estate tail. The Courts were thus placed in this position: the intention to give the estate to particular persons, in particular order of succession, was manifest; but the specified mode in which those persons were to take being excluded by the rule of law against perpetuities, the question was, whether the primary intention to benefit particular persons, in a particular order of succession, should be accomplished, and the particular mode of giving effect to it be rejected, or the whole will be inoperative. This was the difficulty with which the Court had to struggle. Whether the two expressed intentions, both of which could not be effectuated, were well or ill described by the terms "general" and "particular" intention, or whether the criticism upon those expressions is just, appears to me immaterial. It is a mode of characterizing the different, and, to a certain extent, conflicting intentions of the testator, which satisfied Lord *Eldon* and other Judges of great eminence. The meaning of the terms is now sufficiently understood. In order to preserve and effect something which the Court collects from the will, to

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(a) 2 Bro. C. C. 31.

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have been the paramount object of the testator, it rejects something else, which is regarded as merely a subordinate purpose, namely, the mode of carrying out that paramount intention.

In the application of this doctrine prior to the case of *Pitt v. Jackson*, the Court so dealt with the language of testators, as to give the same corpus to the same individuals, and in the same order of succession as directed by the will. *Pitt v. Jackson* went much farther than that. In the first place, by giving an estate tail to the parent, the estate of the children was altogether cut out; and not only was their estate rejected, but a larger corpus than the testator intended was given to the first takers. The whole estate, by the construction put upon the will, was limited so as to go to the parties in succession, instead of vesting in them contemporaneously, which was the will of the testator. Probably, a judge of less weight than Lord *Kenyon* would scarcely have established the application of the *cy près* doctrine to such a case.

Taking the doctrine to be established, I confess I could never see how it was a less violent act to apply it to what is sometimes called an executory trust, than to the case of a purely legal devise. The two cases appear to me not distinguishable; and it is admitted that the decisions in equity establish that in the case of a direction to convey in a particular mode, the Court will apply the doctrine of *cy près*. But *Hopkins v. Hopkins* (a), and *Nicholl v. Nicholl* (b), were cases of legal devises, and there is therefore direct authority for the application of the doctrine to the case of a legal devise. The cases

(a) Ca. temp. Talbot, 44. 1 Atk. 581. West, Ca. temp. Hard. 606.

(b) 2 W. Bl. 1159.

of powers are stronger rather than weaker examples of the same construction: there the intention is expressed to do that which the party cannot lawfully do, and the Court cuts out the particular direction which is illegal, but gives the estates to the parties, so as to carry into effect the general intention. In point of fact, when the estate is once created by the power, so as to take effect under the original devise, the case is the same as if it had been a legal devise. To all these cases the doctrine of *cy près* has been applied; and so far as this case calls for it, I am bound to apply the rule laid down in *Pitt v. Jackson*.

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The next question is, in what way the rule is to be applied with reference to the case of *Matilda*. Now the devise is to a class—to the children of unborn children of *Jane* the daughter; and it is clear that for the purpose of determining whether the whole of that class can take, I must look at the events as they existed at the death of the testator. I cannot wait for subsequent events, so as to see whether a difficulty will be created by the birth of other children of *Jane*. If *Jane*, the first tenant for life, had died in the lifetime of the testator, there might have been no difficulty. *Jane* having survived her father, the difficulty has arisen; and as the estates were limited to the unborn children of *Jane*, and the unborn children of such unborn children, the limitations in the will could not take effect as to some of the class; and as I understand the rule laid down by Sir *W. Grant* in *Leake v. Robinson* (a), if some of the class cannot take, the others cannot, for there has been no gift to any of them apart from the gift to the others of the class. It would be impossible to say what any one separately, and not as a member of the entire class,

(a) 2 Mer. 363. *Jes v. Audley*, 1 Cox, 324.

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should take; the whole class therefore must be excluded, unless the *cy près* doctrine is to be applied; and that being so, it seems to me it must be applied to the share of *Matilda*.

The question then arises, whether, being obliged to alter the limitations in the case of *Matilda*, I am therefore bound to alter them in the cases of the other children of *Jane*: upon that point I feel great difficulty. The devise is to all the children of *Jane*, born and to be born, equally, and to their children. To ascertain the class, it is necessary to apply the reasoning to which I have adverted. Having ascertained the class, and decided that they shall take by the *cy près* doctrine rather than the will be inoperative, I find some of them whose estates I must break in upon, to preserve the general intention, and others with respect to whom there is no necessity for doing so. I am to apply an arbitrary doctrine, introduced merely to preserve the estates as nearly as may be, to those to whom the testator intended they should go; but I cannot see the logical necessity of going on to apply it beyond the immediate exigency of the case; of extending its application to each separate set—to limitations which do not require it—merely for the sake of adhering to one uniform rule throughout the limitations to the different branches of the family. I am bound to disregard events for the purpose of ascertaining the class; but why am I bound to disregard them, in determining what estates the parties take? Why may I not be governed, in that particular, by the exigencies of each branch of the limitation at the death of the testator? If, on the other hand, I should be of opinion that cross-remainders ought to be implied, supposing all the children of *Jane* to take estates tail, but that they are not to be implied if some of those children take estates for life and others take estates tail, and if

the clear intention was to give cross-remainders, as between the different children of *Jane*, it is a strong argument for saying that the doctrine of *cy près* requires that you should deal with every branch of the family of *Jane* in the same manner. If, however, it is not necessary to alter any given line of limitations in order to support it, I am not at present satisfied of the existence of any rule of law which obliges me to do so, only because another distinct line of limitations cannot be supported without the application of the *cy près* doctrine.

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VICE-CHANCELLOR:—

In the argument of this case, it was agreed by all parties, that the devise posterior to the estate for life given to *Matilda* the after-born child of *Jane* the daughter, could not take effect as estates by purchase, and the devise being to the children of *Jane* as a class, it was properly admitted that the same vice which affected those estates must affect the estates posterior to the life estates of all the children.

May 11th.

The questions argued before me were,—first, whether the children of *Jane* were joint tenants or tenants in common under the will; secondly, supposing them to be tenants in common, whether I could apply to this case the *cy près* doctrine, regard being had to the circumstances that the grandchildren of *Jane* were to take as tenants in common; thirdly, assuming that the *cy près* doctrine might and ought to be applied, and admitting that it must be so applied to the share of *Matilda*, as to give her an estate tail,—whether estates tail must also be given to the children of *Jane* who were living at the death of the testator, or whether, as to such children of *Jane* as were living at the death of the testator, the estates given by the will might not take

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effect in the way the will pointed out; and, lastly, whether cross-remainders should be implied, as to the share of *Jane* the grand-daughter, or whether the estate went over upon her death without issue, to the ultimate devisees named in the will, or to the co-heirs at law.

Upon the first two questions, I retain the opinion expressed in the course and at the close of the argument. I think it impossible to read the will as giving estates in joint tenancy to the children of *Jane* the daughter of the testator, and I think the case of *Pearce v. Edmeades* (a) is clearly distinguishable from the present case. And for the reasons I gave at the close of the argument, I think the *cy près* doctrine must be applied so as to sustain the will, in its application to the after-born child *Matilda*, and so as to sustain, as far as it can be sustained, the intention that the descendants of the after-born child *Matilda* should take an interest in the estate. The case of *Pitt v. Jackson* (b) must be treated in this Court as settled law, until it is shaken by the highest authority in the law.

With respect to the third question,—the testator has given his property to be equally divided between the members of a class in certain estates and interests; according to which equality between the different branches of the class was certainly contemplated. The Court, in order to preserve the limitations in the branch of *Matilda*, is constrained to alter the estate given to her by giving to her an estate tail; thereby, in effect, depriving her descendants of all direct interest, and (unless the estates of the other branches are to be altered as well as that of *Matilda*) introducing an inequality between the interest given to the branch of *Matilda*, and the other branches of the family of *Jane* the daughter. And if

(a) 3 Y. & Coll. 240.

(b) 2 Bro. C. C. 51.

in consequence of so altering the estate in the branch of *Matilda*, it were necessary to alter the estates in the other branches, in order to preserve any limitations in the will, I have no hesitation in saying the Court might alter the estates in those other branches also: but if the inequality introduced between the branches, by the alteration of the estate given to *Matilda*,—not altering any other estate,—does not interfere with any of the ulterior limitations, the question is, whether the Court is bound to alter more of the will upon the *cy près* principle than the exigencies of the case call for. Now, assuming that no ulterior remainders would be affected by the inequality referred to, I think I am not bound to apply the *cy près* doctrine to any devise in the will but those which demand its application, in order that the devise may be sustained. Then, does the necessity for applying the *cy près* doctrine exist in any of the branches except that of *Matilda*? I think not. I admit that, where at the death of a testator his will may or may not create a perpetuity according to events, the Court cannot await those events, but must put a construction upon the will of the testator at his death, with reference to every event which the will may contemplate; and full effect has been given to that rule in the admission properly made in argument, that the estates by purchase given by this will to the children of the afterborn children of *Jane*, the daughter, affect the validity of the devises by purchase to the grandchildren of *Jane*, the daughter, although born of parents who were living at the death of the testator. To determine the validity of a given set of limitations, the will must be applied to the facts of that particular case, as they stood at the death of the testator, and not as they stood at the date of the will. And where there are several sets of limitations, I think I am bound to take the case as it stood at the death of the testator, and to apply the *cy près*

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doctrine to those cases only which at that time require that it should be applied, and so far only as each case may require its application. Suppose the testator had given different undivided portions of his estate to each of the children of Jane, the daughter, distributively, repeating the ulterior limitations in the will, in their application to each undivided share, and to the respective families, I cannot conceive that a doctrine, founded upon the principle of approximation, ought then unnecessarily to be applied to distinct shares of the estate, so as to destroy the intention in any particular case, only because with respect to another share the particular intention is necessarily sacrificed to preserve the general or paramount intention. And if that would be right in the case of a will worded as I have supposed, I think I must construe a will, expressed as this testator has expressed himself, in the same way, i. e. distributively, with respect to each share into which the property becomes divisible. The cases of *Humberston v. Humberston* (a) and *Banks v. Le Despencer* (b) appear to warrant this conclusion (c).

Then, will any ulterior consequences follow from this mode of dealing with the will, which might be avoided by applying the *cy près* doctrine to all branches of the family alike? With respect to the implication of cross-remainders,—the reasoning which has been considered sufficient to warrant and establish the doctrine as between a class of devisees in tail has been of this nature: first, that the testator could not have intended that one of the devisees should take the whole estate, if no other were born to share it with him,—and, at the same time,

(a) 1 P. Wms. 333.

(b) 11 Sim. 506.

(c) The opinions of several counsel of eminence were taken

upon the will. That of the late Mr. Charles Butler recorded with the decision upon this point.

have intended, that, if others were born and died immediately, such a circumstance should deprive the survivor of the shares of the deceased children in the estate. Secondly, that the testator has clearly intended, by the very expressions he has used, that the estate should go to the heir-at-law or remainderman as one entire estate, at one time, and not by fractions; and that the event upon which the estate was to go was the failure of issue of all the devisees,—an intention, which, upon the ordinary doctrine of implication, supposed an estate in the whole of the property to exist in all those devisees. Upon this reasoning, if the testator had himself given estates tail to the children of *Jane*, his daughter, the gift over of all and singular the premises, upon the failure of,—“in default of such issue,” (which, without relying upon the words of survivorship immediately preceding, must, I think, be construed all the issue of *Jane*, the daughter), would have obliged me to imply cross-remainders between the estates of the devisees. The same reasoning would, I think, have obliged me to make the same implication, if the estates for life to all the children of *Jane*, the daughter, could have been supported, and no cross-remainders between the grandchildren in each family had been expressly given by the will: *Roe d. Wren v. Clayton* (a). And if such an implication would be admissible in the two cases I have suggested, it must be admissible in this case, unless I am to exclude it upon the ground, that, where cross-remainders are expressed in one part of a line of limitations, they cannot be implied in another, or because of the difference between the limitations which I now suppose to exist between different branches of the class of devisees.

On the first of these points, that express cross-remain-

(a) 6 East, 528.

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ders exclude cross-remainders by implication, *Clache's case* (a) was referred to. On the second ground, the argument was, that there would be a want of equality or reciprocity between the children, if cross-remainders implied where the estates were not equal. Now it seems to me that there is a substantial difference between the reasoning applicable to a devise to individuals as tenants in common, and a devise to a class as tenants in common. In the case of a devise to individuals as tenants in common, if any of them die in the lifetime of the testator, the survivors do not take the whole, but there is a lapse. This is the first ground on which cross-remainders are usually implied, and, in my judgment, it is by far the strongest and most satisfactory ground, that the testator could not have intended, that, if there was one devisee only living at his death, that one should take the whole estate, but if there were two, and one died the next moment, that then the survivor should not take the whole; and this reasoning does apply to the case of a class, but not to the case I have supposed. *Clache's case*, if so considered, would be very much weakened as an authority to govern the case of a class. I have read attentively the cases as collected in *Powell on Devises* (b), with Mr. Jarman's observations upon them, and the conclusion which I have formed is, that any Court would, in the present day, with the disposition of construction which now prevails, carry out established principles, wherever it was certain that, by so doing, the intention of the testator was effectuated; and that any Court would now hold, that an express gift of cross-remainders in one event did not preclude the Court from giving cross-remainders by implication in another, either case being clearly within

(a) *Dyer*, 330 b.

(b) Vol. 1. p. 406 et seq. See 2 *Jarman on Wills*, 461 et seq.

the scope of the reasoning upon which Courts have proceeded in implying cross-remainders.

The argument of the want of reciprocity, I confess, I cannot understand: the only person damnified by the implication of cross-remainders is the ultimate remainderman, whose estate is postponed. As to the different branches, the state of circumstances which supposes a case for cross-remainders to arise supposes also that one of those branches is extinct; and the extinct branch, of course, can have no interest in the question. With regard to the other branches, the reasoning which has been considered sufficient to justify the Court in giving cross-remainders by implication will apply, whether you suppose or not that one of the branches took an estate tail, and that, as to the other, the first taker took for life, and his descendants took estates in tail. The reasoning is the same in both cases. The intention was, that every one should take alike originally, as if there was no other to share with him. The intention could not have been (so the Court holds) that any one branch should lose the substantial part of the estate, only because there happened to be a person to share with him for one moment. The testator intended that the property should continue in each line so long as there were descendants of that line to take; and that it should go over when, but not before, a complete failure of issue took place.

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