

## ENGLAND.

## ERROR FROM THE COURT OF KING'S BENCH.

N. CLAYTON, Esq.—*Plaintiff in error.*

RICHARD ROE, on demises of  
Cecilia Wren, John Bacon,  
and Isabella his wife } *Defendant in error.*

March 15,  
1813.

CASE OF CROSS  
REMAINDERS.

DEVISE of all devisor's lands to his niece for life; *same* to trustees, to preserve contingent remainders; remainder to her first and other sons, successively, in tail male; remainder to her daughters, as tenants in common; and, for default of such issue, to issue of his four sisters, *in such manner as he had limited the same to his niece's issue*; and, for default of such issue of his sisters, to his own right heirs. Decided, that cross remainders were raised as between the issue of the four sisters.

E. T. 1804.  
Ejectment in  
K. B.

IN Easter Term, 1804, an action of ejectment was commenced in the Court of King's Bench at Westminster, by the nominal Plaintiff, Richard Roe, on the joint and several demises of Cecilia Wren, and John Bacon, Clerk, and Isabella, his wife, for recovery of three undivided fourth parts of certain land situate at Elly Hill, in the parish of Haughton, in the county of Durham, to which action Nathaniel Clayton, Esq. having been admitted Defendant, and having pleaded the general issue, the cause came on to be tried at the Durham assizes, 1804, when the Jury found a special verdict, stating as follows:—

The devise on  
which the  
question  
arose.

Cuthbert Ellison, being seized in fee of the estate in question, on the 20th day of June, 1765, made his last will duly executed, and thereby devised,

among other things, as follows:—“ I give and devise  
 “ all my lands, tenements, and hereditaments, at  
 “ Elly Hill, aforesaid, (subject as aforesaid,) and all  
 “ other my real estate, whatsoever and wheresoever,  
 “ to my said niece, Sarah Ellison, for the term of  
 “ her natural life; and after the determination of  
 “ that estate, I give and devise the same to my  
 “ cousin, James Bland, of Hurworth, in the said  
 “ county of Durham, Esq., and his heirs, during  
 “ the life of my said niece, Sarah Ellison, to the in-  
 “ tent to preserve and support the contingent uses  
 “ and remainders hereinafter limited; but, never-  
 “ theless, in trust, to permit my said niece, Sarah  
 “ Ellison, to receive the rents and profits thereof  
 “ during her life: and from and after the decease of  
 “ my said niece, Sarah Ellison, then to remain to  
 “ the first son of my said niece, Sarah Ellison, and  
 “ the heirs of the body of such first son lawfully  
 “ issuing; and for default of such issue, then to  
 “ the use and behoof of the second, third, fourth,  
 “ fifth, and all and every other son and sons of my  
 “ said niece, Sarah Ellison, lawfully to be begotten;  
 “ the elder of such son and sons, and the heirs of  
 “ his body lawfully issuing, to be always preferred,  
 “ and to take before the younger of such sons, and  
 “ the heirs of his body; and for default of such  
 “ issue, then to the use and behoof of all and every  
 “ the daughter and daughters of my said niece,  
 “ Sarah Ellison, lawfully to be begotten, and the  
 “ heirs of their bodies, lawfully issuing, to take as  
 “ tenants in common; and for default of such issue,  
 “ then to the issue of my sisters, Susanna Swin-  
 “ burne, Isabella Wren, Barbara Ellison, and Jane  
 “ Mills, in tail, in such manner as I have limited

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1776. Death  
of testator,  
leaving his  
niece and four  
sisters sur-  
viving.

Niece dies  
without issue,  
and devises to  
Plaintiff in  
error.

Three sisters  
die without  
issue. 

Fourth dies,  
leaving issue a  
son (who died  
without issue)  
and two  
daughters.

“ the same to my said niece, Sarah Ellison’s issue ;  
“ and for default of such issue, to remain to my  
“ own right heirs for ever,” &c. &c.

On 3d February, 1776, the testator died seized, without having revoked his will, leaving his niece, Sarah, the only child of his deceased and only brother, Robert Ellison ; and also leaving his four sisters, Susanna Swinburne, Isabella Wren, Barbara Ellison, and Jane Mills, him surviving.

On the testator’s death, his niece Sarah, being the devisee named in his will, and also his heir at law, entered on the estate in question, and enjoyed the same till her death, which happened on 28th March, 1801 ; she died without issue, having, by her last will, duly executed, and bearing date 28th August, 1788, devised all her estate, and interest therein, to the Plaintiff in error, Nathaniel Clayton, and his heirs.

On 1st September, 1781, Susanna Swinburn died without issue.

On 8th July, 1800, Jane Mills died without issue.

On 20th May, 1801, Barbara Ellison died without issue.

On 1st July, 1795, Isabella Wren died, leaving issue two daughters and one son ; viz. Cecilia Wren, and Isabella, now the wife of John Bacon, the lessors of the Plaintiff below, and Charles Wren, who were all living at the time when Cuthbert Ellison made his said will.

On 29th January, 1799, Charles Wren died without issue, leaving his sisters Cecilia and Isabella his coheirs at law.

The lessors of the Plaintiff below, Cecilia Wren,

and Isabella Bacon, claimed the whole estate devised by Cuthbert Ellison's will, as the surviving issue of his sister, Isabella Wren, his other three sisters having died without issue; and contended, either,

1st, That by his will, cross remainders were limited between the issue of his four sisters; or,

2d, That the issue of the four sisters took as a class, and not severally; so that they and their deceased brother, being the only issue of any of the four sisters, took the whole estate.

The Defendant below, Mr. Clayton, on the other hand, claimed three undivided fourth parts of the estate in question, as the devisee of Sarah, the niece and heir at law of Cuthbert Ellison; contending, that those three parts went over to the testator's heir at law, on default of issue of his three sisters; for that,

1st, The words of the will were not sufficient to create cross remainders, as between the issue of the niece; or,

2d, That if sufficient for this purpose, they were not sufficient to create a double set of cross remainders, the one within the other, which was a thing unprecedented, and yet was necessary to give validity to the construction contended for on the other side.

The case came on to be argued before the Court of King's Bench, which Court, in Trinity Term, 1805, pronounced judgment in favour of the lessors of the Plaintiff below; being of opinion, that cross remainders were limited by the will, as between the issue of the four sisters among each other.

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The two daughters claim the whole estate, on ground, that cross remainders were limited between the issue of the four sisters.

Plaintiff in error claims 3-4ths of estate, as devisee of niece, who was testator's heir at law.

Judgment of Court of King's Bench, that cross remainders were limited between the issue of the four sisters.

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REMAINDERS.

Writ of error  
in *Dom. Proc.*

Argument for  
Plaintiff in  
error.

Against the judgment, the Defendant below brought this writ of error, and insisted that the judgment ought to be reversed for the following reasons:—

1st, That the true construction of the will was to give the estate in quarters to the families of the four sisters, in like manner as the whole had been before given to the niece Sarah, and her family; and that, therefore, when the takers of one quarter failed, that quarter went over. To establish the contrary, it must be held, not only that cross remainders were limited as to the fractions of each quarter among the females, who might take that quarter as tenants in common; but also that another set of cross remainders, behind the former set, was limited as among the several takers of the several quarters; whereas, no authority or principle of law had ever been carried to that extent.

2d, That the issue of the four sisters would not take jointly; because, by the express terms of the will, the issue of the sisters were to take in such manner as had been before limited to the issue of the niece, which was not jointly. And, besides, from giving the estate to the issue of the four sisters jointly, it would follow, that the surviving child, and that, perhaps, a daughter of one sister, would take the whole, to the exclusion of the sons, if any, of her deceased brother; and also in exclusion of the grandchildren, if any, of the testator's other three sisters; which would be a construction manifestly repugnant to the intention of the testator.

It was on the other hand contended, on the part of the Defendant in error, that the judgment of

the Court of King's Bench ought to be affirmed for these reasons:—

1st, Though it had been established, that where cross remainders were to be raised by implication between two and no more, the presumption was in favour of cross remainders; and that where they were to be raised between more than two, the presumption was against them; yet it was to be considered as now equally well established, that that presumption might be answered by circumstances of plain and manifest intention. In this case, the cross remainders, if they were to be raised between the issue of the testator's four sisters, it was true, were to be raised between more than two; but it was submitted, that there were in the will itself circumstances of plain and manifest and declared intention to rebut the presumption against raising cross remainders between such issue; and that, without raising such cross remainders, the testator's plain and manifest and declared intention could not be carried into effect, but would be defeated. It was the plain and manifest intention of the testator, declared by his will, where he devised his estate over, in default of issue, from one person, or class of persons, to another, that nothing should pass over till all the issue of the former person, or class of persons, became totally extinct; and that the whole that he had given to the first, should go over to the succeeding person, or class of persons, together. That which was given and devised, both to the first and the last, was stated in the former part of the will, and ran through all the devises; and it was "All his lands, tenements, and hereditaments, at

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Argument  
for Defendant  
in error.

Watson v.  
Foxon, 2 East.  
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“ Elly Hill, and *all* other his real estate, whatsoever and wheresoever:” *all these* he devised first to his niece, Sarah Ellison, for life; and after the determination of that estate, then to a trustee and his heirs during her life, in trust, to preserve contingent remainders; and after her death, to her first and other sons successively in tail, “ and for default of such issue, then to her daughter and daughters, and the heirs of their bodies lawfully issuing, to take as tenants in common; and for default of such issue, then to the issue of the testator’s sisters in tail, in such manner as he had limited *the same* to his niece, Sarah Ellison’s issue; and for default of such issue, to remain to his own right heirs for ever.” Now that which he had devised, first to his niece, Sarah Ellison, for life, which was, “ all his lands,” &c. and “ all his real estate, whatsoever and wheresoever,” was what he gave over, after her death, to her sons successively in tail, and to her daughters, as tenants in common, in tail; and when those estates tail were spent, and not before, (that was, when *all* the issue of *all* her daughters were extinct, *and not before*,) the devise over to the issue of his sisters took place; and when that took place, it was a devise over of what was first given; namely, of *all* the lands, &c. and *all* the real estate. That devise over of *all* the lands, &c. and *all* the real estate could not wholly wait taking place till *all* the issue of *all* the daughters of the testator’s niece were extinct, without raising cross remainders in tail between those daughters; nor could *all* the lands and real estate go over at the same time, and on the same event, together, without, in like man-

ner, raising cross remainders in tail between those daughters, as nothing was given over to the issue of the testator's sisters, until default of *all* the issue of his niece; and as on that event, and not before, *all* his lands, &c. and *all* his real estate, were then given over together; and as that devise over could not entirely wait to take effect till that event, and then take effect altogether, without raising cross remainders in tail between the daughters of the testator's niece, so the devise over in default of issue of the testator's sisters could not entirely wait to take effect until that event, and then take effect according to the will, without raising cross remainders in tail between the respective issues of those sisters. For *all* the testator's lands, &c. and *all* his real estate, could not entirely wait until that event to go over, and then go over altogether, according to the will, to the testator's right heirs, without raising cross remainders in tail between those issues; and unless such cross remainders were raised, part of the testator's lands, &c. and real estate, would go over to the testator's right heirs on the death of any one or more of his sisters without issue, though the issue of his other sisters were still living; whereas, by the will, the testator's right heirs were not to take until the extinction of *all* the issue of *all* the sisters; and whereas, on the event happening on which the testator's right heirs were to take, when they took at all, they were to take the whole; the raising of cross remainders in tail between the respective issues of the testator's sisters was essential, therefore, in order to

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Wright v. Hel-  
ford, Cowp. 31.

Phippard v.  
Mansfield,

Cowp. 797.

Atherton v.

Pye, 4 T. R.

710.

Watson v.

Foxon, 2 East.

36.

Doe v. Bur-

ville, 2 East.

47. (n.)

Wild's case,

6 Co. 16 b.

Cook v. Cook,

2 Vernon, 545.

Doe v. Collis.

4 T. R. 294.

Litt. S. 283,

284.

Co. Litt. 184, a.

carry the testator's intention into effect, and to prevent it being defeated.

2d, That cross remainders would be raised where they were essential to carry the testator's intention into effect, and to prevent it from being defeated; and that the above reasoning was correct (as to the construction of the above will, with respect to the intention of the testator; and as to the rules of law with respect to raising contingent remainders, to prevent that intention from being defeated, and to carry it into effect) was fully established by many late decisions.

3d, Whether cross remainders were to be raised or not between the issue of the testator's sisters; yet the lessors of the Defendant in error were entitled to the whole of the premises in dispute, on the ground, that under the devise to such issue a joint estate for life passed to all the children of those sisters, as joint tenants; to which joint estate for life, in all the testator's real estate, the lessors of the defendant in error, as survivors, were still entitled, with several inheritances in remainder to them respectively in tail. (*Vide* 6 East. 628.)

Ordered and adjudged, That the judgment of the Court of King's Bench be affirmed.

Agents for Plaintiff in error, CLAYTON, SCOTT, and BLAMIRE.

Agent for Defendant in error, GREY.