

IRELAND:

APPEAL FROM THE COURT OF CHANCERY.

ODELL and others—*Appellants*.CRONE and others—*Respondents*.

DEVISE and bequest by testator of the residue of his estates and property of every kind and nature whatsoever, both real and personal, of which he should be seized, possessed, or entitled to at the time of his death, to his son and two daughters, and all their younger children, their heirs, executors, and assigns for ever: but nevertheless that his intentions were, that each of his three children should take for life the interest of such part as he the testator intended for the younger children of such child. Held that the fund was at the time of the testator's death to be divided into three equal parts, the interest of one of these third parts to be paid to each of testator's children, during his or her life, and then to be distributed among his or her younger children, and that the younger children took *per stirpes*, and not *per capita*, and that the younger children who came in *esse* after testator's death were included, and entitled to share along with those living at the time of the testator's death.

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JOHN CRONE, at the time of making the will upon which the question arose, (September 15; 1789) had four children, Aphra and Constance, his daughters, and Robert Fennel and John, his sons. He first devised certain lands to trustees, subject to an annuity to his son John, (who died in the testator's life-time,) and other annuities to the use of his daughter Aphra, wife of William Odell, for her life, and after her decease to the use

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of all, and every her younger children, to be divided among them in such manner, shares, and proportions, as she should by deed or will appoint, and in default of appointment, equally amongst such younger children as tenants in common, and not as joint tenants; and he empowered her to charge the lands with 500*l.* for each of such younger child and children, as she then had or might thereafter have. And he also devised certain other lands to Aphra for life, with power to charge them with 1000*l.* for her younger children, to be raised if she thought proper in her life-time, and to be divided among them, share and share alike, at their ages of twenty-one years, or on their marriage, with their parents' consent, and after her decease, to her first and other sons in tail-male. He next devised certain other lands to trustees, to the use of his son Robert Fennel Crone, for life, subject to an annuity to his son John Crone, and other annuities, remainder to the trustees to preserve contingent remainders, remainder to the first and other sons of Robert successively, in tail-male, remainder to his daughters Aphra and Constance, and their heirs, share and share alike, as tenants in common: and he authorized Robert to charge these lands with 500*l.* for each of such younger child or children as he then had, or thereafter might have. He then bequeathed his interest in certain leasehold premises to trustees, in trust to pay the issues and profits to his daughter Constance for life, subject to an annuity to his son John Crone, and other annuities, and after her death to the use of her issue, in such manner as he should distribute the

same amongst them, and in failure of such distribution, then the whole to her child, if only one, and if more than one, to be equally divided between or amongst them, share and share alike, and in case of her death without issue, he bequeathed these premises to Robert and Aphra, and their younger children, share and share alike. He also bequeathed to his daughter Constance a sum of 4000*l.* to be reduced to 2000*l.* in case she married without the consent of certain persons named by the Testator. And he then bequeathed 500*l.* to each of the grand children he then had, or should have at the time of his death:—and, along with some other bequests and directions of less consequence, the will contained the following residuary clause:—

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“ I leave, devise, and bequeath the rest and residue, not hereby particularly devised and disposed of, of all my estates and property of every kind and nature whatsoever, both real and personal, of which I shall be seized, possessed, or entitled unto at the time of my death, (subject to and charged with my debts and legacies,) unto my eldest son Robert Fennel Crone,” (who had then one younger child) “ my daughter Aphra Odell, and my daughter Constance Crone,” (who had then no child,) “ *and all their younger children, their heirs, executors, administrators, and assigns, for ever: but nevertheless my intentions are, that my said son Robert Fennel Crone shall have and receive the entire interest or yearly produce of such part of my said real and personal fortune, as I by this my will intend for his*

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“ younger children, during his life: and that my
 “ daughter Aphra Odell shall have the entire in-
 “ terest or yearly produce of what I hereby intend
 “ for her younger children, during her life; and
 “ that my said daughter Constance Crone shall
 “ have the entire interest or yearly produce of what
 “ I hereby intend for her younger children, during
 “ her life; and in case any of my said three chil-
 “ dren, Robert F. Crone, Aphra Odell, or Con-
 “ stance Crone, shall die, the share of my child so
 “ dying, if such child shall have younger children,
 “ shall go to the younger children of such child;
 “ but if any of my said children shall so die with-
 “ out leaving younger children, the share of my
 “ child so dying shall go to the survivor or survivors
 “ of my other children, and their younger children,
 “ share and share alike. And I do hereby declare
 “ my will and intentions to be, that my said son
 “ Robert F. Crone, and my daughter Aphra Odell
 “ and Constance Crone, shall respectively have a
 “ power of distributing and dividing, by any in-
 “ strument in writing to be executed by them
 “ under hand and seal, or by their respective last
 “ wills and testaments in writing, among his and
 “ their respective younger children, such parts of
 “ my said real and personal estate and fortune as
 “ such younger children respectively may be en-
 “ titled unto under this my will; and in failure
 “ of such distribution, or division, that all my said
 “ children and grand-children shall have equal
 “ shares of the said residuum of my said real and
 “ personal estate and fortune. And further, that in
 “ case any of my said grand-children shall happen

“ to die under their respective ages of twenty-one
 “ years, or days of marriage, the shares and pro-
 “ portions of such of them as shall die shall re-
 “ main to the brethren of the child or children so
 “ dying.”

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By a codicil dated April 11, 1790, the testator revoked the legacy of 4000*l.* to his daughter Constance, having, as he stated, made a proper provision for her in lieu thereof, on her then intended marriage with Mr. Massy. The testator died very soon after, and at the time of his death, Aphra had nine younger children, Robert one younger child, and Constance no child. Robert on the 14th May, 1791, filed a bill in the Exchequer, praying that the property which was the subject of the residuary clause might be divided into three equal portions and secured, and that the interest of one third should be paid to himself for life, the interest of another third to Aphra, and the interest of the remaining third to Constance; but this suit was never effectually prosecuted, and in August, 1791, Aphra and her husband in their own right, and as next friends of their children, filed a bill in Chancery against the proper parties, praying an account of the residue of the testator's property, and the application of the fund according to his intention. This cause came to a hearing before Lord Clare, in December 1792, who made a decree declaring “ that
 “ the testator's three children, and such younger
 “ children as they or any of them had at the time
 “ of the testator's death, were entitled to the residue
 “ in equal shares, subject to the power of appoint-
 “ ment and distribution mentioned in the will;”

Lord Clare's
 decree, Dec.
 1792.

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Order by con-
sent, May 3,
1794, founded
on the above
decree.

Bill filed May
28, 1806, on
behalf of chil-
dren born after
testator's
death.

Decree, Feb.
14, 1811, re-
versing decree
of 1792.

that is, that the residue was to be divided into thirteen shares, one for each of the testator's three children, and ten for the younger children living at the time of the testator's death: so that Aphra in respect of her nine younger children would, in addition to her own share, have the interest of nine shares for life; Robert in respect of his younger child, in addition to his own share, the interest of one share for life; and Constance, having no child at the time of the testator's death, would have nothing beyond her own thirteenth share. The son, and the daughters and their husbands, agreed that the fund should be divided according to this decree, and a consent in writing to that effect was entered into, and on May 3, 1794, made an order of Court, and the residue amounting to 25,000*l.* was divided accordingly, and directed to be paid over to the parents. Subsequent to the testator's death, Robert had seven younger children born, and Constance four children, who by their next friend on May 28, 1806, filed their bill in Chancery, insisting that by the true construction of the will, they were entitled to a share of the residue, and were not bound by the decree of Lord Clare, not being parties to it. This cause having come on to be heard before the Lord Chancellor Manners, assisted by Chief Justice Downes, it was on February 14, 1811, decreed that the decree of December 3, 1792, should be reversed, and that by the true construction of the will, the residue at the time of the testator's death became divisible into three equal shares, and that Aphra, or her husband in her right, became entitled to the interest of one-third part for her life, with

power of distribution among all her younger children, whether born before or after the testator's death, as in the will mentioned; Robert, to the interest of another third for life, with the like power of distribution; and Constance, or her husband in her right, to the interest of the remaining third for her life, with the like power of distribution; that an account should be taken, and the money paid into Court, and laid out with the privity of the Accountant-general, in the usual manner; and that the interest should in the mean time be paid according to the consent order, which was not objected to; that is, the interest of ten-thirteenths to Aphra's husband for her life, of two-thirteenths to Robert for life, and of one-thirteenth to the husband of Constance. From this decree Aphra, and her husband and children, *appealed*.

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Lord Eldon, (C:) Is it the practice in Ireland; in case of bequests to parents for life, and then to their children with power of appointment and distribution to the parents amongst the children, to order the fund to be paid over to the parents? That is what is done by Lord Clare's decree.

Cited for Appellant, *Ellison v. Airey*, 1 Ves. 111.—*Horseley v. Chaloner*, 2 Ves. 83.—*Buffar v. Bradford*, 2 Atk. 220, to show that in case of a bequest to children, the tendency of construction is in favour of a vested interest in those then living. Cited for Respondent, *Douglas v. Chalmer*, 2 Ves. 501, to show that the words, *in case any, &c.* shall die, may be construed *when any &c.* shall die.

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Whitbread v. St. John, 10 Ves. 152.—*Andrews v. Partington*, 3 Bro. C. C. 60. 401, to show that the inclination of the Courts is to extend the construction to as many objects as possible. *Walker v. Shore*, 15 Ves. 125, to show that the bequest must extend to all that should be in existence at the period of distribution, viz. the death of the parents who had only a life interest.

Leach and Nolan for Appellants; *Romilly and Fonblanque* for Respondents.

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Judgment.

In construing
a will, state
of the family
at the time of
execution to
be attended to.

Lord Eldon (C.) In this case it appeared that the testator was desirous to provide for three families, that of his daughter Aphra Odell, that of his son Robert Fennel Crone, and that of his daughter Constance Crone, now Massy: and in construing a will, he might state what was the situation of the testator's family at the time when it was made. His daughter Aphra had nine younger children; his son Robert one younger child, and his daughter Constance was unmarried. He first devised his lands in a place called Tomeline, and other places mentioned in the will, to trustees, to the use of his daughter Aphra Odell, for her life, subject to certain annuities, the trustees to permit her to take the rents and profits to her sole and separate use, during her natural life; all which was expressed in terms sufficiently artificial; and then to the use and behoof of all and every the younger children of his said daughter, to be divided among them as she should appoint, and in failure of such appointment to be divided among them equally, share and share

alike, as tenants in common, and not as joint tenants. Then the testator empowered her to charge the lands with 500*l.* “for each and every “such younger child or children as she now hath, “or hereafter may have,” and from these words an argument had been drawn, that when he meant to include children to come in *esse*, he had so distinctly expressed himself; but it was unnecessary to state to those who knew any thing of the principles adopted in the construction of wills, that where it appeared from the words of the will to be the intention of the testator, that children to come in *esse* should take, they would take, though the testator should not have expressed such his intention in technical language. Then he devised certain other lands to Aphra for life, charged with 1000*l.* for the use of her younger children, to be divided among them, share and share alike, remainder to her first and other sons, in tail-male. He next devised certain other lands to trustees, to the use of his son R. F. Crone, with power to charge the same “for the benefit of the younger children of “the said Robert, &c.” which expression, *younger children*, in case the testator had died immediately on the execution of his will, must, as Robert had then only one younger child, have extended to children born after the testator’s decease, remainder (after the usual remainder to trustees) to his first and other sons, in tail-male, remainder over; and then he empowered Robert to charge the lands with 500*l.* “for each and every child or children, he “now has, or hereafter shall have.” He then devised certain lands to the use of his daughter

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In construing the words of a will the intention of the testator, and not the technical import, is to be attended to.

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Constance Crone, for life, and after her decease *to the use of her issue*; Constance being then unmarried, and so described, and he bequeathed her a legacy of 4000*l.* to be paid on her day of marriage, and he afterwards reduced that legacy, in case she married without the consent of persons whom he named, so that it was clear that she was then a single woman, and could have had no lawful issue, and that he contemplated her marriage and having children after his death, as he might in his life-time have himself given or withheld the consent, and the condition would have been considered as so satisfied. The testator then bequeathed 500*l.* to each of the grand-children *he should have at the time of his death*, and it was proper to mention that he bequeathed 5*l.* to each of the five younger children then in *esse* of John Coughlan, his herdsman; and made a similar bequest to each of the seven younger children of John Magney, one of his tenants. The residuary clause was in these words, (*vide ante*).

Then came the decree of Lord Clare, the import of which he took to be that this was a residuary devise and bequest, of one share to R. F. Crone, and one to his younger child; of another share to Aphra, and nine shares to her nine younger children; and one share to Constance, who had no children at the time of the testator's death; or that the whole was to be divided into thirteen shares, of which the three children of the testator, and such of their younger children as were living at the time of the testator's death, were each to have one. Aphra and her family having by this

means ten shares ; R. F. Crone and his family, two shares ; and Constance only one share, having no children at the time of the testator's death, who by this construction could be objects of his bounty.

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With respect to the first part of the clause, it had been truly enough said, that if this were to be considered as an immediate devise, it would make them joint tenants in fee as to the real estate, and joint tenants as to the personal ; and no doubt if it was meant to describe the persons who should be living at the time of his death, and this was an immediate devise to them, such would be the effect of the law. But it was difficult to believe that he, having a daughter unmarried, could really mean that those only should take who were born before his death, and that this was a devise to them *in presenti*. But nothing was more clear than that where there was an immediate devise, unless the testator could use such technical words as would not give way to his own exposition of his meaning, that exposition ought to be attended to in order to determine the meaning of words which, without such an exposition, would have a fixed legal sense. And then the testator went on: "But nevertheless," &c. (*Vide ante.*)

They had been driven to this : that R. F. Crone was entitled during his life to the interest of the share of only one child ; and to admit the effect to be that Aphra took not only the share originally given her, but also the interest for life of the nine shares given to her children ; and that as to Constance who had no children, she had only one out of thirteen shares, and that the benefit given her

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in respect of her children was nugatory. It was besides provided that the share of a child dying should go over to the younger children of such child. If then Lord Clare was right that the thirteen persons living at the time of the testator's death took as devisees, he still overlooked all the last part of the residuary clause, for there was nothing in the decree as to the taking for life, or going over in case of death; so that the decree even on its own principle could not be maintained. Then came the decree made by Lord Chancellor Manners, assisted by one of the Judges; and he never in the whole course of his experience knew of more efficient advice and assistance having been given in this way to the Chancellor, than was given to Lord Manners by Chief Justice Downes in this case; which decree was that, at the testator's death, the residue real and personal was to be divided into three equal parts or shares, one-third part or share to Aphra and her children, another to R. F. Crone and his children, and the remaining third to Constance and her children, with power of distribution as in the will. And the question was, whether this was an intention which, consistently with the rules of law, their Lordships could impute to the testator? That could not be done under the first words of the residuary clause. But the question was, whether considering the state of the family and the general intent as to be collected from the whole, and the principles of law applicable to the case, such might not be held to be his intention. Then take it with the exposition, and what did the testator say? That his son and two daughters should

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each receive for life the interest of what he intended for his or her younger children. — Could he mean under such circumstances that one daughter should, in addition to her own share, have the interest of nine shares, his son the interest of one additional share, and his other daughter only her own share, without any thing in respect of her children (unless he contemplated her having younger children at the time of his death), though she should have never so many younger children after his death? But it did not stop there; for he went on, “in case any of my said three children “shall die,”—*shall* die: it was certain they must die some time or other, and that might be legally construed, *when* they shall die, “the share of my “child so dying,” on the Appellant’s construction that could mean only one-thirteenth share, “if “such child shall have younger children, shall go “to the younger children of such child; but if “any of my said three children shall so die “without leaving younger children, the share of “my child so dying shall go to the survivors or “survivor of my other children, and their younger “children, share and share alike.” Now it was the share of his child so dying that was to go over; but Aphra in addition to her own share, might by the Appellant’s construction have the interest of nine shares in respect of her younger children; and yet what was to go over to her brother and sister, and their children, in case she died without leaving younger children alive at the time of her death, was merely her own one-thirteenth share instead of the whole shares. Then what were they to make

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Object of the
Courts to com-
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many as by
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of this power of distribution, when R. F. Crone had only one younger child, and Constance no child? The principle of law was this, that where persons were to take under this general description, the object of the Court should be to comprehend as many as by fair construction could fall within it, and unless it was necessary under the words to shut out all except such as were born at the time of the testator's death, the rule was to include all such as might have come into existence before the time when the fund was to be distributed. On the best consideration he could give this case, it appeared to him that the last decree was right, and ought to be affirmed. He said nothing about the interest, for though he doubted whether the consent was binding, there was no appeal from the consent order, and therefore that question was not properly before their Lordships.

Lord Redesdale. He should not have thought it necessary to say any thing, if there had not been a contradiction between the decrees. The decree of Lord Clare was manifestly in contradiction to the will throughout; for it was clearly the intent of the testator that the younger children should take nothing during the lives of their parents. The question was, whether the subsequent decree of the present Chancellor was correct, and he thought it perfectly well founded; and that the argument against it proceeded on a misconception of the words "all their younger children;" for by their construction all their younger children did not mean all, but some. It was true that in many

cases the Courts were obliged to restrain the meaning to persons living at the death of the testator, and could not extend it where he distinctly, so expressed himself. Suppose it had been to the parents for life, and then to all their younger children, all would take. And what was the subject of dispute here? It was said, "to all their younger children." How? Immediately? No—The whole was suspended till the death of the parents, and so it was to the parents for life, and then to the younger children. They took *per stirpes*, and it was impossible to execute the will in any other way. And then the question was, in what proportion the fund was to be divided. If all took, it must be by thirds, each of the parents taking what was *intended* for, not *given* to, his or her younger children, so that the testator adverted to the future by strong implication, and also to the marriage of one of his daughters after his death, for wills were generally made in contemplation of death. He had no doubt that this decree was right, and that the decree of Lord Clare was unfounded. As to the order by consent which the Chancellor had considered as binding on Crone and Massy, he had some doubt about that, and confessed that the inclination of his opinion was the other way. But as that order was not appealed from, they could not meddle with it.

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Judgment affirmed.

Agents for Appellants, WILLIAMS and BROOKS.

Agents for Respondents, CANNON and GARGRAVE.