thereof its judgment nisi the second Monday in November Term last, and now at this day that second Monday of November to Wit in the year aforesaid came again into Court here the said parties aforesaid by their Solicitors aforesaid, and thereupon afterwards to Wit on the 21 day of November in the year aforesaid all and singular the premises aforesaid being by the Court here seen heard and fully understood and matured deliberation thereupon had the Court here passed and filed in said cause the following Opinion in Writing to Wit.

Margaret Ann Johnson vs Richard Fenby and others | Construction of the Will of Jas Johnson dec'd

The only question submitted to the Court at the hearing of this cause arises upon one of the clauses in the Will of James Johnson deceased a copy of which is filed in this cause marked Exhibit A.

A part of the clause contains a devise and to the testators Widow which with the other devises and bequests that he made to her she renounced and filing therefor that part the clause is in these words.

I give devise and bequeath the other two undivided thirds to my Children equally. I further do my Will that in case both my Children shall die in their minority unmarried without issue and intestate then I give devise and bequeath the same to my right heirs.

The first question is about the character of the devise to the testators two children. I understand that the property to which this testamentary disposition applies is real and personal Estate. I am of opinion that it is clearly and exclusively devise. The testator gives the two thirds of his Estate to his two children in equal parts absolutely in the first instance; and then in the event of contingencies which must occur, if at all during their minority it is limited over to his right heirs. Here there is absolute bequest of personal Estate, with a limitation over to take effect upon a contingency which must happen within the period allowed by the rule established in reference to such limitations. This is an exact example of one of the classes of executory devises, as described by the elementary writer Hearle in his Comm 4 Vol 2 Ed says and kind of executory devise is "where the devisee parts with his whole Estate but upon some contingency grasps the disposition of it, and limits an Estate on that contingency".

See also 6 G & J 232 Brown vs Brown 6 Md 151 Woodland and Cook and Walker Ex of Mason Robins admr vs Hammond 2 Hoz G 42. 10 G & J 157 Jones vs Southern.

The second question is Will Cross remainders be implied between the testator two children from the devise in his Will "But in case both my children shall die, in their minority unmarried without issue and intestate, then I give the same to my right heirs."

We note that Cross remainders will be implied between devises from such words as these is simply settled in cases where they take Estates tail but a different rule has after from conflict of authority been adopted in cases in which they take estates in fee and executory limitations over. The ground of these apparent decisions seems to be, that the same reason for the rule does not exist in the two classes of cases. Cross remainders are implied among tenants in tail to prevent a chasm in the limitations, inasmuch as some of the Estates tail might expire, while the ulterior devise could not take effect until the failure of all. But in cases of limitations in fee of

Real Estate or of an Absolute Estate in personal property as is alleged in the case here, the gift resting in the persons to whom the testator has given his whole Estate in the property upon their death it will rest in their legal representatives and thus a chasm cannot occur which the ultimate devise is awaiting the contingency upon which it is to be gratified. The law as I understand it to be now settled is clearly expressed in the example given by Jarman in the 2 Vol of his work on Wills p. 474. "If a gift is made to several persons in fee simple as tenants in common with a limitation over in case they shall die under age the share of one of the devisees dying during minority will devolve upon his representatives unless and until the whole die under age" And there is no distinction in regard to this rule between Real and personal Estate. This learned author in the 143 Chapter of his work 2 Vol in which he discusses the question which he proposes to the Chapter "Whether Cross Executory limitations can be implied among devises in fee or legacies" has collected all the authorities upon the subject and shows the conflict between them and concludes that the cases of Key vs Barnes 3 Mar 334 and Baxter vs Ford 14 Bear 612 have fixed the rule of law as I have stated it above as the important distinction of testamentary construction. This rule has been followed upon these decisions including as appears from the cases of Turner vs Trotter 5 Jon 466 Templeman vs Warrington 13 Sch 205 Cohen vs Waley 15 ib 318 Mawer vs Butler 2 Y & C. cc 465 In the case of Reid vs Armstrong in the Supreme Court of N Car 2 Iredell Eq Reps 231 the only case in which the question as far as I have been able to discover has been presented to an American Court, the Judge who delivers the opinion examines all the cases upon the subject and adopts the rule as settled in Key vs Barnes as the true rule of construction. I am therefore of opinion that Cross Remainders between the children will arise by implication from the terms of the Will that the devise vested in them as tenants in common and upon the death of either before the contingency on which the whole property was to go over to the Estates Heirs his share would devolve upon his legal representatives subject to the contingency of passing to those Heirs in the event of occurrence of the contingencies upon which those Heirs were to take. I will therefore pass a Decree in conformity with these views.

Wm Gr Krebs.

And thereupon afterwards to Wit on the 10 day of December in the year aforesaid the Court passed and filed in said cause the following Decree to Wit

Margaret Ann Johnson vs Richard Fenby and others |

This cause standing ready for hearing and having been argued and submitted and the Bill, answers depositions and other proceedings having been read and considered

It is thereupon this 4 day of December 1858 for the reasons assigned in the Court's opinion filed in this case Adjudged and Decreed that the investment made by the Defendants Richard Fenby and James Murray as Executors of the Will of James Johnson deceased as shown by the deed from Samuel B Fenby and others to James Murray and Richard D Fenby dated the 18 day of April 1857 and recorded in Liber E D No 126 Folio 284 &c be and it is hereby approved ratified and confirmed