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ESTATE OF JOHN CREAM, DECEASED.

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tested by the will and the testator's use of the word *then* as introductory to the limitation, does not sufficiently indicate such different intent.

3. The remainder vested in the son's death without issue surviving, in the heirs of the testator who were living at his (testator's) death.
4. The result would be the same if the estate given to the heirs be regarded as a vested remainder subject to be divested by the death of the son leaving issue surviving. *Etter's Estate*, 11 Harris, 381, and *Reihle's Appeal*, 4 P. F. Smith, 97, commented on.

No. 15, July term, 1868. Appeal of Mrs. John L. Buzby, from the decree of the Orphans' Court.

Opinion by WILLIAMS, J., delivered July 6, 1869.

John Cream, the elder, devised the real estate, the proceeds of which are in controversy, to Isaac Heylin, his heirs and assigns, in trust, for the use of his son, William, for life; and after his decease, in trust for his children then living, and the lawful issue of such of them as should then be deceased, their respective heirs and assigns forever, in equal parts and shares; such issue to take and receive such part and share only as his, her, or their deceased parents would have had and taken, if then living; and for want of such children, or lawful issue, then in trust for the use of his right heirs forever. The testator's son, William, died unmarried, and without issue, and the question is, who are the persons entitled to the remainder as the right heirs of the testator? Are they the persons who were his heirs at his death, or are they the persons who were his heirs at the death of his son William? It is conceded that under the first limitation, William took only an estate for life. *Powell v. Board of Domestic Missions*, 13 Wr. 46. And that the remainder in fee limited to his children living at his decease, and the lawful issue of his children then deceased, was contingent or executory. But whether the remainder limited to the heirs of the testator on the death of William without children, or issue of deceased children then living, is to be regarded as vested or contingent, has been greatly discussed because of its important, if not decisive, bearing upon the question, whether the heirs at the death of the testator, or the heirs at the death of William, are entitled to the remainder. Perhaps the limitation to the heirs might be regarded as a vested remainder under the decision of this Court in *Etter's Estate*, 11 Harris, 381; and its rulings in *Kelso v. Dickey*, 7 W. & S. 279; *Hopkins v. Jones*, 2 Barr, 69; *Mining v. Baldorff*, 5 Ibid, 503; *Chew's Appeal*, 1 Wr. 23; *Ross v. Drake*, Ibid 373; *Young v. Stoner*, Ibid. 105. The rule is well settled that a remainder is to be regarded as vested, rather than contingent if such a construction is possible. If it did not vest absolutely in the heirs at the death of the testator, why may it not be regarded as having vested *quodam modo* subject to be divested by the death of William leaving children living? The contingency upon which the heirs were to take the remainder, was not a contingency annexed to their capacity to take, but an event independent of them, and not affecting their capacity to take and transmit their right to the remainder.

Their right to the remainder was only prevented from being an absolute interest by the possi-

bility of a child of William coming into *esse* and surviving him.

The limitation here is substantially the same as in *Etter's Appeal*, which was declared to be a vested remainder.

Lowrie, J., says: "The estate to Henry in terms was a life estate. If it was only a life estate, then the estate of his unborn children was a contingent remainder, and that of the other devisees (the testator's surviving heirs) a vested one, subject to be defeated by the death of Henry leaving issue." If then the estate devised to the testator's right heirs was a vested remainder, the heirs at his death took the estate, and as William, the devisee for life, was one of the testator's heirs, it would follow that his devisees became entitled to his share on the termination of his life estate. But there are authorities, and among them some decisions of our own, which show that the remainder in this case is to be regarded as contingent, rather than as vested, and the weight of the authorities seems to be in favour of this doctrine. If the prior fee be contingent, a remainder may be created, to vest in the event of the first estate never taking effect, though it would not be good as a remainder, if it was to *succeed*, instead of being collateral to the contingent fee. Thus, a limitation to A. for life, remainder to his issue in fee, and in default of such issue remainder to B, the remainder to B is good as being *collateral* to the contingent fee in the issue. It is not a fee mounted upon a fee, but it is a contingent remainder with a double aspect, or on a double contingency. 4 Kent's Com. 200; *Luddington v. Kine*, 1 Ld. Raym. 203; *Fearn on Rem.* 373. The same doctrine is laid down by this court in *Dunwoodie v. Reed*, 3 S. & R. 451; *Waddell v. Ratteu*, 5 Rawle, 231; *Stump v. Findlay*, 2 Id. 168, in reference to similar limitations. If then the remainder is to be regarded as contingent, in whom did it vest? In those who were heirs of the testator at the time of his death, or in those who were heirs at the death of his son William? The remainder, if contingent, did not vest till William's death. But it does not follow that it vested in those who were the heirs at his death. If it did, then it was doubly contingent. The event upon which it was to take effect, and the persons to whom the estate was limited, were both dubious and uncertain. If there was no uncertainty as to the class, the persons composing the class, could only be known and ascertained upon the death of the tenant for life. If the remainder had been expressly limited to the heirs living at the death of the testator, it would have been contingent, in view of the doctrine of the cases last cited; and the question recurs, who are the testator's right heirs?

As a general rule of construction, it is well settled that a devise, or bequest to heirs, or heirs-at-law of a testator, or to his next of kin, will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifested by the will; *Halloway v. Halloway*, 5 Vesey, 399; *Elmsley v. Young*, 2 M. & K. 82; *Jenkins v. Gower*, 2 Coll. 537; *Seiffirth v. Badham*, 9 Bear. 370; *Grundy v. Primager*, 1 De Gex, McHoughten & Gordon, 502; *Urquhart v. Urquhart* 36 Eng. Ch. 613; *Abbott v. Bradstreet*, Allen, 589.