

above bequest to descend to and become the estate of the survivor or survivors."

Upon the death of the devisee, Mary Dashiell, a bill was filed by Richard Henry Jackson, one of the devisees in remainder, against Benjamin Douglass Dashiell and James H. Colston, the heir-at-law of George Minor Colston, another of the devisees in remainder, who had likewise died, for a sale of the property for the purpose of partition; and the same having been sold, the proceeds are now to be distributed; and the question submitted is, whether the limitation over to the survivors, Richard Henry Jackson and Benjamin Douglass Dashiell, is good, and can take effect as an executory devise, George Minor Colston, having died without issue, leaving a brother of the whole blood, his heir-at-law.

In my opinion, this can scarcely be considered an open question, since the decision of the Court of Appeals in the case of *Newton vs. Griffith*, 1 H. & G., 111. It was there held upon great consideration, that the words "without issue" in a will, when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there is nothing in the will restraining the operation of the words; and that the circumstance that the limitation over is to a survivor either in fee or for life, will not have the effect to restrain the established legal meaning of the words. It follows, therefore, that the limitation over to the devisees, Jackson and Dashiell, in this case, is too remote, being after an indefinite failure of issue, and that the share of Colston, the deceased devisee, upon his death descended upon and vested in his heir-at-law, the defendant, James H. Colston, to whom his share of the proceeds of the property must be awarded.

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B. D. JACKSON, for Complainant.

S. D. LECOMPTE, for Colston.