

G. A. Stiles, for the applicant.

R. A. Pringle, K.C., for Catharine Lillian Warner (formerly Froom.)

BRITTON, J.:—John Roger Johnson made his will on the 1st September, 1904, in the words following:—

(1) "I will and direct my executrices hereinafter named to pay my just debts and funeral and testamentary expenses out of my personal estate.

(2) "I will and devise all of my real and personal estate to my mother Margaret J. Johnson and to my sister Catharine Lillian Froom. or the survivor of them.

(3) "I hereby appoint my mother Margaret J. Johnson and my sister Catharine Lillian Froom executrices of this my will and I hereby revoke all other wills by me heretofore made."

The testator died on the 9th May, 1905. Both his mother, Margaret, and his sister Catharine survived the testator; but the mother, Margaret, died on the 22nd November, 1911.

The contest here is between the sisters, Eliza Blackwood and Catharine Lillian Warner (formerly Catharine Lillian Froom) as to the true meaning of the second clause of the will. It is contended on behalf of the applicant Eliza Blackwood that the survivorship mentioned has reference to the testator; and, as both the mother and sister survived the testator, they took as tenants in common.

The rule as laid down in Theobald on Wills, 4th ed., p. 554, seems correct as deducible from the authorities: "Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator—and the survivors at his death will take the whole legacy. But, if a previous life estate is given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy. The same rule applies to realty as to personalty." See cases cited by Theobald.

Here no life estate was given. It was a direct gift to the two—the mother and sister or the survivor. They both survived the testator—they both took it all, as tenants in common.

Some of the cases cited on the argument and relied upon for Mrs. Warner are outside of this rule. In *Peebles v. Kyle*, 4 Gr. 334, there was a devise to the wife of the testator for life, with remainder to A. B., and C., or survivors or survivor of them. Survivorship there meant survivors at the death of the tenant for life—and not of the testator. In *Smith v. Coleman*, 22 Gr. 506, there was a devise to the wife for life.