Executors were named in the will, and it is at their instance that this application is made. They suggest that there has been an intestacy, and ask the opinion of the Court as to the proper construction of the will.

The heirs of the testator as at the date of the death of the widow contend that they should take the property as on an intestacy at that time. The heirs of the widow also contend that there was an intestacy, but that it must be dealt with as at the time of the testator's death, in consequence of which the son Thomas, who was then the testator's heir, was entitled to the fee in remainder after the life interest of the widow. On his death during her lifetime, his mother became his heir, and her heirs are now entitled.

I think this latter view is the correct one. The widow was to have the income and enjoyment of the property for the term of her natural life, unless she re-married, "for her support and for the support and education" of the son Thomas. There was a further provision that if she re-married then the use and enjoyment of the property should be given to the son to be held "absolutely and for ever" on the day that he should be of the full age of twenty-one years. She did not re-marry, and there is no direct provision in the will devising the property to him at her death. There is a provision that if he should die a minor then at her death or re-marriage the property should be otherwise disposed of.

There will be a declaration that, apart from the provision in the will for the life estate of the widow, there was an intestacy. One has then to apply the rule that the "heirs and next of kin are to be ascertained as at the death of the ancestor," a rule which has application to "realty, personalty, and to a mixed fund." See Cusack v. Rood, 24 W.R. 391. The testator's heir at his death was his son Thomas; and, he having died unmarried and intestate during the lifetime of his mother, she became his heir. On her death, intestate, her heirs became and are entitled to the property in question.

It was also argued on behalf of her heirs that there was a residuary devise by implication to the son. There is perhaps much to be said in favour of this view. See Re Branton, 20 O.L.R. 642. The result would in the end be the same.

The cost of all parties to the application will be paid out of the fund, those of the executors as between solicitor and client.