Dickinson dying without issue then I will and direct that the said residue of my estate shall be divided into two equal parts one of which parts I devise and bequeath unto the children of my cousin Elizabeth Spencely and the other of such equal parts I devise unto the children of my cousin Mary Ann Worden."

The widow died on the 3rd November, 1918. At the date of the will, John Dickinson had two children, Pearl and John Ernest, who, having survived the widow, now claimed to be entitled absolutely to the estate. The children of the two cousins contended that Pearl and John Ernest did not take absolutely but subject to an executory devise over in the event of their dying without leaving issue them surviving.

This contention was based upon Re Coté (1919), 46 O.L.R. 4, where the actual words of that which was there found to be an executory devise were very similar to the words here used; but that was the only point of similarity. The question upon the Coté will was, whether the gift over was to take place upon the death of the children without issue in the life of the testator only, or also upon the death of the children without issue at any time.

In the present case the direction was one relating to the state of affairs on the death of the life-tenant. When she dies, the estate is to go absolutely to the nephew and niece if they are then living. If both are dead and have left no issue, the children of the cousins come in. There was no intention on the part of the testator to tie up the property—there was merely an intention to provide for its distribution on the death of the wife.

Reference to O'Mahoney v. Burdett (1874), L.R. 7 H.L. 388.

This gift over is operative only if both the nephew and niece die without issue. The fund is to be distributed among the children of John who survive the widow. If only one survived and the other died without issue, the survivor would take the whole. If neither survived, there must be a gift over so as to avoid intestacy. This is a sensible and a probable testamentary disposition. On the other hand, if there was an executory devise, and one died without issue after the estate had vested in possession, there would be no gift over unless and until the other died also without issue; and in the meantime the devisee of the deceased would be in possession, there being no provision that, on the death of either without issue, his or her share should go to the survivor—an intention that no one would impute to a sane testator.

Reference to Olivant v. Wright (1875), 1 Ch.D. 346, and In re Roberts, [1916] 2 Ch. 42.

The facts that the provision relates to personal property as well as real estate and that there are no trustees are also important. The whole clause, in short, seems clearly to relate to the period of distribution.

Order declaring accordingly; costs out of the estate.