In re Clerke, [1915] 2 Ch. 301; Read v. Snell (1743), 2 Atk. 642; Re Wright and Fowler (1916), 10 O.W.N. 299; Re Edgerley and Hotrum (1913), 4 O.W.N. 1434.

The only doubt in the mind of the learned Judge was whether the fact that the gift to "Robert or his heirs" was not a remainder, but an executory devise, affected the application of the rule, either because in principle it ought not to apply in such a case, or because the fact that the devise is executory may be an indication that the testator intended by the word "or" to make a gift to Robert's heirs by way of substitution. So far as the principle of the rule is concerned, the learned Judge sees no reason why it should not apply to an executory devise as well as to a remainder. The reason for the rule prior to the Wills Act of 1838 was that, in the case of a gift to "A. or his heirs," unless "or" was read as "and," A. would take only a life-estate: Hawkins on Wills, 2nd ed., p. 222. Whatever logic there may be in this as a reason for the rule is equally applicable to an executory interest. The same reasoning would apply to the question whether or not the fact that an executory interest, and not a remainder, is being dealt with, indicates a contrary intention on the part of the testator. Had the gift to Robert been contingent upon his surviving John—by the use of some such words as "if then living"—the words "or his heirs" might well be construed as substitutional, on the authority of Wingfield v. Wingfield (1878), 9 Ch. D. 658, Keay v. Boulton (1883), 25 Ch. D. 212, and like cases; but the words "then at his decease" do not make the executory devise to Robert contingent upon his surviving John. Had the gift to John been of a life-estate only, these words would not cut down the vested remainder to Robert to a contingent remainder. So that, if the executory interest had been given to Robert simply without the addition of the words "or his heirs," his interest would have been assignable under the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 10, and would also be devisable by will. If the addition of the words "or his heirs" to a devise of the fee or of a vested remainder does not contain an implication of an intention to make the gift to the heirs substitutionary, there can be no reason for applying any different rule, when the devise is executory, and there is no condition as to survivorship or otherwise.

Therefore, the words "or his heirs" are to be construed as words of limitation, the word "or" being read as "and;" and it should be declared that John Nesbitt and Robert Nesbitt can together make a good title to the land.

Each party should bear his own costs of the application.