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*Feb'y.17,18.

*March 3.

LOUIS J. ALMON *et al*..... .....APPELLANTS;

AND

JAMES D. LEWIN *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Will—Annuities, sale of Corpus to pay.

J. R. died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testa-

*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

tor directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules, marked respectively, A, B, C, D and E, annexed to his will, upon these trusts, viz. :—Upon trust, during the life of his wife, to collect and receive the rents, issues and profits thereof which should be, and be taken to form a portion of his "general estate;" and then from and out of the general estate, during the life of the testator's wife, the executors were to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, contracts and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends and profits of the lands, etc., mentioned in the said schedules, and to pay to his daughter *M. A.*, the rents, etc., apportioned to her in schedule A; to his daughter *E.*, of those mentioned in schedule B; to his daughter *M.* of those mentioned in schedule C; to his daughter *A.* of those mentioned in schedule D; and to his daughter *L.* of those mentioned in schedule E; each of said daughters being charged with the insurance, ground rents, rates and taxes, repairs and other expenses with or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the parties to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of his daughters in case of her death. In the residuary clause of the will there were the following words :—"The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following:" He then gave out of the residue a legacy of $4,000 to his brother *D. R.*, and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters, as were thereinbefore declared, with respect to the said estate in the said schedules mentioned.

The rents and profits of the whole estate left by the testator

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proved insufficient, after paying the annuity of $10,000 to the widow and the rent of and taxes upon his house in *L.*, to pay in full the several sums of $1,600 a year to each of the daughters during the life of their mother, and the question raised on this appeal was whether the executors and trustees had power to sell or mortgage any part of the *corpus*, or apply the funds of the *corpus* of the property, to make up the deficiency.

Held, on appeal, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the *corpus* of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity.

THIS was an appeal from the decision of the Supreme Court of *New Brunswick* in a suit brought by the executors and trustees under the will of the late Hon. *John Robertson*, for the construction of said will.

The parties agreed to the following case.

"1. The respondents, *James D. Lewin*, *Charles Duff*, *Sophia Robertson* and *DeLisle Gracie*, filed a bill in the Supreme Court in Equity, of the province of *New Brunswick*, for the construction of the last will and testament of the late Honorable *John Robertson*, which said last will and a codicil thereto form a part of this case [See head note and judgments for provisions of the will] 2. The several defendants appeared and answered, and the case was heard on bill and answers before the Supreme Court in Equity; 3. Among the facts admitted were the following: (*a*) That the testator's estate consisted, 1st. Of certain lands and tenements, stocks, and other personal property, set forth and described in the several schedules marked A, B, C, D and E, annexed to said will. 2nd. Of a debt due by *David D. Robertson*, the son named in the will, to his father of over fifty-three thousand dollars; and 3rd. Of a large estate, real and personal, exclusive of and in addition to the property mentioned in the schedules in the hands of respondents, *James D. Lewin*, *Charles Duff*, *Sophia Robertson* and *DeLisle Gracie*, as executors and trustees under said will. (*b*) That *Mary*

Allen Almon had received, in the life-time of the testator, the sum of nine thousand five hundred dollars, which sum is charged against her in the testator's books. (*c*) That the whole net income of the testator's estate, including the properties mentioned in the several schedules, was not sufficient to pay the amount of the annuity of $10,000 to the widow *Sophia Robertson*, and also the several annuities of $1,600 each to the five daughters, *Mary Allan Almon*, *Eliza*, *Agnes Lucas*, *Margaret Sophia* and *Laura Campbell*. (*d*) That, in order to pay each of the daughters the yearly annuity of $1,600, the respondents would have to take a large portion thereof out of the *corpus* of the estate. 4. Among the questions submitted by the above named respondents to the Supreme Court in Equity were the following, which they prayed it might be declared and decreed. First—Whether the trustees are or are not bound or authorized to pay the annuities of $1,600 each to the daughters of the testator, during the life of the testator's widow, in full out of the *corpus* of all or any part or parts of the real or personal estate of the testator, if the rents, issues and profits of the whole of the said estate, or the whole of the said estate applicable for that purpose, prove insufficient. Second—Whether, if the trustees are so bound or authorized, they, during the life of the widow, have not power to sell or mortgage any and what part or parts of the *corpus* of the estate to raise funds to pay said annuities of $1,600 to each of said daughters in full, so far as the rents, issues and profits of the said estate prove insufficient for that purpose, or to any and what extent. Third—Whether the trustees, during the life of the widow, before selling the *corpus* of the testator's estate to meet the said annuities of $1,600 to each of said daughters, ought or ought not to reserve so much of any and what part of the said estate as may be necessary to provide for and secure the

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widow's annuity, and if so, how is the extent of such reserve to be ascertained and determined, and by whom. 5. The appellants in this case claim that after setting aside so much of the estate outside and exclusive of the property mentioned in the schedules as may, together with the income derived from the scheduled property, be sufficient to provide for and secure the widow's annuity, they are entitled to have the amount of their several annuities of $1,600 a year each paid to them out of the *corpus* of the estate, outside of and beyond the scheduled property, if the income is not sufficient to do so, and that the trustees should sell so much of said estate outside of scheduled property as may be necessary for said purpose. 6. That in the Supreme Court in Equity, His Honor the Chief Justice, delivered judgment, and decreed, among other things, as follows: 'And, as to the *first* and *second* questions, it being admitted that the rents and profits of the whole estate left by the testator are insufficient, after paying the annuity of $10,000 to his widow and the rents and taxes upon his house in *London*, to pay the several sums of $1,600 a year to each of his daughters during the life of their mother, whether under these circumstances the executors and trustees have power to sell or mortgage any part of the *corpus* of the property to make up the deficiency, his honor doth declare that the said executors and trustees have no such power. The answer to the said *first* and *second* questions being thus given renders it unnecessary for his honor to answer the *third*.' 7. The appellants appealed to the Supreme Court of *New Brunswick*, when the appeal was heard before their honors Mr. Justice *Weldon*, Mr. Justice *Fisher*, Mr. Justice *Wetmore* and Mr. Justice *Palmer*, and after consideration their honors gave judgment, and were divided in opinion. Mr. Justice *Weldon* and Mr. Justice *Wetmore* concurring with the Chief Justice, while their honors

Mr. Justice *Fisher* and Mr. Justice *Palmer* were of a different opinion, and the division being equal the decree of the Supreme Court in Equity was affirmed."

Dr. *Barker*, Q. C., representing the administrators who are nominal parties, declared he would take no part in the case.

Mr. *Weldon*, Q.C., for appellants, *E. & M.* and *A. & L. Robertson*:—

The question now is simply whether the annuities to the children are chargeable on the *corpus* of the real and personal estate. It is one of those cases where the testator thought his property worth more than it really was. The manifest intention of the testator is clearly shown that there should be equality amongst his children in the participation of the benefits of his estate, as well during the life-time of their mother as after her death. The testator divided his estate into two divisions. The one which may be called the scheduled estate and the other which he calls the general estate, the former to be held intact during his wife's life, and then to be held in trust and with limitations over for his daughters respectively, the latter consisting of two parts, namely, the rents and profits of the scheduled estate and the residue of his property.

Out of this general estate so made he directs an annuity of $10,000 to be paid to his wife during her life, and also "from and out of the said general estate during the life of my said wife, to pay to each of my daughters, *Mary Allan Almon*, *Eliza*, *Margaret Sophia*, *Agnes Lucas*, and *Laura Campbell*, the clear yearly sum of $1,600, dominion currency, by equal quarterly payments, free from the debts, control or engagements of any husband they may respectively have, the first of such quarterly payments to be made at the expiration of three months from my decease."

By his will he also orders and directs that his said

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executors shall reduce the amount of the advances made by him to his son *David Dobie*, and interest thereon, as aforesaid, by crediting him with "the like annual sum of $1,600, by quarterly credits of $400 each."

This deduction or allowance, in effect an annuity, was to be made under any circumstances, whether the income of the estate was sufficient to pay the whole of the annuities or not.

And having estimated the property in each schedule to be worth $50,000, he directs that upon the death of his wife that amount shall be credited to his son.

After payment of certain legacies he directs the residue to be divided equally among his children.

It now appears, that after the payment of the annuity to Mrs. *Robertson*, the residue of the income is not sufficient to pay the daughters their several annuities, and the question is, are they entitled to have the deficiency made up out of the *corpus* of the estate? This question, it is submitted, must be answered in the affirmative.

The law on this subject has been very fully discussed in a late case, *Gee* v. *Mahood* (1), where Vice-Chancellor *Hall* made a decision somewhat similar to that of the Chief Justice in the present case. On appeal the Lords Justices and the late Lord Chancellor, Earl *Cairns*, reversed the Vice-Chancellor's decision (2). The case was then taken to the House of Lords, where the decision of the Court of Appeal was affirmed. The case in the House of Lords is reported as *Carmichael* v. *Gee* (3). We rely on this decision and contend that the annuities are chargeable on the *corpus* of the real and personal estate of the testator.

Mr. *Gilbert* for appellants, *L. J. Almon* and *Mary A. Almon*:—

(1) 9 Ch. D. 151. (2) 11 Ch. D. 891.
(3) 5 App. Cases, 588.

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The only question which arises is, what did the testator mean by the term general estate?

The word general is defined as "belonging to or relating to the whole" opposed to "partial or special" on the one side and to "universal" on the other, *i.e.*, being the greater part but not the entirety. Or applying it to a devise or bequest, it would be out of the whole of the estate, except so much thereof as is carved out and separated from the whole, and thereby made *special* in contradistinction to *general*. Then the meaning of the term general estate would be found by ascertaining if there was any portion of his estate which the testator intended to separate and set apart, and this being found, the whole of the residue would constitute the "general estate," unless indeed the context of the will, or some expressions contained in it, would show that the testator had used the word in a more limited sense.

The only expression used by the testator bearing on the meaning of the term is, he directs his executors to collect the income arising from the scheduled properties, "which shall be and be taken to form a portion of my general estate." This income, then, is a *portion*, not the whole of his general estate; only a portion. Where, then, is the balance? for balance there must be, if this is only a portion. It can not be the *corpus* of the scheduled properties, for these are afterwards in the will (not only directed to be held by the trustees after the death of the widow in their entirety for the benefit of his daughters) but the trustees are directed if any portion should have been disposed of by the testator in his life-time, "or if any stocks, mortgages, bonds or debentures therein named shall have depreciated in value, to substitute therefor or add thereto, in money or otherwise, from and out of '*my residuary estate*' some other property or security or its equivalent in money which they or the majority of them may consider of

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equal value to the property so disposed of or depreciated." Nor can it, the balance, be the debt due from his son *David*, for this is to remain uncollected during the life of the widow, undergoing a process of reduction by $1,600 a year, and after her death is to be reduced or extinguished to at least the extent of $50,000 by giving or crediting that amount to his said son, and the balance of it treated as an investment of his (the son's) portion of the estate. If so, then the balance or other portion of the general estate, of which the income of the scheduled property is one portion, must be sought for and can only be found in that large amount of real and personal property not included in the schedules, and which, if not then consumed in the payment of the annuities and the other charges laid on it in the will, becomes at the death of the widow, and not until her death, and all other previous bequests paid, *his residuary estate.*

It is true that when the death of the widow occurs that then what is left of the large estate not included in the schedules passes out of the category of general estate and becomes residuary, and as such is to be kept intact. But there can be no residuary estate until all previous bequests are satisfied, annuities as well as other charges, and the testator has well marked this in his will, for he says: "And from and after the death of my said wife the amount of such premiums of life policies and all other monies which my said executors and trustees shall pay, lay out or expend in the execution of the trusts of this my will shall be deducted from the income of the property of my estate." In other words, the testator says, as clear as words can, the scheduled property shall be kept intact.

It will be said, however, that the reduction of debt to his son should also abate *pro tanto* as the daughter's annuities abate. But this cannot be, for the testator has provided a fund from which the son's yearly allow-

ance is to come, *i. e.*, the debt due from him, not the interest of the debt but the debt itself. And the annuity or reduction to him cannot abate until the fund from which it is to be taken is exhausted, which cannot happen because it is perpetually renewed by the accruing interest on it. And this debt or fund and the interest accruing on it can form no part of the general estate available for the purpose of paying either the annuity to the widow or the annuities to the daughters, because it is to remain until the widow's death for the purpose of being then applied or given to him to the reduction of the son's debt, and the balance, after such reduction is made, is specifically appropriated to be held as an investment of his portion. Under no circumstances (at any rate, before the widow's death) is it to be collected and applied or the interest on it collected and applied to the payment of any charges on the general estate, the interest from it, unlike the income of the scheduled properties, not forming a portion of the general estate, but specifically appropriated to the preservation of the fund from which his allowance of $1,600 a year is to be had.

Mr. *Kaye*, Q.C., for respondents:

It is my duty, as representing the trustees and executors, to call the attention of this honourable court to the passages in the will which, in their opinion, shows the testator's intention was that the *corpus* should not be touched. The general estate (which includes all but the *corpus* of the scheduled property), comes to the trustees subject to a charge of an annuity to the widow, and is to be held upon the same trusts for the daughters as the schedule property. Under the trusts, as to the scheduled property, the *corpus* is to remain intact until the daughters' decease, therefore the *corpus* of the general estate, which is to be held upon the same trusts, is also to remain intact in like manner.

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The widow has a primary charge on the general estate, therefore, so far as the daughters are concerned, the *corpus* of the general estate is to remain intact for the purpose of securing the widow's annuity as intended and provided by the will.

The provisions of the will in favor of the widow are in lieu of dower, and as the testator left real estate in which her dower right existed at his death, she is a purchaser for value (1), her claim is therefore preferential to that of the daughters, and the fund provided for her security ought not to be taken to pay their annuities.

Now, by referring to the will it will be seen that the testator gives to his wife the annuity which, he says, "shall be a charge upon my general estate;" thus making an independent gift of the annuity to her, and expressly charging it upon his general estate; but it will also be seen that there is no charge of the annuities to the daughters, and no independent gift of the annuities to them; the gift to them consists only in the direction to the executors and trustees to pay them from and out of the general estate.

How could the trustees pay out of the general estate, unless that general estate is first in them from and out of which they can pay? How is the estate in them except by the residuary clause?

If they take nothing as trustees except what is left after deducting the annuities to the daughters, what have they in them from and out of which to pay those annuities? It is a fallacy to assume that there was a charge of those annuities in favor of the daughters, or an independent gift of such annuities to them; they take only through the trustees, who take at the decease of the testator the whole legal estate, both real and pre-

(1) *Burridge* v. *Brady*, 1 P.W. 127; *Blower* v. *Morrett*, 2 Ves. sen. 420; *Heath* v. *Dendy*, 1 Russ. 543.

sonal, in order to fulfil and discharge the trusts thereof. As to so much of the whole estate as is comprehended under the term general estate, the trustees take subject to a charge in favor of the widow, and subject to no other charge.

Can the trustees, by selling to pay the annuities to the daughters, destroy or diminish the estate expressly charged in favor of the widow, and subject to which charge the trustees take the estate? If they can sell to pay the annuities to the daughters, what becomes of the express charge in favor of the widow? So to sell, implies that the daughters, with respect to the annuities, stand on equal terms with the widow.

In the case of *Baker* v. *Baker* (1), the testator gave his estate to trustees in trust to invest a sum, the dividends of which would realize the clear annual sum of two hundred pounds, and to pay such dividends to his wife, and at her death the trustees were to hold the principal money in trust for other parties, and it was there contended, on behalf of the widow, that if the, dividends were insufficient, the *corpus* should be taken to pay her annuity; referring to this contention, the Lord Chancellor observed: "According to the construction which is contended for on behalf of the widow, this strange state of things would arise, that, supposing her life to continue for many years, the provision which was clearly intended for her by the will might, in the course of time, by appropriating annually a portion of the *corpus* of the property, be utterly annihilated, and she would be left without any provision at all, and therefore, as the question is one regarding intention, I apprehend that nobody can suppose that such an intention could have ever existed in the mind of the testator." Now it is the daughters in the present case, and not the widow, who seek to use the *corpus* of the general estate.

(1) 6 H. L. 616.

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Can anybody suppose that an intention existed in the mind of the testator that the *corpus* of the estate charged by him with the widow's annuity should be taken to pay the daughters annuities, whereby possibly the *corpus* may be annihilated and his widow left without the provision intended for her, and in return for which he required her to relinquish her right to dower out of his estate?

That it was not the intention of the testator that the *corpus* of the general estate should be taken to pay the annuities to the daughters is further shown by the effect which the taking of such *corpus* would have in possibly destroying the equality of shares amongst his daughters which he plainly desired to preserve; thus Mrs. *Almon*, one of his daughters, received in her father's lifetime advances to over nine thousand dollars, while the other daughters received nothing. Under the provisions of the will, the amount of these advances are to be taken as a part of her share of the residuary estate. Mrs. *Almon* has therefore received upwards of nine thousand dollars on account of her share of the residuary estate, and to make the shares of the other daughters equal, each would have to receive nine thousand dollars; or, the whole of them together, $4 \times 9{,}000 = \$36{,}000$; but if the *corpus* of the estate be used, it does or may take away the fund out of which this $36,000 has to be paid to make the shares of the four daughters equal, and the using of the *corpus* does or may defeat the intention of the testator that the shares of the children should be equal.

STRONG, J.:—

The question presented for our decision on this appeal arises on the will of the Hon. *John Robertson*, who died on the 3rd of August, 1876. The provisions of the will material to be considered may be stated as follows:

The testator, in the first place, gave his widow an annuity of $10,000 for her life, which he declared to be in lieu of dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property, particularly described in five schedules marked respectively A, B, C, D and E, annexed to his will, upon the trusts hereafter stated, viz., upon trust during the life of his wife to collect and receive the rents, issues and profits thereof, which should be and be taken to form a portion of his "general estate," and then, from and out of the general estate, during the life of the testator's wife, to pay to each of his five daughters the clear yearly sum of $1,600 by equal quarterly payments, free from the debts, control, and engagements of their respective husbands. Next, resuming the statement of the trusts of the scheduled property specifically given, the testator provides that from and after the death of his wife the trustees are to collect and receive the rents, issues, dividends and profits of the lands, tenements, hereditaments and premises mentioned in the several schedules, and to pay to his daughter *Mary Allen Almon* the rents, issues, dividends and profits of the lands, tenements and hereditaments apportioned to her and mentioned in the schedule A; to his daughter *Eliza* the income arising from the property comprised in schedule B; to his daughter *Margaret* that of the property comprised in schedule C; to his daughter *Agnes Lucas* that of the property comprised in schedule D, and to his daughter *Laura Campbell* the income arising from the property in schedule E. Such payments to be made to the separate use of his daughters. Then there is a provision that each of the daughters are to be charged with insurance, ground rents, rates and taxes, repairs and other expenses connected with or

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incidental to the management and upholding of the property apportioned to her, the same being from time to time deducted from such quarterly payments. The will then, after directing the executors to keep the properties described in the schedules insured against fire, and giving the devisees an option either to re-build or to lease the ground, in case of loss by fire, proceeds as follows: "And upon trust, on the death of either of my said daughters, to convey one-third of the said lands, tenements, hereditaments and premises apportioned to her in such schedule to such person or persons, upon the trusts, and for the ends, intents and purposes, or in such manner, as my said daughter may, by any writing under her hand, attested by two or more witnesses, or by her last will and testament, direct and appoint, and in default of such direction and appointment, then and in such case the said two-thirds and one-third shall be held by my said executors and trustees in trust for such child or children, and be equally divided between them and their heirs, share and share alike, on the youngest child living attaining the age of 21 years, and in the mean time and until such child shall attain such age the rents, issues and profits thereof shall be applied by my said executors towards the support, maintenance and education of such child or children; and in the event of my daughter dying leaving no issue her surviving, then and in such case I will and direct that the said two-thirds and the one-third before mentioned (if no disposition of the same shall be made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs *per stirpes* and not *per capita*". The testator then gives a "like" annuity of $1,600 to his son *David Dobie Robertson*, and directs that after the death of the testator's wife his son shall have a legacy of

$50,000, which he estimates to be the equivalent in value of the property contained in the schedules given to each of his daughters; and he directs that as well the annuity as the legacy of the capital sum shall be paid to his son by setting it off against a debt due by his son to himself, on which debt he directs interest to be charged at the rate of 5 per cent. per annum. Subject to these specific devises and bequests, annuities and pecuniary legacies already mentioned, the testator gives the residue of his estate to his executors upon trust by the following words, which are important to be considered: "The rest, residue and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give devise and bequeath the same to my said executors and trustees upon the trusts and for the intents and purposes following." He then gives out of the residue a legacy of $4,000 to his brother *Duncan Robertson*, and the ultimate residue he directs to be equally divided among his children, upon the same trusts with regard to his daughters as are hereinbefore declared with respect to the said estate in the said schedules mentioned.

For the purpose of obtaining a declaration as to the proper construction of this will, the executors filed a bill in the Supreme Court in Equity of the Province of *New Brunswick*, and the defendants, the present appellants, having answered, the cause was heard upon bill and answer before his honor the Chief Justice of *New Brunswick*.

Among the questions submitted by the respondents for the decision of the court were the following:

First—Whether the trustees are or are not bound or authorized to pay the annuities of $1,600 each to the daughters of the testator, during the life of the testator's widow, in full out of the *corpus* of all or any part or parts of the real or personal estate of the testator, if

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the rents, issues and profits of the whole of the said estate, or the whole of the said estate applicable for that purpose, prove insufficient. Second—Whether, if the trustees are so bound or authorized, they, during the life of the widow, have not power to sell or mortgage any and what part or parts of the *corpus* of the estate to raise funds to pay said annuities of $1,600 to each of said daughters in full, so far as the rents, issues and profits of the said estate prove insufficient for that purpose, or to any and what extent. Third—Whether the trustees, during the life of the widow, before selling the *corpus* of the testator's estate to meet the said annuities of $1,600 to each of said daughters, ought or ought not to reserve so much of any and what part of the said estate as may be necessary to provide for and secure the widow's annuity, and if so how is the extent of such reserve to be ascertained and determined and by whom.

By the decree pronounced by the Chief Justice, sitting in the Supreme Court in Equity, it was declared as follows: "And as to the first and second questions, it being admitted that the rents and profits of the whole estate left by the testator are insufficient, after paying the annuity of $10,000 to his widow, and the rents and taxes upon his house in *London*, to pay the several sums of $1,600 a year to each of his daughters during the life of their mother, whether under these circumstances the executors and trustees have power to sell or mortgage any part of the *corpus* to make up the deficiency, his honor doth declare that the said executors and trustees have no such power. The answer to the said first and second questions being thus given, renders it unnecessary to answer the third."

The appellants appealed to the Supreme Court of *New Brunswick*, and the appeal was there heard before four judges, two of whom, Mr. Justice *Weldon* and Mr. Justice *Wetmore*, concurred with

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the Chief Justice, whilst Mr. Justice *Fisher* and Mr. Justice *Palmer* were of opinion that the part of the decree complained of should be reversed, and the court being thus equally divided the decree of the Supreme Court in Equity was affirmed. From this order of the Supreme Court the appellants have appealed to this court.

The gifts to the testator's daughters of the property, real and personal, included in the schedule, are specific, and are, in the absence of a contrary intention indicated in the will, to be taken free from any charge in respect of the annuity given to the testator's wife, as well as from those given to the daughters themselves.

The learned Chief Justice proceeded upon the assumption that the annuities were not merely charged on the property described in the schedules, but were so charged in exoneration of the general estate of the testator. The testator, after directing that the income of the property specifically devised to the daughters shall, during the life of his wife, be added to and form part of his general estate, expressly directs that "from and out of his general estate during the life of his wife," his executors shall pay to his daughters the annuities in question. And as regards the annuity to the widow the words are equally decisive to show, not merely no intention to charge the specific gifts with the annuities, but to restrict them to the fund out of which they would be *primâ facie* payable, the general personal estate, for, after giving this annuity, he adds the words "which shall be a charge upon my general estate." It seems, therefore, very clear that, as in the simple case of a testator first giving a particular chattel by way of specific bequest and then an annuity to another legatee the whole personal estate other than the subject of the specific legacy is available for the payment of the annuity, so in the present case the whole personal

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estate, other than that specifically given to the testator's wife and comprised in the schedule, is liable for the payment of the annuities.

In so applying the fund to be produced by the conversion of the general personal estate, the income is of course to be first applied to the payment of the annuities, but if this should prove insufficient then recourse may be had to the capital, unless the testator has expressly or by implication demonstrated an intention to restrict the annuitants to the income. Is there, then, to be found in the will anything which will authorize us to say that the persons to whom these annuities are given are to be confined to the income? As regards the annuity to the widow, which, having been given in lieu of dower, is of course entitled to priority, no question arises, since it is admitted that the income is sufficient for its payment. The conclusion at which the learned Chief Justice arrived seems to have been entirely founded on a misapprehension of the terms of the will, for he assumed, as I have already said, that the annuities were charged exclusively on the scheduled properties, but this, as I have already pointed out, was beyond all question not the case; had it been, the construction adopted by the Chief Justice would undoubtedly have been right, for the case of *Baker* v. *Baker* (1), quoted in his judgment, and many other authorities, a collection of which will be found in *Theobald* on Wills, at p. 470, shew that where the *corpus* is dealt with by the will, as by a specific gift over after the termination of the annuity, it is not liable to make good arrears which the income has been insufficient to pay. And if the annuities had been confined to the scheduled properties this principle would have applied in the present case. But the fund out of which the annuities are here payable is, as I have already shewn, the general

(1) 16 H. L. 616.

personal estate, and, as I will shew hereafter, the real estate not specifically devised in addition. Then, does the will contain any expression or implication of an intention to conserve the capital or *corpus* of both or either of these funds until after the death of the testator's wife? The learned counsel who supported the judgment of the court below argued that such an intention was indicated by two distinct considerations,—first, he contended that the testator must be presumed to have intended that the widow should have the security of the whole real and personal estate for the payment of her annuity, and that consequently neither of these funds was to be broken in upon during her life for the payment of arrears of other annuities which the income was inadequate to pay. As the annuities to the testator's children are to cease at the death of the widow, this would of course have been tantamount to saying that the annuities should be payable out of income only. The answer to this contention is, however, very obvious. We nowhere find that the testator has said that his wife should have the security of his whole estate. He has simply given her an annuity, so given, it is true, as to be payable in priority and to the disappointment, if requisite, of all his other beneficiaries, but there is nothing to show that he intended his gift to have any other or greater effect than the ordinary gift of an annuity. The widow is therefore entitled to have a portion of the *corpus* of the estate, real and personal, not specifically devised or bequeathed, sufficient to produce an income equivalent to the amount of her annuity, set apart at once for that purpose (1), and invested for her benefit in such securities as, by the rules of the Supreme Court in Equity in *New Brunswick*, trustees are authorized to invest in. Subject to the investment of such a fund the remainder of the

(1) See form of decrees: Seton on Decrees, 202, 207, Ed. 3.

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estate, real and personal, is available for the payment of other annuitants and legatees. It was further argued that the residue given to the executors and trustees meant the residue after what had previously been given to the same trustees, namely, the scheduled properties, and therefore included the whole estate subject only to the specific bequests, and that, there being then a gift of this residue to the testator's children, with the same limitations as those upon which the scheduled properties had been settled, the whole *corpus* was to be kept intact for the purpose of carrying out the trusts.

The fault of this argument is that it assumes the whole question in dispute. The enquiry is, what is the residue composed of? or, in other words, are the annuities to be paid out of the *corpus* of the estate before the residue is ascertained? and this is not met by assuming that the residue is the whole estate less the fund set aside for the widow. It is clear beyond all question, much too plain to require authority to be cited to sustain the proposition, that where a legacy, annuity, or any other bequest is first given, and is then followed by a gift of residue, the word "residue" *ex vi termini* imports what shall remain after satisfaction of the previous bequests. So in the present case the residue given to the executors means what shall remain after satisfaction of the annuities in question. The will therefore contains nothing which would warrant us in depriving the children of the testator of their *primâ facie* right to have the arrears of their annuities made good out of the *corpus* of the estate, subject only to the prior rights of the widow and other specific legatees and devisees.

The direction to pay the annuities out of the general estate would not warrant us in holding that the annuities are charged on the realty. The terms of the residuary clause are, however, amply sufficient for that

purpose. By it the testator has charged all his pecuniary legacies and annuities on his real estate. The introductory words of that clause are "the rest, residue and remainder of my said estate, both real and personal, I give, devise and bequeath." Now it is a well established principle of construction that if a testator, after giving a pecuniary legacy without any indication of an intention to charge it on the realty so far as the language of the gift itself indicates, subsequently gives the residue of his *real* estate, the use of the word "residue," as applied to the real estate, is sufficient to charge the legacy by implication, and this is so, even though there have been previous specific devises of real estate (1).

From a vast number of authorities, the following have been selected as affording examples of the application of this rule: *Bench* v *Biles* (2); *Francis* v. *Clemow* (3); *Greville* v. *Brown* (4). There can, therefore, be no doubt of the authority of the executors and trustees to raise any arrears of the annuities from time to time by sale or mortgage of the testator's real estate not specifically devised in aid of the *corpus* of the general personalty.

I am, therefore, of opinion that so much of the decree of the court below as is complained of in this appeal must be reversed; and that there must be substituted for it a declaration that the annuities given to the appellants are charged on the *corpus* of the real and personal estate, subject to the right of the widow to have a sufficient sum set apart to provide for her annuity; and I think that the costs of all parties should be paid out of the estate.

FOURNIER and TASCHEREAU, J.J., concurred.

(1) Jarman on wills, Vol. 2, Ed. 3, p. 573.
(2) 4 Madd. 187.
(3) 1 Kay 435:
(4) 7 H. L. 689.

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The plain meaning of the testator's will, as it appears to me, is, that the property in the several schedules mentioned, subject to such alteration as should be made therein under the provisions in the will in that behalf, so as to make the parcels in each, in the opinion of the executors, &c., of the value of $50,000, should be held by the executors and trustees during the life of testator's wife upon trust to receive the rents, issues and profits thereof for the purpose that such rents, &c., should form part and parcel of what the testator calls his general estate. He then gave to his wife and to his five daughters out of this general estate (which term must plainly be construed as meaning the rents, issues and profits of the property in the schedules particularly mentioned, together with the residue of his estate not specifically appropriated), six several annuities, namely $10,000 per annum to his wife during her life and $1,600 per annum to each of his five daughters during the life of his widow; and, being desirous to place all his children on an equality, he directed that a sum of money, amounting to or exceeding $50,000, in the testator's son's hands bearing interest at 5 per cent., should be suffered to remain at interest in his hands, and that out of such interest he should be allowed $1,600 per annum during the life of testator's widow. At the death of the widow the annuities to the children are to cease, and the executors and trustees are directed to hold then the parcels in the schedules mentioned upon certain trusts in favor of the five daughters respectively, and provision is made as to the debt due by the son so as to place him on an equality with the daughters, valuing the parcels in each schedule set apart for the daughters at $50,000. Then as to all the rest, residue and remainder of the testator's estate, both real and personal, after payment thereout, during the widow's lifetime, of certain premiums of

insurance and other charges, he gave, devised and bequeathed the same to his executors and trustees upon trust after paying testator's brother a legacy of $4,000, to sell and dispose of the same, and to apportion the same and the proceeds thereof equally to and among his children, share and share alike, the daughters' share to be held on the same trusts as are declared in respect of the scheduled lands; and he directed that the son's share should by held by the executors, &c, upon certain trusts declared concerning it.

The terms of this will, as it appears to me, plainly constitute the annual payments bequeathed during the life of the testator's widow, both to herself and to the testator's five daughters, to be annuities in the ordinary sense of that term. The annuity to the widow is expressly charged upon the general estate, which estate is constituted as above mentioned, and it is out of the same *general estate* that the gifts to the daughters, during the widow's life, are made payable also. There is nothing in the will expressing or indicating an intention that the gifts to the daughters during the widow's life shall be made good out of the income only of such general estate, they are, on the contrary, expressly made payable out of the general estate itself, which estate is constituted as above stated. The rule therefore is that the daughters are entitled to have their annuities made good, not only out of the income, but out of the capital of such general estate, so only, however, as not to prejudice the right of the widow to receive first her annuity in full

The principle of *Gee* v. *Mahood* (1), reported in appeal as *Carmichael* v. *Gee* (2), is, in my judgment, sufficient for the determination of this case.

Appeal allowed with costs.

Solicitors for appellants: *G. G. Gilbert and C. W. Weldon.*

Solicitors for respondents: *F. E. Barker* and *J. J. Kaye.*

(1) 11 Ch. D. 891. (2) 5 App. Cases 588.