1881

JAMES H. RAY *et al*.....APPELLANTS;

*Feb'y. 18.

AND

*April 11.

THE ANNUAL CONFERENCE OF NEW BRUNSWICK AND PRINCE EDWARD ISLAND IN CONNECTION WITH THE METHODIST CHURCH OF CANADA *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Will—Construction of—Surplus—Whether residuary personal estate of the testator passed.

Among other bequests the testator declared as follows:—"I bequeath to the Worn-out Preachers' and Widows' Fund in connection with the Wesleyan Conference here, the sum of £1,250, to be paid out of the moneys due me by *Robert Chestnut*, of *Fredericton*. I bequeath to the Bible Society, £150. I bequeath to the Wesleyan Missionary Society in connection with the Conference the sum of £1,500." Then follow other and numerous bequests. The last clause of the will is:—"Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will.

Held, affirming the judgment of the Supreme Court of *New Brunswick*, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a *pro rata* addition should be made to the three above-named bequests, Statutes of Mortmain not being in force in *New Brunswick*.

[*Fournier* and *Henry*, J. J., dissenting.]

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*PRESENT.—Sir Wm. J. Ritchie, Knight, C.J.; and Strong, Fournier, Henry and Gwynne, J.J.

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THIS was an appeal from a judgment of the Supreme Court of *New Brunswick*, by which it was declared that by the proper construction of the will of *Gilbert T. Ray*, the respondents, "*The Annual Conference of New Brunswick* and *Prince Edward Island*, in connection with the *Methodist Church of Canada*," and the "*New Brunswick Auxiliary Bible Society*," were entitled to the whole residuary personal estate of the said *Ray*.

This was a bill filed in the Supreme Court in Equity of the province of *New Brunswick*, by the plaintiff, as surviving executor of the last will and testament of *Gilbert T. Ray*, for a decree declaring the persons entitled to a fund of some $40,000 in the executors' hands. The question arose in reference to the last clause in the will. Under it the *Methodist Conference of New Brunswick and Prince Edward Island*, and the *New Brunswick Bible Society* (respondents), claim all the residuary, real and personal estate, while the remaining defendants (appellants), who are the testator's heirs, claim that, as to this residuary estate, there is an intestacy, and that they are entitled.

Gilbert T. Ray died on the 23rd October, 1858, without leaving any issue. By his will he appointed the plaintiff and *Aaron Eaton* and *John Fraser*, executors; and after giving to his wife an annuity of £300 per annum and the use of his house and furniture on *Carmarthen* street for life; and an annuity of £200 per annum to his sister, *Rachael Hallett*, for life; and from and after her death an annuity of £100 per annum for eight years to her daughters, he bequeathed—

"To the worn-out Preachers and Widows' Fund in connection with the Wesleyan Conference here the sum of £1,250, to be paid out of the monies due me by *Robert Chestnut*, of *Fredericton*; to the Bible Society £150; to the Wesleyan Missionary Society in connection with the Conference here, £1,500."

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He then gave a number of other legacies, of unequal amounts, to some of his next of kin and others, amounting in the aggregate to $31,360. In addition to a pecuniary legacy of £1,000 to one of his next of kin, he gave him "All his marsh lands in the County of *Annapolis*."

To another, Mrs. *Fraser*, he gave his house and land on *Carmarthen* street; and the will then concluded as follows:

"I hold by deed 540 acres of land in *Sussex*, which I leave to be disposed of, by my executors, at a time when they shall deem it most advantageous."

"Should there be any surplus or deficiency a *pro rata* addition or deduction, as may be, to be made to the following bequests, viz.:—

"Worn-out Preachers and Widows' Fund. Wesleyan Missionary Society. Bible Society."

The defendants, "*The Annual Conference of New Brunswick* and *Prince Edward Island*, in connection with the *Methodist Church of Canada*," represent the bequests to the Worn-out Preachers and Widows' Fund, and to the Wesleyan Missionary Society; the defendants, "*The New Brunswick Auxiliary Bible Society*" represent that to the Bible Society; and amongst the other defendants are all the next of kin of the testator.

All the legacies mentioned in the will were paid except one of £400 to *Charles Prichard*, which, with an annuity of £100 per annum for eight years to *Elizabeth C. Hallett*, *Fanny Hallett* and *Margaretta Ray Hallett*, unmarried daughters of *Rachael Hallett*, are now the only charges on the estate.

In addition to the lands at *Annapolis*, the lands devised to Mrs. *Fraser* and the lands at *Sussex* mentioned in the will, the testator died seized of a lot of land and house (No. 643) fronting on Princess street, in the city

of *St. John*; two lots fronting on Orange street (No. 691 and 692); and another lot fronting on Orange street (No. 730) which were appraised as of the value of £1,300.

Exclusive of these lands, the plaintiff, as surviving executor, has in his hands personal property and assets belonging to the estate amounting to $39,462.12.

The matter was heard before Mr. Justice *Duff*, who made a decree declaring that the two defendants first named were entitled to the fund in question representing the real and personal estate under the last clause in the will. On appeal to the Court in Term this decree was varied, and a majority of the Court held that, as to the real estate (except the land in *Sussex*), there was an intestacy, and it went to the heirs; but they sustained the decree as to the personal estate, agreeing with Mr. Justice *Duff* that it passed to the first two named defendants under the will in the proportions of the legacies given them.

From this judgment of the Supreme Court of *New Brunswick*, affirming Mr. Justice *Duff*'s judgment, except as to the four lots of land in the city of *Saint John*, the present appeal was taken.

Dr. *Barker*, Q. C., for appellants:—

The testator after giving to his relations certain legacies, and bequeathing to the respondents' small legacies, comparatively to the residue of the estate, closes his will by a very short, but which would be a very comprehensive clause if the decision of the court below was sustained. It is upon this clause that the controversy arises.

It is a well understood rule that merely negative words are not sufficient to exclude the title of the next of kin; there must be an actual gift to some other definite object. *Johnson* v. *Johnson* (1), *Fitch* v. *Weber* (2).

(1) 4 Beav. 318.

(2) 6 Hare 145.

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It is an equally well understood rule of construction as to wills that the heir is not to be excluded without an express devise or necessary implication. *Wilkinson* v. *Adam* (1), *Dashwood* v. *Peyton* (2).

It is submitted that a clause so ambiguous and general as that in this will amounts neither expressly nor by necessary implication to such a gift as would exclude the heir.

Admitting, however, for argument's sake, that the words amount to a sufficient devise to defeat the claim of the heir, what passes under the clause?

It seems obvious that the real estate would not pass under it. There is no devise of the real estate to any one. The word *bequeath* used in the will is inapplicable to real estate. In whom did the title vest? Certainly not in the executors, for it is not given to them. The title could not be in a *fund*; neither could it be in two unincorporated voluntary societies; much less could it be in the three as tenants in common. Besides this, they were only to take in case of a surplus. It therefore follows that the title to the real estate, except that which the executors were empowered to sell, must have vested in the heirs, subject to the payment of the legacies, if they were a charge upon it.

It cannot be argued that by the use of the same words in the same sentence, you are to gather a different intention in the testator as to one subject matter from what he has as to another. The object to be sought in construing a will is the testator's intention. When we find in reference to this clause that the testator could not have intended to pass real estate, we must infer that he did not intend to pass any property to which the word surplus would be applicable.

It has been put forward that the word *surplus* refers only to the personal estate in the hands of the executor.

(1) 1 Ves. & B. 466. (2) 18 Ves. 40.

Supposing this to be so, there would still be a large fund undisposed of to go to the heirs. It would seem to have been the testator's intention that the charitable legacies should be paid on his death; payment of them is not postponed as in the case of some others. This being so, the legacies were then due, and if due, the amount due could be ascertained. If, therefore, the latter clause has any reference to these legacies, it must be applied then, for there is no means of recovering a portion of these legacies back in case of a deficiency, to be determined years afterwards, and the will does not contemplate more than one payment. The executors, however, must retain sufficient in their hands to pay the other legatees and to produce the annuities payable to the widow and Mrs. *Hallett*. Whatever remains of the fund which produced the annuities, at the death of the annuitants, was undisposed of, and must go to the heirs. It is submitted that when these charitable legacies were paid by the executors, the executors waived all claims against the charities in case of a deficiency and the charities all claims in case of a surplus. There was then neither surplus nor deficiency, as there remained, after payment of legacies, sufficient to pay the annuities.

The testator made his will but twelve days before his death, and when "weak in body," and at a time when he knew substantially the amount of his property as it would be at his death.

If you deduct the amount of legacies from the total estate, the balance represents a capital just sufficient at six per cent. to yield the annuities, and he inadvertently did not dispose specifically of this capital, and the proper construction would be to say the respondents are entitled to whatever "surplus" or sums of money would be left after laying aside sufficient capital to pay these annuities. In the absence of any clause in the will declaring an intention to dispose of his whole estate,

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as is found in the wills under discussion in *Enohin* v. *Wylie* (1), and *Hughes* v. *Pritchard* (2), and in view of the fact that the testator knew that there would be a surplus of some £3,000, or nearly half of his whole estate, it seems impossible to suppose that if he intended to dispose of it he would not have used different language from the ambiguous clause at the end of his will. *Coard* v. *Holderness* (3).

Mr. *Sturdee* for respondents:

The fact that the testator declares it to be his last will and testament shows conclusively that he was making, in his own opinion at least, a will disposing of his entire estate.

Mr. *Jarman* has, in his Rule 16 of Construction, well laid down the law. Words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are in all cases to receive a construction which will give to every expresssion some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction that is to be preferred which will prevent a total intestacy (4).

The residuary clause as to personalty certainly gives any surplus to these charities. The annuitants were dead, and the capital set aside to pay the annuities now is a *surplus* covered by the residuary clause. The case of *Smyth* v *Smyth* (5) is perhaps the latest case, and we submit on the authority of that case that by surplus he meant any surplus of the property out of which these legacies were to be paid, viz: The general personal estate.

(1) 10 H. L. C. 1.
(2) 6 Ch. D. 24.
(3) 20 Beav. 147.
(4) See also, Redfield on Wills (4 Ed.), vol. 1, p. 427.
(5) 8 Ch. D. 56.

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Mr. *Kaye*, Q. C., followed on behalf of the resopndents:

The testator had two things at heart, his family and his religion. He distributes certain legacies to his family and the balance to his religion. He orders his executors to provide for his family for an uncertain number of years and then he says, if there is not enough the charities will suffer, if there is surplus then the charities will benefit.

Where a will deals with both real and personal estate, as in this case, it is a rule of construction that a residuary clause will be construed to cover both real and personal estate, as was decided in the case of *Smyth* v. *Smyth* (1), and cases there cited.

The will directs £300 per annum to be paid to the testator's wife, and £200 to his sister *Rachel*, during their natural lives. These sums are not charged on or payable out of a specific fund. There is no difference between an annuity and a legacy. They both stand on the same footing. In the event of any deficiency both would abate *pro rata*. *Wright* v. *Callendar* (2). To assume, therefore, that a certain amount must be set apart for the annuities, is assuming what is contrary to fact and law. When the testator speaks of surplus or deficiency, he clearly means of what he has been speaking in the former part of his will, viz.: his estate. He is not speaking of what his property was at the time of making his will, but what it would be at the time of his death. In this will the words are general, not special—there is nothing to control or limit them. As the will speaks from the testator's death, the argument that the estate about equals what would be required to pay legacies and produce sufficient on interest to pay the annuities, cannot apply. The death of the testator occurring shortly after making the will, can have no bearing on the case: he might have lived years; and

(1) 8 Ch. D. 561. (2) 2 DeG. M. & G. 655.

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the court cannot look at the amount of the personal estate to aid in construing a will (1).

If the argument that it is necessary to set aside a sufficient amount of the estate to produce interest to pay the annuities were to prevail, it might happen that such a large sum would be needed for that purpose as to leave nothing to pay the charitable bequests. Who, in such case, is to judge of the necessary amount, and the rate of interest on which to base the calculation? There would also, on the death of the annuitants, be an intestacy as to the sum so set aside; an intestacy as to a large amount of the estate, with the possibility of these general legacies being left unpaid.

If the doctrine propounded by Mr. Justice *Wetmore* were to prevail, viz., that the surplus or deficiency refers to the money coming from *Chestnut*—the effect would be to make a new will for the testator, instead of construing the one he has made, which is contrary to the principle that "the words must be read in their ordinary sense, as written." See *Grey* v. *Pearson* (2).

From the clauses of this will, it is evident the time to ascertain the surplus or deficiency spoken of would not be upon the death of the testator, as some of the legacies are not to be paid until a future day.

Dr. *Barker*, Q. C., in reply.

RITCHIE, C. J.:—

The case states that:

Gilbert T. Ray, late of the city of *Saint John*, by his last will and Testament, dated 11th October, 1858, among other bequests gave to his wife, *Amelia Ray*, £300 per annum during her life, and the use of the house and furniture on *Carmarthen Street*, in said city; to his sister *Rachel*, widow of *W. P. Hallett*, of *New York*, £200 per annum during her life, and on his sister's decease, £100 per annum for eight years thereafter to be divided equally among his sis-

(1) See Wigram on Wills, 4th ed., 92.

(2) 6 H. L. C. 61.

ter's unmarried daughters. He also gave to the "*Worn-out Preachers and Widows Fund* in connection with the *Wesleyan Conference*" the sum of £1250, and to the *Missionary Society* in connection with the said Conference" the sum of £1,500. These charitable funds are represented by the respondent, "The Annual Conference of *New Brunswick* and *Prince Edward Island* in connection with the Methodist Church of *Canada*." He also gave to the "*Bible Society*" £150, now represented by the respondent, "The *New Brunswick Auxiliary Bible Society*." After disposing of a large amount of his property in bequests, in which all his next of kin were named, he closed his will in the following words:

"Should there be any surplus, or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests; viz:

"Worn-out Preachers and Widows' Fund; Wesleyan Missionary Society; Bible Society."

In addition to this the testator owned real estate in the city of *St. John*, with reference to which no mention whatever is made in his will. When the case came before Mr. Justice *Duff* in the Supreme Court in Equity of *New Brunswick*, he decreed against the heirs at law and representatives of the testator, and held that these several parties: The *Worn-out Preachers and Widows' Fund*, the *Wesleyan Missionary Society*, and the *Bible Society* were entitled to the whole surplus of the estate. This went on appeal to the Supreme Court of *New Brunswick*, and there Mr. Justice *Palmer* was also of opinion that the whole residuary real and personal estate of the testator should go to these beneficiaries. The majority of the court, however, held that only the surplus of the personal property mentioned in the Will passed and that the heirs-at-law, having no interest in that, this surplus should be divided among the beneficiaries, but as regards the land in the city of *St. John* not disposed of, that went to the heirs-at-law. With this conclusion I entirely agree. At the time of this suit, those persons who had a life-interest were dead, and all the annuities and bequests had been paid, and

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there being a very large surplus of the estate remaining in the hands of the surviving executor, the heirs-at-law and next of kin of *Ray* claim it as being residuary legatees of his estate undisposed of under his will. I think that although, when the estate came to be wound up, it was found that there was a very large surplus of personal estate, including certain lands in *Sussex*, which were made personal estate, that is to say over which the executors were given control, and which they had power to realize, the proper construction of the will is that the testator clearly intended to dispose of all his personal property. The words used are "should there be any *surplus* or *deficiency*." What surplus do they refer to if not to the surplus of the general personal estate and the amount realized by the sale of the *Sussex* lands? I am entirely unable to see what other surplus could meet the exigencies of the case and the words of the will. The appeal should be dismissed.

STRONG, J.:—

I see no difficulty in construing this will in the same way as the Supreme Court of *New Brunswick*.

The testator gives a number of pecuniary legacies, including an annuity of £300 to his wife and one of £200 to his sister, and also £1,250 to the respondents, "The Worn-out Preachers' and Widows' Fund"; £150 to the respondents, the Bible Society, and £1,500 to the Wesleyan Missionary Society; he also devises two parcels of real property to devisees named in the will, and leaves 540 acres of land, situate in the county of *Sussex*, to be disposed of by his executors "at a time when they shall deem it most advantageous." The will concludes with the following provision, which alone has given rise to any question:

Should there be any surplus or deficiency, a *pro rata* addition or deduction, as the case may be, to be made to the following bequests,

viz: Worn-out Preachers' and Widows' Fund; Wesleyan Missionary Society; Bible Society.

There being a considerable surplus of personal estate and some real estate undisposed of, after paying the pecuniary legacies and setting apart a fund sufficient to produce an income equal to the annuities to the testator's widow and sister, this surplus both of realty and personalty was claimed by the three charities mentioned in augmentation of the pecuniary legacies which had already been paid them. The majority of the court below held that the charities are entitled to the surplus of the fund in the hands of the executors, composed of the residue of personalty and the proceeds of the *Sussex* lands, and that the real estate undisposed of, other than the *Sussex* lands, descended as on an intestacy to the heirs at law. One learned Judge, Mr. Justice *Palmer*, was of opinion that the word "surplus" in the concluding provision of the will already stated carried not only the residue of the personal estate, but also all the realty not specifically devised.

It has been contended on the appeal before this court that nothing passed under this general bequest of the surplus, but that the next of kin are entitled as upon an intestacy to the whole residue of the personalty, including the capital of the funds invested to answer the annuities to the testator's wife and sister. Whilst I am clearly of opinion that the realty other than the *Sussex* Lands does not pass under the gift of the surplus, but descends to the heirs at law, I am equally in accord with the court below in their determination that the gift of the surplus does carry the whole residue of personalty, including the reversionary interest in the corpus of the fund invested for the annuitants. The direction that the *Sussex* lands are "to be disposed of by the executors" being imperative and not discretionary, except as to the time of conversion, includes a power of sale and

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a trust of the proceeds to be applied for the purposes of the will, namely, in the payment of the legacies bequeathed by the testator in the same manner as the general personal estate, the sums to be produced by the sale thus forming with the personalty a blended fund for the payment of legacies (1). Then the word "surplus" has reference to the fund out of which the legacies are payable. The words "surplus" and "deficiency" apply to the same antecedent subject, and "deficiency" can only refer to the fund for the payment of legacies, which, as I have already said, is the general personal estate, and the money produced by the sale of the *Sussex* lands. And as it was in the case of a deficiency of this fund that the three charitable legacies were to abate, so it was in the event of there being a surplus of the same fund, that they were to be augmented. Had the legacies, by any provision to be found in the will, independently of this gift of the surplus, been charged on the realty, I should have been of opinion that the real estate not specifically devised, passed under the word "surplus;" but I cannot agree that the legacies were charged on the real estate generally. The will contains nothing to warrant such a proposition. There is no doubt that many authorities, such as *Greville v. Browne* (2), shew that where pecuniary legacies are bequeathed, and then the testator has given the "residue of his real and personal estate," the legacies are charged on the real estate; but it is a *petitio principii* to apply such an argument here, for the very question in the present case is whether the word "surplus" is used by the testator as an equivalent for "residue of real and personal estate," or whether it means only "residue" of the fund out of which pecuniary legacies are payable.

For these reasons it follows that the surplus

(1) *Singleton* v. *Tomlinson*, 3 App. Cases 404. (2) 7 H. L. Cas. 689.

given to the charitable corporations includes only the residue of personalty and the proceeds of the *Sussex* lands, and does not carry the realty not specifically mentioned.

Then it was argued on behalf of the appellants that the capital sums set apart and invested for the benefit of the annuitants were not to be included in the surplus, but were, in the event, which has happened, of the personal estate being ample for the payment of all the legatees, to be considered as undisposed of personalty, and as such to go to the next of kin. This proposition is wholly untenable. The residuary clause with which the will concludes is to be construed as a gift of the residue of the testator's personal estate, and it surely cannot be seriously questioned that the capital invested to secure the life annuities sinks into the residue upon the death of the annuitants. The circumstance that pecuniary legacies are also given to the residuary legatee, which can be paid *in presenti*, whilst the payment of so much of the residue as is made up of the capital of the annuities must be deferred until after the death of the annuitant can make no difference in the right of the residuary legatee to that capital when the annuities fall in. Take the case of a testator directing his whole estate to be invested in an annuity given to A for his life, with a general residuary gift to B; could it be doubted that B, the residuary legatee, would eventually be entitled to the amount invested to secure the annuities? And in what respect does the present case differ from that supposed. A gift of the residue of personalty wholly excludes the next of kin, for under it everything which would be distributable in the event of an intestacy, including all reversionary interests, passes to the legatee. If, therefore, we were to give effect to this argument, we should be altering the estator's will by

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interpolating an exception in favour of the next of kin of the reversionary interest in the capital of the annuities.

No question was made as to the capacity of the respondents, the three charitable societies, to take these legacies. It was conceded that they were all incorporated and authorized by statute to hold lands, and as to so much of the bequest as consists of impure personalty derived from the sale of the *Sussex* lands, no question can arise under 9 *Geo.* 2, c. 36, since that statute is not in force in the Province of *New Brunswick* (1). The appeal must be dismissed with costs.

FOURNIER, J.:—

Le testament de *Gilbert T. Ray*, dont l'interprétation fait le sujet de la difficulté en cette cause, ayant déjà été cité textuellement par ceux des honorables juges qui viennent d'exprimer leur opinion, je me dispenserai de le transcrire de nouveau ici, me bornant à donner un résumé de ses principales dispositions.

En tête de ce document se trouve la déclaration suivante:

This is the last Will and Testament of *Gilbert T. Ray*, of the City of *Saint John, N.B.*, at present residing in *Granville, N.S.*

Elle est suivie de la nomination des exécuteurs testamentaires parmi lesquels se trouve l'intimé *Lockhart.*

Viennent ensuite deux legs annuels, l'un à dame *Amelia Ray*, son épouse, de la somme de £300, avec l'usage d'une maison meublée, sa vie durante; l'autre, de £200, à sa sœur *Rachel*, veuve de *W. B. Hallett*, aussi sa vie durante, et à son décès une somme de £100 par année, pendant huit ans à ses filles non mariées, etc.; aux ministres retirés (*Worn-out Preachers*) et au fonds des veuves, en rapport avec la "Conférence Wesléyenne", la somme de £1,250 à être payée à même les argents

(1) *Whicker* v. *Hume*, 7 H. L. 123.

qui lui sont dus par *Robert Chesnut*, de *Fredericton*; à la Société Biblique, £150; à la Wesleyan Missionary Society, £1,500; à *Alfred Ray*, ses terres de marais dans le comté d'*Annapolis*, plus une somme de £1,000, pour le bénéfice de ses enfants, la dite somme à être payée dans quatre ans; à *William Ray*, £2,000; *Charles Ray*, £2,000; à *Amelia Fraser*, épouse de *John Fraser*, la maison et le lot sur la rue *Carmarthen*; à *Charles Pritchard*, la somme de £400 à lui être payée à son âge de majorité.

Il y a en outre douze autres legs particuliers à diverses personnes, de sommes d argent, variant de £10 à £600.

Ces legs sont suivis d'une déclaration que le testateur possède 540 acres de terre dans le comté de *Sussex*, dont il autorise l'aliénation par ses exécuteurs à l'époque qu'ils croiront la plus avantageuse, mais sans leur donner aucune direction quant à l'emploi des deniers en provenant.

Vient enfin la disposition qui a donné naissance au présent litige; elle est ainsi conçue:

Should there be any surplus, or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, viz.:—
Worn-out Preachers and Widows' Fund.
Wesleyan Missionary Society.
Bible Society.

De l'aveu de toutes les parties en cette cause les nombreux legs particuliers faits par ce testament ont été acquittés. Les rentes viagères, ou legs annuels, en faveur de la veuve du testateur et de sa sœur *Rachel*, veuve *Hallett*, sont éteintes par le décès de ces deux dames. Il est admis aussi que les seules charges dont la succession reste grevée sont 1° le paiement annuel, pendant 8 ans aux filles non mariées de madame *Hallett*, savoir: *Elizabeth C. Hallett*, *Fanny Hallett*, and *Margaretta Ray Hallett*, puis 2° le legs de £400 à être payé à *Charles Pritchard*, fils de *Joseph Pritchard*, à son âge de majorité, devenu majeur depuis.

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La valeur actuelle de la succession d'après l'état fourni par *Lockhart*, le seul exécuteur survivant, serait de $38,000, sur laquelle il n'y aurait à faire que la diminution des deux sommes ci-dessus mentionnées. Il resterait donc un surplus considérable.

Les choses étant en cet état, *Lockhart*, le seul exécuteur testamentaire survivant, assigna comme seules parties intéressées, ceux des légataires qui sont défendeurs devant la cour de première instance à l'effet d'obtenir une sentence ou décret de cette cour déclarant auxquels d'entre eux devait appartenir le surplus des biens du testateur non absorbé par ses diverses dispositions particulières.

La Cour Suprême du *Nouveau-Brunswick*, siégeant en équité sous la présidence de l'honorable juge *Duff*, a déclaré que le résidu des biens, tant mobiliers qu'immobiliers, du dit *Gilbert T. Ray* devait appartenir, sujet aux diverses charges ci-dessus mentionnées, aux sociétés religieuses intimées "The Annual Conference of *New-Brunswick* and *Prince-Edward Island*, in connection with the Methodist Church of *Canada*, et "The *New-Brunswick* Auxiliary Bible Society." Ce jugement ayant été porté en appel à la Cour Suprême du *Nouveau-Brunswick*, il fut confirmé, excepté quant aux quatre lots de terre situés dans la cité de *Saint-John*, qui furent déclarés ne pas faire partie du surplus à être ajouté aux legs des intimées. C'est ce dernier jugement qui est maintenant soumis à la révision de cette cour par les appelants, qui sont tous héritiers ou maris de quelques-unes des héritières du testateur *Gilbert T. Ray*.

Leur prétention est qu'après le paiement de tous les legs et l'extinction des annuités créées par le susdit testament, le surplus de tous les biens, soit mobiliers, soit immobiliers, doit leur revenir à titre d'héritiers pour être partagé entre eux. Le testateur, suivant eux, n'en

ayant point fait de disposition. Sa succession se trouve *ab intestat* quant à ce surplus. Les diverses sociétés religieuses intimées prétendent, au contraire, qu'il en a été disposé en leur faveur par la clause du testament déclarant que, dans le cas de *surplus* ou *déficit*, il faudra, suivant le cas, ajouter ou retrancher à leurs legs.

De l'interprétation de cette clause dépend la solution de la question soulevée.

Il n'est pas douteux qu'un des premiers devoirs du juge dans l'interprétation d'un testament est de s'efforcer de découvrir la véritable intention du testateur et de lui donner effet; mais, dans le cas actuel comme dans toutes les causes de ce genre, la difficulté est de constater cette intention. Les termes employés par les testateurs et la nature des dispositions testamentaires variant pour ainsi dire dans chaque cas, les précédents sont ici de peu de secours. C'est, en conséquence, aux principes généraux qu'il faut recourir pour trouver la solution de la présente difficulté.

On a vu, par les dispositions du testament rapportées ci-dessus, que le testateur a fait preuve d'une grande libéralité envers sa femme et ses proches parents. N'ayant point d'enfant, il a laissé à sa femme une rente annuelle de £300 et à sa sœur une autre rente de £200; à ses nièces, filles de cette sœur, une somme de £100 pendant huit ans, après la mort de leur mère; à ses neveux des sommes considérables et des propriétés immobilières à l'un d'eux. Il semble n'en avoir oublié aucun. Rien n'indique donc dans ce testament que le testateur ait voulu priver ses héritiers de sa succession. Aucune disposition ne les exclut, et il est de principe que même de simples expressions négatives ne suffiraient pas pour exclure l'héritier légitime, mais qu'il est nécessaire pour cela qu'il y ait une disposition formelle qui donne les biens de la succession à d'autres personnes. Le présent testament n'en contient aucune, à moins que

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l'on ne considère comme telle les expressions au sujet du surplus ou du déficit.

Quelle a pu être l'intention du testateur en employant les termes surplus ou déficit ? Se rapportaient-ils dans son esprit à toute sa succession, ou ne les appliquait-il, comme l'a pensé l'honorable juge *Wetmore*, qu'au surplus des argents qui lui étaient dus par *Robert Chesnut*, sur lesquels devaient se prendre les £1250 donnés aux *Worn-out Preachers* et au fond des veuves. Ou bien encore, le testateur voulait-il par ces termes faire allusion au surplus ou déficit qui pouvait avoir lieu après le placement des fonds nécessaires pour assurer le paiement des annuités, ou encore, le surplus de tous les capitaux, argents, biens personnels de toute espèce enfin qui devait inévitablement rester après le paiement des legs et l'extinction des annuités. Voilà bien des possibilités ; nous n'avons que l'embarras du choix et il n'est pas peu considérable.

L'idée que les termes surplus ou déficit pouvaient se rapporter à toute la succession est nécessairement exclue par la nature des dispositions du testament fait peu de jours avant la mort du testateur, à une époque où il était malade et ne pouvait plus songer à faire des affaires qui auraient pu matériellement altérer sa fortune. S'il était en état de faire un testament valable, on doit considérer qu'il connaissait parfaitement l'état de ses affaires, et qu'il ne pouvait pas ignorer que sa succession valait à peu près ce que l'inventaire, fait peu de temps après, a constaté, £18,592.2.7.

Avec l'idée de la valeur réelle de ce qu'il possédait, il ne pouvait certainement lui entrer dans l'esprit qu'après avoir fait des dispositions qui n'absorbaient qu'à peine une moitié de sa fortune, il avait à prévoir le cas d'un déficit, lorsqu'il devait au contraire savoir que, tous les legs payés, il devait encore rester une moitié de sa fortune, composée des capitaux qui devaient être

employés à servir les annuités. Il ne pouvait pas avoir de doute à ce sujet. Le caractère des libéralités faites à sa femme, à sa sœur et à ses nièces devait nécessairement, dans son esprit, exiger l'application de capitaux suffisants pour produire le montant des annuités constituées. Il a dû penser que ses exécuteurs testamentaires en agiraient ainsi, après avoir payé tous les legs exigibles au moment de son décès.

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La nature des dispositions indique clairement qu'un tel règlement devait avoir lieu peu de temps après l'ouverture de la succession, car la plupart des legs, à l'exception des annuités et de deux autres sommes, sont payables sans délai déterminé, et conséquemment immédiatement exigibles. Telle a été l'interprétation adoptée par les parties intéressées. Elles n'ont pas cru que le testateur avait ajourné le paiement de leurs legs à une époque éloignée, dépendant entièrement d'événements incertains, comme la mort de son épouse, arrivée en 1875, et celle de sa sœur en 1876 et devant se prolonger encore après le décès de cette dernière, pendant huit ans en faveur de ses filles. Il est certain que non. Le testament est au contraire fait dans la vue d'un règlement immédiat, excepté comme il a déjà été dit des deux autres legs. Dans le cas d'un tel règlement, prévu sans doute par le testateur, les legs une fois payés, et les capitaux nécessaires pour assurer les annuités placés, il était assez naturel pour lui de penser qu'il pourrait y avoir un certain montant au-dessus ou au-dessous du capital qu'il fallait investir pour assurer les annuités. Dans le premier cas, le surplus devait être partagé de la manière indiquée par la clause en question ; de même que dans le second cas, le déficit devait être comblé aux dépens des mêmes legs. Tout cela suppose une opération qui devait se faire presqu'aussitôt après la mort du testateur et non pas 26 ans après, c'est-à-dire à l'expiration de toutes les annuités. Le résultat défi-

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nitif de l'exécution du testament ne peut servir à l'interprétation d'une clause qui devait immédiatement recevoir son exécution. Pour saisir le sens de cette clause obscure, il faut se reporter à l'époque du testament, alors on comprend mieux que le surplus ou déficit dont le testateur a fait mention devait être le résultat qu'il entrevoyait comme la conséquence du règlement immédiat de sa succession.

En interprétant la disposition de cette manière, il se serait encore trouvé un surplus d'environ $8,000 ; mais d'un autre côté le testateur pouvait penser que quelques-unes de ses créances ou des capitaux pourraient diminuer de valeur et amener peut-être un déficit. C'est sans doute pour cette raison qu'il a fait usage des deux mots surplus ou déficit. A ce point de vue les deux mots s'expliquent d'une manière naturelle et *tous deux* reçoivent leur interprétation ; tandis qu'en les appliquant à la totalité de la succession il faut pour les interpréter omettre la possibilité entrevue par le testateur d'un déficit, et, dans ce cas la clause n'est pas interprétée dans son entier, puisqu'on l'applique à une certitude absolue au lieu de l'alternative possible prévue par le testateur. Ce n'est plus son intention que l'on constate, mais c'est une disposition que l'on fait pour lui en supprimant la possibilité d'un déficit. De cette manière on arrive à un résultat qui n'a jamais dû entrer dans l'esprit du testateur, celui de lui faire donner, au moyen de ces expressions vagues et obscures, plus de la moitié de sa succession.

A part de cette interprétation qui consiste à dire que le testateur avait en vue un surplus ou déficit après le paiement de tous les legs et le placement de tous les capitaux nécessaires pour produire les annuités, il y a encore celle suggérée par l'honorable juge *Wetmore*, tendant à faire l'application de ces termes au surplus ou déficit des argents dus par *Robert Chesnut*. Ainsi que

l'honorable juge en a fait mention, l'état de la succession produit par l'exécuteur testamentaire *Lockhart*, les legs en question payés, il reste encore un surplus de $1,200 sur la créance *Chesnut* qui pouvait être réparti suivant le désir du testateur. Il aurait pu se faire qu'il y eût un déficit dans la rentrée de cette créance, et c'est peut-être à une probabilité de ce genre que pensait le testateur lorsqu'il a fait la disposition dont il s'agit. L'une ou l'autre de ces deux explications me paraît plus conforme aux intentions du testateur que celle qui lui fait léguer plus de la moitié de sa succession, en donnant au mot surplus une signification à laquelle il ne pensait pas, puisqu'il ne séparait pas l'idée du surplus de la possibilité d'un déficit. Il y a en faveur de l'une ou l'autre de ces deux interprétations la possibilité de faire l'application des deux termes employés par le testateur, car dans l'un et l'autre cas, il ne pouvait dire avec certitude s'il y aurait ou non un surplus, tandis que le doute était impossible s'il avait en vue la totalité de la succession.

Quant à l'interprétation du mot "*surplus*" comme n'étant pas suffisant dans le cas actuel pour transmettre les propriétés immobilières, j'adopte le raisonnement de l'honorable juge en chef *Allen*, établissant bien clairement, suivant moi, que la disposition est tout à fait insuffisante pour produire cet effet.

Des différentes applications possibles du mot "surplus" mentionnées plus haut, il reste encore celle qui consisterait à l'appliquer aux biens mobiliers seulement, restant entre les mains des exécuteurs testamentaires après le paiement des legs et l'extinction des annuités. A cette interprétation j'oppose le raisonnement fait plus haut pour réfuter l'application que l'on veut faire du mot "surplus" à la totalité de la succession : ce n'est pas le cas prévu par le testateur. Il ne pouvait pas avoir un seul instant l'idée qu'il y aurait

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un déficit; il devait, au contraire, être bie ncertain qu'après déduction faite des sommes léguées, sa succession mobilière laisserait un surplus considérable. Ce devait être pour lui une certitude absolue à laquelle il n'est pas possible de faire l'application d'une phrase comportant un doute. Si son intention eût été de léguer le résidu de ses biens, il n'aurait certainement pas fait usage des deux mots surplus ou déficit. Il se serait évidemment borné à parler du résidu.

Quoi qu'il en soit, le moins que l'on puisse dire, c'est que, dans les circonstances de la cause, cette clause du testament fait naître tant de doute qu'il n'est guère possible de lui donner effet sans s'exposer à faire un testament pour le testateur. Il n'y a aucune raison de donner une interprétation forcée à ces termes, dans le but d'assurer l'exécution complète du testament. Toutes ses dispositions positives ont été exécutées ; chacun des légataires a reçu ce qu'il devait recevoir. Dans un cas semblable, le doute qui rend l'exécution d'une telle disposition aussi incertaine doit tourner au bénéfice de l'héritier légitime. Dans le cas d'une telle interprétation, il est vrai qu'il reste une partie de la succession dont le testateur n'a point disposé. C'est vrai, mais ce n'est pas un événement très rare, et lorsqu'il se présente, la loi supplée à l'omission du testateur. Rien n'oblige un testateur à faire une disposition de tous ses biens par testament. S'il est vrai que l'on présume ordinairement qu'il a voulu disposer de la totalité, faut-il au moins pour cela qu'il y ait dans le testament des expressions générales qui puisse établir que telle a été son intention. Nous n'en trouvons aucune dans le testament en question. Les expressions en tête du testament : "This is my last will and testament," font bien voir que c'est le testament auquel il s'arrête et le seul auquel il entend donner effet, si toutefois il en a fais d'autres ; mais cette déclaration ne fait aucunement

voir l'intention de disposer de la totalité de succession. Pour réaliser cette intention, si elle eût existé, il faut des dispositions formelles pouvant avoir cet effet.

It certainly shows that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an active disposition.

Si les expressions générales qui, dans bien des cas, ont été jugées suffisantes pour opérer une disposition de toute la succession, comme celles-ci par exemple : "*All that I am worth,*" "*all that I shall die possessed of,* "*real and personal, of what nature and kind soever,*" "*such* "*wordly property wherewith it has pleased God to bless me in this world, I give,*" etc., se rencontraient dans le présent testament, on pourrait avec raison en tirer la conclusion que les mots *surplus* ou *déficit* doivent se rapporter à une disposition universelle et qu'ils doivent en avoir les effets, au moins quant aux biens mobiliers. En l'absence de semblables expressions, je ne puis pas donner aux mots surplus et déficit une autre signification que celle que j'ai essayée de leur trouver et que j'ai exposée plus haut. C'est sur cette signification que je m'appuie pour conclure que le testateur n'a pas disposé de toute sa succession et que le *surplus* qui devait être adjugé aux intimées devait être seulement l'excédant des capitaux nécessaires au service des annuités,—les capitaux eux-mêmes devant retourner aux héritiers du testateur, faute de disposition suffisante pour les transmettre à d'autres personnes.

HENRY, J :—

The will in this case was made on the 11th October, 1858, and the testator died on the 23rd of the same month; and, probate having been granted to his executors, they, on the 25th July, 1859, filed an inventory of his estate amounting to £18,592 2s 7d., or $74,390.11.

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The legacies to be paid under the will amounted to £10,350 or $41,400.

The testator left to his widow an annuity of £300, or $1,200, a year during her life, and the use of a house, valued at £1,500, or $6,000, and the furniture therein. He also left to his sister *Rachel* an annuity of £200, or $800, a year for her life, and at her death one-half that sum to her daughters for 8 years.

It appears and it is admitted, that after the paying the legacies and annuities, there remained of the estate at the time of the commencement of the suit, undisposed of in the hands of the surviving executor in the shape of land in the county of *Sussex*, valued at $608, mortgage securities $17,005, stocks $14,900, debentures $6,600 and cash $349.12, making in all $39,462.12.

The widow of the testator died in 1875, and his sister *Rachel* in 1876. The only remaining charges on the estate under the will are a legacy of £400 to *Charles Pritchard*, and the annuity of £100 to the daughters of *Rachel* the sister of the testator.

The appellants claim to be entitled to the balance as next of kin and heirs at law of the testator. The respondents claim it under the last clause of the will.

The testator, by his will, after giving an annuity of £300 and the use of a house and furniture to his widow during her life, and an annuity of £200 to his sister *Rachel* during her life, made bequests to the respondents amounting in the aggregate to £2,900, and several bequests to some of the appellants and others amounting to $7,840, and concludes his will by these words "should there be any surplus or deficiency a *pro rata* addition or deduction, as may be, to be made to the following bequests, viz: Worn out preachers and widows fund. Wesleyan Missionary Society. Bible Society."

Our judgment therefore depends solely on the construction to be put upon this clause of the will.

The testator was a permanent resident of *St. John, New Brunswick*, but his will shows it was made at *Granville*, in *Nova Scotia*, where, it states, he was "at present residing." Being absent from his place of business when the will was executed it is not unreasonable to conclude that he had not all the means of reference for information as to the value of his estate which he otherwise would have had, and that may account for the large part of it left specifically undisposed of. We cannot speculate as to the result of a more specific disposition under other circumstances. It is, however, reasonable to conclude that had he known or thought, at the time of making his will, of the value of his estate, he would have disposed of it more specifically. If indeed he had reason to believe his estate was as valuable as it really was, would he, if he intended so large a bequest to the respondents, have given them the specific sums bequeathed to them respectively, or is it not the reasonable presumption that he intended to make a distribution of his estate in something like the proportions stated in his will, but that he wished to have the annuities and legacies to his relatives and other friends, securely provided for, and that any unimportant deficiency or excess should affect only the legacies to the respondents. We must gather the intentions of the testator from his will, and from that alone where it is unambiguous. Where it is otherwise, we are not only permitted, but bound, to call to our aid, in considering the matter, the surrounding circumstances, including the quality, extent and value of his whole estate, and, looking at the whole will, come to a conclusion as to the intentions of the testator. It is an elementary principle of the law that it requires an express devise or bequest to oust the heir-at-law, or, what may be as effectual, a clearly manifested intention shown in the will to oust him. The party seeking to

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do so has the burden on him of showing it, and if there is any reasonable ambiguity as to the right or claim of a residuary or other legatee, the heir is entitled. That principle is clearly applicable in this case, if the residuary clause admits of two constructions—one favorable, the other adverse to the claim of the respondents

In resolving the difficulty it becomes necessary to enquire, in the first place, at what time under the will was the distribution to be made? If the inventory showed sufficient to pay and provide for the specific legacies other than those to the respondents, independent of the security necessary to provide for the payment of the annuities, the other legacies vested and the legatees could, in a short time after the inventory was filed, being the time provided by law for distribution, have enforced their claims to them. The inventory having been filed in July, 1859, we find nothing in the case to show when the specific legacies were paid except those to the respondents, which was in November and December, 1860. The receipts for the same are, in one case, for "one thousand two hundred and fifty pounds bequeathed to the worn-out Preachers and Widows Fund in connection with the Wesleyan Conference here." Another for "One thousand five hundred pounds bequeathed to the Wesleyan Missionary Society in connection with the Conference here;" and the third for "One hundred and fifty pounds bequeathed to the Bible Society."

Those entitled to the legacies just mentioned, at the dates of the payments to them, received from the executors the several sums as and for the bequests made to them respectively by the testator. They received, and the executors paid, those several legacies, with, as we must assume, a full knowledge of all the circumstances of the estate and of the terms of the will. It is very questionable in my mind, whether the parties who

received payment of those legacies on the terms stated in the several receipts would not be estopped from claiming further of the estate. The words used make no reference to any specific legacy, but refer to and include all *bequeathed by the testator*. The parties entitled to the legacies had then the alternative of accepting or refusing the several amounts, and in doing the latter might have waited until some future time to have ascertained whether they would be entitled to claim more under the residuary clause, or run the risk of getting less. The residuary clause (so called), in the shape we find it, is an unusual one. In the usual residuary clauses the terms are plain and simple ; they, in most cases, provide for giving unqualifiedly the residue of the estate. Here the residuary clause operates both ways ; either to add to or diminish the amounts of certain preceding specific legacies. A different construction must therefore be be given to it. It gives nothing absolutely ; and not only so, but provides for even a deduction from previous bequests. We must, therefore, ascertain from the whole will what the testator intended when he made provision for the result of "any surplus or deficiency."

As I have already shown, parties interested as legatees, the payment of whose legacies was not postponed, might, under the law, have enforced the payment of all the legacies at or about the date of the payment of the legacies to the respondents. We are not informed whether they did so or not ; but it may be presumed from what we do know, that they pressed for payment at the usual time, and the respondents may also have done so. There was no provision in the will for ascertaining the amount of the several legacies to be paid to the respondents more than once ; and, when once done, I think it must be considered as final. It was a question of deduction from or addition to the amount of the specific legacies to them ; and the case is, therefore, very different from

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what it would have been had no question of *deduction* required to be settled. That question had to be considered in connection with the provision for addition, if the value of the estate entitled the respondents to it. When, therefore, they received the respective amounts, they saved themselves from the *chances of a reduction*, and that, it appears to me, taken in connection with the receipts signed, is evidence of a waiver of any further claim. At the time (in 1860) when the respondents received the amount of the specific legacies, in what position was the estate, and what course had the executors to adopt to secure to all parties the rights they obtained under the will, and, at the same time, to secure themselves? After the lapse of over twenty years we are apt to look at the present position of the estate and be thereby influenced. It is, however, wrong to do so. That a comparatively large balance remains undisposed of is fortunate; but it was not necessarily so, and although the assets in 1860 warranted the belief that the estate would eventually be sufficient to meet the provision for the annuities and unconditional legacies, it might have resulted very differently. The assets were largely composed of property liable to loss and deterioration, such as vessels liable to be lost, damaged, or decreased in value, and unsecured debts due to the estate. This information I have got from the inventory. We have none as to the position or value of the assets when the legacies were paid to the respondents; but we have this fact, that several of the debts are marked "doubtful" in the inventory. No general account of the executors showing receipts and payments was in evidence, and all we have is a statement of what, at the time the present suit was commenced, was then alleged to be in the hands of the surviving executor. This gives us no information as to the position of the estate in December, 1860. We cannot therefore judge

as to it when the payments of the legacies in question were made, and cannot decide whether or not it was, at that time, for the interests of the respondents to have accepted the sums paid them as in full for what was bequeathed to them. Their acceptance of the amount of the specific legacies is, however, affirmative evidence that it was so. In taking this position, however, I do not, in the absence of more positive evidence, insist upon their receipt of the specific legacies as a full and complete bar to the claim they now make; but as evidence to aid us in the construction of the ambiguous clause in question, so far as their acts are evidence of the construction put upon it by themselves at the time. Independently, however, of every other consideration let us see, as far as we can from the evidence before us, what were the duties and responsibilities of the executors in December, 1860, before the payments in question were made. They had then, as shown by the inventory, an estate amounting in gross to $74,368.50.

They had, then, that sum available to provide for the annuities and legacies. I have made a calculation of the amount the executors should retain for the annuities, which constituted the first charge, and for the unconditional legacies, and find that for that purpose nearly the whole sum would be required, leaving little or nothing for the conditional legacies to the respondents. Did then the testator intend that should be the mode of dealing with his estate, or did he mean that the matter of his estate should remain open and undistributed, and the matter of the adjustment, under the residuary clause, postponed until the lapse of the annuities by the death of his widow and his sister *Rachel*? We find the former lived seventeen and the latter eighteen years after his death; and, for all we know, they might in the course of nature have lived many years longer. I cannot bring myself

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to the conclusion that the latter is the proper construction of the clause. We must read the will, as I before said, not by any speculation as to how he would have disposed of the balanee now claimed had he known positively how the administration of his estate would have resulted, but by the words he uses in respect to his bequests. And if we can find a reasonable interpretation we should at once adopt it in preference to one of an opposite character. We must assume, in the absence of postponing provisions, that he meant his estate to be administered in the usual legal way and within the prescribed time. Did he desire the estate not to be governed by the law as to estates generally? We would look for some manifestation of such in the will; but such is not to be found in it; we cannot therefore attribute to him any such desire. He, in my opinion, therefore, virtually instructed his executors within the prescribed period to ascertain how much of his estate, specially undevised, would be necessary to secure the annuities and pay or secure the unconditional legacies, and to apply the balance to the payment of the conditional legacies to the respondents. If not sufficient to pay the whole, then to pay in the proportion he prescribed. If more than sufficient, to distribute the surplus in the same proportion. Taking the clauses giving the specific sums to the respondents, with the residuary clause, they are just the same as, and no more, in my opinion, than a provision in the will, stating that if any balance remained after providing for the annuities and unconditional legacies, it was to be distributed to the respondents in the proportion of £1,250 to one; £1,500 to another; and £150 to the third. Each of those specific bequests is just as effectually made to depend on a contingency in the one case as in the other; and the question is, what that contingency is, and when it was to arise and govern the dis-

tribution? I have called the clause in question a residuary clause, but it is not so in the usual acceptation of the term. It amounts to nothing more than conditional bequests to the bodies named. The usual residuary clause is evidence of an anticipated surplus from the whole or certain prescribed parts of an estate. The clause in this will is evidence that the testator was altogether uncertain whether there would be sufficient to pay even the whole or any part of the specific bequests to the respondents.

I have fully considered the bearing of the cases cited at the argument, and others, from which I am justified in saying that it requires, in order to divest the heir-at-law, that it should conclusively appear on the face of the will to have been the testator's intention to do so; in fact, that the testator should clearly manifest his intention of disposing of the whole of his estate.

I will refer to two cases in proof of the positions I have taken.

In *Hughes* v. *Pritchard* (1), in 1877, the words used by *James*, L. J., as showing the purport of the will in that case, are:

> In order to make a disposition of all my estate, real and personal, I give Whiteacre to *A.*; Blackacre to *B.*; £1,000 to *C.*; my shares to *D.*, and I make *E. F.* and *G.* my residuary legatees.

The question at issue was whether such a devise would include a farm to the residuary legatees which was not specifically devised, and it was held that it did, to the exclusion of the heir-at-law.

Bramwell, L. J., in his judgment, uses these words:

> But it is true that though he says "I ordain this to be my last will and testament," if he had omitted to dispose of any portion of it, it would follow then that the intention he had expressed would be unfulfilled as to part of his estate. But that is not so, because, after giving, as has been observed, gifts of personalty and devises of realty he finishes in this way: I make my sister, *Mary Pritchard*, and

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the others my residuary legatees, that is to say, legatees of the residue. Residue of what? Why, residue of that of which he had been previously disposing of parts.

The learned judge thought, from the tenor of the will generally and the words "the estate which God has been pleased in his good providence to bestow on me," which are very comprehensive, and upon which much stress was laid, that the testator did not intend to die intestate as to the farm then in question.

In that case the residuary clause is altogether unambiguous and very comprehensive. In this the provision is of very uncertain meaning and reference. There are no words showing, as in the case cited, the intention of the testator to dispose of his whole estate. In that the testator expressly stated his intention to devise and bequeath all the estate, real and personal, which it pleased God to bestow on him. Here no such intention is manifested or declared. In this case we have not only the absence of any expression of such intention, but a disposition which can be understood, as the intention of the testator to make his bequests to the repondents wholly to rest on the contingency which I have explained.

As I before stated, the onus of sustaining the bequests is on the respondents; and in order to divest the heir-at-law the devise must be certain and unambiguous.

The prevailing rule is laid down by Lord *Mansfield*, C. J., in *Roe ex dem. Willing* v. *Tend* (1), thus:—

> In cases between the heir and the devisee the question is not whether the heir can prove that the testator did not intend to pass real property, but whether the devisee can prove that he did; the proof lies on the devisee.

The same doctrine is applicable to this case and must guide us.

After the best consideration I have been able to give

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to the matter, I have arrived at the conclusion that the respondents have failed to show, as they were bound to do, a devise to them sufficient to oust the heirs. At the very least, there are grounds for serious doubts which should not exist in a case in which it is sought to oust the right of the heirs-at-law and which alone are sufficient, in my opinion, to prevent the recovery of the respondents; such doubts should not be resolved in favor of the latter upon mere speculation. If they have failed to remove all such doubts, the heirs are entitled to our judgment. I think there are such doubts at all events in this case, and therefore our judgment should find that the balance now in contest was undisposed of by the will—that no provision was therein made for the disposition of it, and that to that extent the testator died intestate.

I think the appellants are entitled to our judgment in their favor, and that the appeal should be allowed with costs

GWYNNE, J.:—

It may be that if the testator had thought that his estate would have turned out as valuable as it has done, he might have made a different disposition of the surplus; but the question we have to deal with is, what is the disposition which he has made of his property by his will, and upon this point I concur in the construction put upon the will by the majority of the court below, and in the reasons given for that judgment.

Appeal dismissed with costs.

Solicitor for appellants: *F. E. Barker.*

Solicitors for respondents, *The Annual Conference, &c.: A. A. & R. O. Stockton.*

Solictors for respondents, *The N. B. Auxiliary Bible Society: H. L. Sturdie.*