[HIGH COURT OF AUSTRALIA.

PARKIN AND COWPER . . . . . APPELLANTS;
PLAINTIFFS,

AND

JAMES AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS (No. 2),

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Aug.* 1, 2, 14.

Griffith C.J., Barton and O'Connor JJ.

Will—Construction—Legacy—Annuities—Payment out of personal estate—Charge on real estate—Gift of all property as blended fund to trustees—Intention of testator.

Where by his will a testator expresses the intention that his real and personal property shall form a blended mass from which certain legacies and annuities are to be paid, these legacies and annuities are charged on the corpus of the real estate, and in such a case the rule that a legacy is *primâ facie* payable out of personalty has no application.

A testator gave devised and bequeathed to his executors and trustees all his real and personal estate whatsoever upon the trusts thereinafter declared of and concerning the same, that is to say upon trust to pay his debts, &c. He then gave a specific bequest to his wife, he directed his executors and trustees to pay an annuity to each of three children, he directed his executors and trustees to set aside three several sums and to pay the income arising therefrom to three several persons for each of their lives with a gift over of the corpus, then followed a gift of a sum of money to his solicitor. The will continued: "As to the rest and residue of the income of my trust estate after making the payments hereinbefore set forth I direct" my executors and trustees "to pay the same to my wife" for life or until her re-marriage, "and from and after her death or marriage again I direct" my executors and trustees "to convert the whole of my estate whether real or personal into money and to divide the same amongst my five children." He also empowered his executors and trustees, "notwithstanding anything hereinbefore contained to the contrary" to sell any of his real estate and invest the proceeds, "and pay and apply the income arising therefrom in the same manner as if my said real estate had not been sold as hereinbefore appearing."

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Held, that the annuities to the three children and the three several sums directed to be set aside were charged upon the corpus of the real estate.

Judgment of *Hodges* J. on this point reversed.

APPEAL from the Supreme Court of Victoria.

Charles Lister, deceased, made his will on the 15th October, 1890, the material portions of which were as follow:—"I give devise and bequeath unto my said executor executrix and trustees all my real and personal estate and effects whatsoever and wheresoever situate upon the trusts hereinafter declared of and concerning the same that is to say upon trust that my said executor executrix and trustees shall as soon as conveniently can be after my decease pay all my just debts funeral and testamentary expenses I bequeath the household furniture plate linen china glass books fuel and housekeeping stores horses carts carriages vehicles pictures prints and other household effects of which I shall die possessed to my wife absolutely I direct my said executor executrix and trustees to pay to my daughter Annie Lister for her life or to such time as the payment of the said annuity shall be determined as hereinafter mentioned an annuity of One hundred pounds per annum by equal quarterly payments commencing from the date of my death for her sole and separate use free from all legacy duty Also to pay to my daughter May Lister for her life or to such time as the payment of the annuity shall be determined as hereinafter mentioned an annuity of One hundred pounds per annum by equal quarterly payments to commence from the date of my decease for her sole and separate use free from all legacy duty Also to pay to my son Harold Lister for his life or to such time as the payment of the annuity shall be determined as hereinafter mentioned an annuity of One hundred pounds by equal quarterly payments commencing from the date of my decease free of all legacy duty I direct my said executor executrix and trustees to set aside a sum of One thousand pounds free of all legacy duty and invest the same upon Government or real securities or by depositing the same at interest in any of the associated banks in Melbourne and to pay the income arising therefrom to Elizabeth Parkin wife of John Arthur Parkin for her sole and separate use so long as she shall live and after her decease to pay the income arising from the aforesaid investment to the said John Arthur Parkin for his

life and after his death I direct my said executor executrix and trustees to divide the principal sum of one thousand pounds equally between and amongst such of the children of her the said Elizabeth Parkin as shall be living at the date of the decease of the survivor of them the said Elizabeth Parkin and John Arthur Parkin I direct my said executor executrix and trustees to set aside the sum of £1000 free of all legacy duty and invest the same upon Government or real securities or by depositing the same at interest in any of the associated banks in Melbourne and to pay the income arising therefrom to William Cowper for his life and after his decease to divide the said principal sum of one thousand pounds equally between and amongst such of his children as shall be living at the date of his death I direct my executor executrix and trustees to set aside a sum of five hundred pounds free of all legacy duty and invest the same upon Government or real securities or by depositing the same at interest in any of the associated banks in Melbourne and to pay the income arising therefrom to Emma Burton now the wife of John Burton for her life and after her decease to divide the said principal sum of five hundred pounds equally between and amongst such of the children of the said Emma Burton born of her previous marriage with one Obadiah Booth as shall be living at the date of her decease I give devise and bequeath to my solicitor the said Arthur Henry Manton the sum of two hundred and fifty pounds free of all legacy duty. As to the rest and residue of the income of my trust estate after making the payments hereinbefore set forth I direct my said executor executrix and trustees of this my will to pay the same to my dear wife Annie Lister for her life if she shall so long continue my widow and from and after her death or marriage again whichever event shall first happen I direct my said executor executrix and trustees to convert the whole of my estate whether real or personal into money and to divide the same between and amongst my five children that is to say George Lister Frank Lister Annie Lister May Lister and Harold Lister . . . I declare it shall be lawful for my said executor executrix and trustees of this my will in their discretion to raise and apply in or towards the advancement in life of each of my children Annie Lister May Lister and Harold Lister

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a sum of two thousand pounds each but so soon as such advancement has been made to all or any of my said children the annuity of one hundred pounds hereinbefore directed to be paid to them or him or her as the case may be shall thereupon cease and be determined . . . . . I also empower and authorize my executor executrix and trustees notwithstanding anything hereinbefore contained to the contrary to sell all or any part of my real estate . . . . upon trust to invest the money arising from the sale in the names of my said executor executrix and trustees upon Government or real securities or by depositing the same at interest in any of the associated banks in Melbourne and to pay and apply the income arising therefrom in the same manner as if my said real estate had not been sold as hereinbefore appearing."

The testator died on 23rd Feb., 1892, and probate of his will was granted on 31st March, 1892, to Arthur Henry Manton and Annie Lister the executor and executrix appointed by the will. Manton having died on 23rd May, 1896, Alfred Ernest James was, on 1st October, 1903, appointed by Annie Lister to be co-trustee with her, and Annie Lister having died on 29th April, 1904, her daughter Annie Watson Lister was by Alfred Ernest James appointed to be his co-trustee.

The personal estate was insufficient to pay the debts and legacies.

An originating summons was taken out by Alfred Ernest James, one of the trustees of the will, to determine the following questions (*inter alia*) arising in the administration of such will and the execution of the trusts thereof:—

1. According to the true interpretation of the will was the real estate of the testator applicable for the payment of:—
   (*a*) The three annuities given by the will.
   (*b*) The three sums of £1000, £1000 and £500 directed by the will to be set aside and invested either in aid of the income of the estate and the general personalty or otherwise and if so how otherwise.

3. How and out of what funds or properties were the said annuities and the said sums payable and in what order of liability?

4. Is interest payable on the arrears of the said annuities and on the said sums? If yea at what rate and as from what time and out of what fund?

The summons coming on for hearing before *Hodges* J., he answered the questions above set out as follows:—

1. That, according to the true interpretation of the said will, the corpus of the real estate of the testator was not applicable for the payment of the three annuities given by the will, or of the three sums of £1000, £1000 and £500 directed therein to be set aside and invested or of any of them, and the said annuities and the said sums of £1000, £1000 and £500 were to be paid only out of the income of the trust property.

3. That the said annuities and sums were payable out of the income of the trust estate, and that none of the said annuities or sums was entitled to any preference over any other part of the said annuities or sums.

4. That no interest is payable on the arrears of the said annuities, but that interest at the rate of four pounds per cent. per annum is payable out of the income only on the said sums, such interest to commence to run from the time there was or ought to have been a fund available out of which these moneys or any part thereof should have been paid, provided that, if and so far as such fund would only provide for part of such sums, interest should only be calculated on such part.

From the order so made by *Hodges* J., the plaintiffs now appealed to the High Court asking that the order might be varied, and that an order be made that the sums of £1000, £1000 and £500 directed by the will of the testator to be set aside and invested were to be and should be set aside out of the corpus of the testator's estate, and that interest thereon at four per cent. per annum should be paid as from the testator's death or within twelve months afterwards.

McArthur (with him *Cussen*) for the appellants. It is admitted that legacies are not charged on the real estate unless there are words in the will which show an intention on the part of the testator that they shall be so charged. If the testator deals with his whole estate real and personal as a blended mass and

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gives to certain persons the residue of that blended mass, and out of that mass gives certain legacies, then the effect is to charge the legacies upon the real estate: *Greville* v. *Brown* (1). It is not necessary to use the specific words "rest and residue" in order that this result may be brought about as long as it can be gathered from the will that the testator intends to dispose of the blended mass: *In re Bawden* (2). The clauses of this will from which that intention is to be gathered are the gift of the whole of the estate real and personal to the trustees "upon the trusts hereinafter declared of and concerning the same"; the direction to set aside the several sums of £1000, £1000 and £500; and the direction after the death or re-marriage of his widow to convert "the whole of my estate real and personal," &c. There must be inserted into the latter direction, after the words "my estate real and personal," the words "not otherwise disposed of." He also referred to *Theobald on Wills*, 6th ed., p. 797.

Hogan for the trustees. There is evidence that, at the time the will was made, there was ample income from the estate out of which to pay the legacy to the solicitor and to set aside the three sums mentioned. That evidence may be taken into consideration in interpreting the will. *Gordon* v. *Gordon* (3).

Higgins K.C. and *Irvine* for the respondents Annie Watson Lister, May Lister and Harold Lister. The onus is on the appellants of showing that there is a charge express or by implication upon the corpus of the real estate. They have not discharged that onus. As to the clause giving all the property real and personal "upon the trusts hereinafter declared of and concerning the same" it must be interpreted *reddendo singula singulis*; it does not mean that all the property is given on all the trusts: *In re Cameron* (4). There is no doubt that the rule is that legacies are to be paid out of personalty unless there are words charging the real estate: *Inchiquin* v. *French* (5); *Parker* v. *Fearnley* (6). There is no distinction for this purpose between a

(1) 7 H.L.C., 689.
(2) (1894) 1 Ch., 693.
(3) L.R. 5 H.L., 254, at pp. 268, 273.
(4) 26 Ch. D., 19, at p. 25.
(5) 1 Amb., 37.
(6) 2 Sim. & St., 592.

legacy and an annuity, which is a series of legacies contingent on the life of the annuitant: *Miller* v. *Huddlestone* (1); *Ward* v. *Grey* (2). The idea of the testator is that he will have plenty of assets out of which to pay all his gifts, and that the income of the estate will provide for the legacies. He then tells the trustees that, when they have paid the legacies, they are to pay the rest of the income to the widow. It is not disputed that the legacies are charged on the income of the real estate by reason of the gift of the residue of income. In order to apply the words of the will, one must know the subject-matter to which they can apply. The Court will presume that the testator, when he made his will, thought he had enough to provide for all his bequests. The direction to set aside a sum does not create a charge: *Gee* v. *Mahood* (3). The respondents are entitled to call in aid the principle of administration that annuities and legacies are payable out of personalty and abate rateably unless a contrary intention is expressed. There is another principle, which is one of construction, that sums of money are charged upon the real estate if the real estate is given subject to payment of these sums. There is nothing in this will which indicates an intention to postpone annuities to legacies, or to charge either upon the real estate. The natural meaning should be given to the words "the rest and residue of the income of my trust estate" unless some repugnancy with other parts of the will is thereby created. The natural meaning is the income of the trust estate after paying out of that income the various sums before mentioned. The words do not mean the reduced income after payment out of the corpus of those various sums. An annuity is as much a charge on the corpus as is a legacy: *Wroughton* v. *Colquhoun* (4).

[GRIFFITH C.J.—Have the annuitants any right to ask for an alteration of the answers in their favour?]

This Court will give the answers that ought to have been made below.

[GRIFFITH C.J.—That is only as to the subject-matter of the appeal.]

(1) 3 Mac. & G., 513, at p. 523.
(2) 26 Beav., 485, at p. 491.
(3) 11 Ch. D., 891, at pp. 894, 897.
(4) 11 Jurist, 536, 940; 1 DeG. & S., 36, 357.

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I ask formally for leave to appeal if it is necessary. The words "set aside" have no greater effect than the word "pay." The power of sale of the real estate given by the will shows that the testator did not mean that the real estate should be applied to payment of legacies. The general power of sale and mortgage does not protect the executor unless he sells or mortgages for a proper purpose.

They also referred to *Administration and Probate Act* 1890, (Vict.), sec. 7: *Boughton* v. *Boughton* (1); *Croly* v. *Weld* (2).

Cussen in reply. While the Court is at liberty to look at the condition of the testator's estate when he made the will for the purpose of identifying particular subject-matters therein referred to, it may not do so in order to find out what was the testator's intention in making the dispositions contained in the will. *Higgins* v. *Dawson* (3). There is no conflict as to the rule of law, viz., that legacies are a charge on personalty and are payable only out of it unless by express words or by implication an intention is shown to charge them on the real estate. There is an express direction to charge these sums on the real estate in the gift to the trustees of the whole estate real and personal upon the trusts of the will, and in the direction to set aside these sums, and there is an implied charge of them upon the real estate in the direction as to the rest and residue of the income. It is beside the question to show that the personalty is the primary fund out of which these sums should be paid. Examining the last mentioned clause, if the word "payments" includes the three sums directed to be set aside, then having regard to the nature of these sums and the direction to set them aside, it is quite clear the words "after making the payments hereinbefore set forth" attach themselves to the words "trust estate." If so, the case is within the rule in *Greville* v. *Brown* (4). If the word "payment" does not include these three sums, but is confined to the debts, annuities and the income of the sums to be set aside, this particular clause does not show one way or the other what the testator intended. The words "trust estate" clearly mean the

(1) 1 H.L.C., 406, at p. 435.
(2) 3 DeG. M. & G., 993.
(3) (1902) A.C., at pp. 5, 7.
(4) 7 H.L.C., 689.

whole estate real and personal, and that gets over any argument which can be drawn from *In re Cameron* (1), in which the Court came to the conclusion that the real estate was not dealt with at all by the will. The meaning of "the rest and residue of the income" will depend on the meaning of "payments." These words suggest that the testator thought that the payments of income of the sums to be set aside, would be payments out of the income of his estate, and that the sums themselves, being still under the control of his trustees, were part of his estate. In this view these words qualify the words "trust estate." The principle *reddendo singula singulis* does not apply to the particular clause by which the testator gives all the real and personal property to his trustees. That clause is an express direction charging the real estate with all and each of the five payments thereafter mentioned.

He also referred to *In re Smith* (2); *Theobald on Wills*, 6th ed., p. 804; *Meierhause* v. *Scaife* (3); *Robertson* v. *Broadbent* (4).

Cur. adv. vult.

The judgment of the Court was read by

GRIFFITH C.J. The testator by his will appointed his wife and A. H. Manton to be executor, executrix and trustees of his will, and in the event of the death of either appointed his son George to be executor and trustee with the survivor. He then gave, devised and bequeathed to his "said executor executrix and trustees" all his real and personal estate whatsoever "upon the trusts hereinafter declared of and concerning the same, that is to say, upon trust that my said executor executrix and trustees shall as soon as conveniently may be after my death pay all my just debts and funeral and testamentary expenses I bequeath" (then followed a specific bequest to his wife). The will proceeded: "I direct my said executor executrix and trustees to pay to my daughter Annie for her life or to such time as the payment of the said annuity shall be determined as hereinafter mentioned an annuity of £100 per annum by equal quarterly payments com-

(1) 26 Ch. D., 19.
(2) (1899) 1 Ch., 365.
(3) 2 My. & C., 695, at p. 707.
(4) 8 App. Cas., 112.

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mencing from the date of my death for her sole and separate use free from all legacy duty." Then followed gifts of annuities of £100 each to his daughter May and his son Harold, expressed in the same terms as the gift to Annie. The will then went on: "I direct my said executor executrix and trustees to set aside a sum of £1000 free from legacy duty and invest the same" in certain specified securities "and to pay the income arising therefrom to Elizabeth Parkin wife of John Arthur Parkin for her sole and separate use as long as she shall live," and after her decease to pay the income to her husband for his life, "and after his death I direct my said executor executrix and trustees to divide the said principal sum of £1000 equally" amongst such of their children as should be living at the death of the survivor. Then followed directions to set aside and invest another sum of £1000 and a sum of £500, and to pay the income of the investments to named persons for life and after their death to divide the corpus. These gifts are in identical language, so far as material upon the question of construction, with the gift of the £1000 for the benefit of Mrs. Parkin and her children. The next clause in the will is in these terms: "I give and bequeath to my solicitor the said A. H. Manton the sum of £250 free of legacy duty," after which the will proceeds: "As to the rest and residue of the income of my trust estate after making the payments hereinbefore set forth I direct my executor executrix and trustees of this my will to pay the same to my wife for her life if she shall so long continue my widow and from and after her death or marriage again . . . I direct my said executor executrix and trustees to convert the whole of my estate whether real or personal into money and to divide the same amongst my five children," naming them, with a direction to deduct from the shares of two of his sons advances which he had made to them in his lifetime. The testator then declared that it should be lawful for his executor executrix and trustees in their discretion to raise and apply in or towards the advancement in life of each of his children Annie, May, and Harold, the annuitants, a sum of £2000 each, and that upon such advancements being made their respective annuities of £100 should cease. He also empowered his executor executrix and trustees "notwithstanding anything hereinbefore contained to the

contrary" to sell any of his real estate and invest the proceeds and "pay and apply the income arising therefrom in the same manner as if my said real estate had not been sold as hereinbefore appearing."

The personal estate having proved insufficient for the payment of debts and legacies, an originating summons was taken out for the determination (*inter alia*) of the question whether the corpus of the real estate was applicable to the payment of the three annuities of £100 and the three sums of £1000, £1000, and £500, with other incidental questions which would arise if that question were answered in the affirmative. The summons was heard by *Hodges* J., who decided that the corpus of the real estate was not applicable for the payment of the annuities and sums in question, and that they were to be paid only out of the income of the trust property. From this decision the persons entitled in respect of the sums of £1000, £1000, and £500 have appealed to this Court. The annuitants are respondents to the appeal, and have asked to be allowed to become themselves appellants if the Court should be of opinion that the annuities are charged on the corpus of the real estate.

In the reasons for the learned Judge's decision furnished to us, after referring to the residuary gift of income to the testator's wife, he points out that in order that there may be a residue of income there must have been a disposition of a portion of it, and the testator must be dealing with the remainder. From this he concludes that the testator meant the sums previously mentioned to be paid out of the income of his trust estate, and thinks that this provision and the direction to convert the whole of the estate at his wife's death taken together show that it was to remain intact until the death of his wife, and that those payments were consequently to be made out of the income, and that the corpus for that purpose was not to be touched. The view that the annuities and sums in question were only charged upon the income, and not upon the corpus, of the personal estate was not presented to us. Such a view would be quite inconsistent with the expressed intention of the testator that the beneficiaries should enjoy the income given to them for their lives. The residue of the income is only given to the widow during widowhood, and is followed by

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a direction for conversion and distribution of the whole corpus upon her death or marriage, so that on such a construction the continuance of the income of these beneficiaries would depend upon the continuance of her life interest. The language of the residuary gift of income, upon which the learned Judge mainly based his decision, appears to be susceptible, grammatically, of two constructions. The phrase "after making the payments hereinbefore set forth" is an adjectival expression which may be read as qualifying either the word "income" or the words "trust estate." If read in the latter sense, it is clear that the rule finally established by *Greville* v. *Brown* (1), that when, after a gift of legacies, there is a gift of the residue of real and personal estate the legacies are charged on the realty, would apply. Having regard to the whole scheme of the will there is, in our opinion, much to be said in favour of this construction. A more purely verbal criticism of the language of the will, however, tends rather to favour the former construction, which was adopted by the learned Judge. The words "after making the payments hereinbefore set forth" obviously refer to some preceding provisions of the will relating to payments. Now we find that all the preceding gifts, except the specific bequest to the testator's wife and the gift of the legacy of £250 to his executor, are expressed in directions to "pay." In the case of the gifts of the annuities the gifts are introduced by the words "I direct my executor executrix and trustees to pay." In the case of the gift of the three sums claimed by the appellants the direction to the same persons is to "set aside" and invest the sums and "to pay the income." Taking, then, the word "payments" in the residuary gift to refer to the antecedent directions "to pay," it would appear that the testator regarded the payments as payments made out of the income of his trust estate, and consequently that the estate, from the income whereof they were to be paid, would continue to be part of his trust estate. This view is quite consistent with the direction to "set aside" the specific sums mentioned, instead of paying them to new trustees for the beneficiaries.

It seems to have been assumed by the learned Judge that the word "payments" included the setting aside of the capital sums

(1) 7 H.L.C., 689.

now in question. If this were so, it would be a strong reason for holding that the adjectival expression "after payment &c." qualifies "trust estate" and not "income." For otherwise no provision would have been made for the widow until these sums, amounting together to £2500, had been set aside out of income, besides providing £300 a year for the annuities. In our opinion the better construction is that the word "payments" does not include these capital sums, but refers only to the income of them. On this construction, the rule in *Greville* v. *Brown* (1), does not govern the case, and it is necessary to have recourse to other considerations.

The duty of the Court is to ascertain and declare the intention of the testator as expressed in the whole will. Now the scheme of the will is to create a common trust estate comprising the whole of the testator's real and personal property except the specific bequest, and to constitute one body of persons as his executors and trustees, to whom he confides the duty of carrying out all the directions in the will in favour of the objects of his bounty without distinction. There is nothing to suggest that one class was to be favoured rather than another. He hoped that it would not be necessary to convert the real estate until his wife's death or marriage, but provided for the contingency of such a necessity, adding a direction that the income of the proceeds of conversion should be applied as if the land had not been sold "as hereinbefore appearing," words which we construe as meaning "by applying it in making the payments hereinbefore directed." Those payments exhausted the whole income. Having regard to these intentions of the testator to be collected from the will, we proceed to refer to some cases which appear to supply a rule of construction sufficient to dispose of the question now before us.

In *Nyssen* v. *Gretton* (2), Lord *Abinger* C.B., after remarking that it had always appeared to him very idle to look at cases upon the construction of wills for the purpose of finding a precise precedent for that under discussion, and that all that can be done is to find what general principle of law is applicable, and then to determine how far that principle is to be illustrated in the particular case, went on to say (3): "I have looked at the several

(1) 7 H.L.C., 689.

(2) 2 Y. & C., 222.

(3) 2 Y. & C., 222, at p. 231.

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cases, and I find only two rules which govern them which are not rules of construction, but of law. One is (what is familiar to every one), that, *primâ facie*, all legacies are paid out of the personal estate; the other is, that if it appears to be the intention of the testator, as collected from his will, that the legacies should be charged on real estate, then they should be charged on real estate. Whether the testator so intended depends on particular expressions of doubtful character appearing in the will, and the Judge determines the point according to the language of the will; not according to any rule of law, but as he would construe the intentions of the party from any other document laid before him." And, after referring to the instances of a gift of the real and personal estate of a testator to one individual subject to the payment of legacies, and of a bequest of legacies followed by a devise of the residue of the testator's real estate after payment of debts and legacies, in which case it is reasonable to suppose that the testator intended to give his real estate subject to the payment of legacies, he said (1): "If a man left legacies generally, and then left his real and personal property to one individual, it would not from thence be inferred that he meant to charge them on his real estate; but if he left legacies, and devised his real and personal estate to his executor, and directed his executor to see the legacies paid, you would infer from that direction given to the person to whom he left all the real estate, that he meant to charge them on the real estate." The circumstance that the land is devised to the executor in trust for other persons does not make any difference: *Dormay* v. *Borradaile* (2); *In re Tanqueray-Willaumez Landau* (3).

In *Preston* v. *Preston* (4), *Stuart* V.C. said that it had repeatedly been decided that where there was a mandatory direction that the executor, who was also a devisee of the real estate, should pay a sum of money, everything which he took under the will was subject to such direction. The doctrine, he said, had been established by a long line of cases commencing with *Alcock* v. *Sparhawk* (5), and the only case not reconcilable with it was

(1) 2 Y. & C., 222, at p. 232.
(2) 10 Beav., 263.
(3) 20 Ch. D., 465.
(4) 2 Jur. N.S., 1040.
(5) 2 Vern., 228.

Parker v. *Fearnley* (1), which, he said, was overruled by *Henvell* v. *Whitaker* (2), which was a decision of the same Judge, Sir J. *Leach* V.C., when Master of the Rolls.

In *Gallemore* v. *Gill* (3), decided by the Court of Appeal in Chancery in the same year 1856, a testatrix had by her will given two specific bequests, and given all her real and personal estate to trustees upon trust to get in the personal estate, and out of it to pay a legacy of £10, and stand possessed of the residue of the proceeds and of all the real estate upon specified trusts. By a codicil she directed the trustees to pay to the legatee an additional sum of £40, and to pay an annuity of £100 to one of the specific legatees. *Turner* L.J., who delivered the judgment of the Court, said that they entertained no doubt on the question (whether the additional legacy and the annuity was charged on the real estate). After quoting the codicil, he said (4): "It is necessary, therefore, to revert to the will to see how and from what source the trustees were to make these payments. The will vested in the trustees the residue of the personal estate and the whole of the freehold and leasehold estates, and the presumption is that it was out of the funds thus vested in the trustees that the payments directed by the codicil were to be made; *primâ facie*, therefore, they must be considered as charged upon the real estate." He then dealt with the argument that this presumption was rebutted by the circumstance that the legacy of £10 and the specific bequest came out of the personal estate only, and that it must be taken that the additional gifts must come out of the same funds, and said that a codicil might not only add to a legacy but also extend the fund out of which it was to be paid, and added (5): "In this will and codicil I think that there is no doubt that that is the case. The codicil contains a direction that the trustees shall pay the legacy, and the testatrix by her will has blended real and personal funds in the hands of the trustees for the payment."

In *Peacock* v. *Peacock* (6), *Wood* V.C. said: "All the other cases" (*i.e.*, the cases on the question whether legacies are charged on the real estate) "depended on two principles: first, that when

(1) 2 Sim. & St., 592.
(2) 3 Russ., 343.
(3) 8 DeG. M. & G., 567.
(4) 8 DeG. M. & G., 567, at p. 570.
(5) 8 DeG. M. & G., 567, at p. 571.
(6) 34 L.J. Ch., 315, at p. 316.

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there was a direction to an executor to pay debts or legacies, followed by a devise to the executor, the legacies were held to be charged on the real estate, because some force must be given to the direction to pay, and it was unnecessary for any purpose except to charge the debts or legacies on the real estate." He then mentioned the second principle, which is that shortly afterwards definitely established by the House of Lords in *Greville* v. *Brown* (1).

We are quite unable to see any distinction in principle between a direction to an executor to whom real estate is devised that he shall pay a legacy, and a direction to such an executor that he shall set aside and invest a sum of money and pay the income of it until the happening of a specified event, and then divide the capital. In our judgment, therefore, applying what appear to us to be settled rules of construction, the testator in the present case has expressed the intention that the real and personal estate shall form a blended fund from which the legacies in question were to be paid. Apart altogether from the authorities to which we have referred, we should come to the same conclusion. We can see no reason for thinking that the testator intended to make any distinction so far as regards recourse to his real estate between the several objects of his bounty. And the rule that a legacy is *primâ facie* payable out of personalty has, in our opinion, no application to a will such as that which we are called upon to construe.

The direction to convert the whole of his estate after the death of the testator's widow and divide it amongst his children cannot, of course, be literally carried out without rejecting the directions to set aside the several sums in question. We construe these latter directions as intended to be carried into effect immediately. It follows that, if these sums are charged on the real estate, the expression "the whole of my estate" in the direction for conversion must be read either as excluding the parts of the estate otherwise disposed of by the will, or as including them on the assumption that the testator still regarded them as parts of the trust estate until actual distribution. The result in either view will be the same. We are therefore of opinion that the legacies in question

(1) 7 H.L.C., 689.

were charged upon the corpus of the real estate. It follows that the annuities, which are in the view of the Court legacies (*Carmichael* v. *Gee* (1)) are equally charged upon it. The payments of the annuities were directed to begin from the testator's death and to be paid quarterly. We think that interest upon them should be computed from the date when the first payment was due, *i.e.*, three months after his death. Interest on the capital sums should be computed from the end of one year from his death.

The result is that the order of *Hodges* J. must be varied by omitting the order and declarations appealed from, and substituting a declaration that the real estate of the testator was applicable for the payment of the annuities and the three sums of £1000, £1000, and £500 in aid of the income of the general estate, and of the personalty not specifically bequeathed, with interest at the rate of 4 per cent. per annum from the respective dates above stated. The costs of all parties to this appeal (on the same basis as in the Supreme Court) should be paid out of the estate.

Formal leave to appeal will be given to the annuitants, and the judgment should be drawn up on that basis.

Appeal allowed. Order varied accordingly.

Solicitors for appellants, *Maddock & Jamieson*, Melbourne.

Solicitors for respondents, *E. E. Dillon*; *Crawford, Ussher & Thompson*, Melbourne.

B. L.

(1) 5 App. Cas., 588.