[HIGH COURT OF AUSTRALIA.]

ROYAL NORTH SHORE HOSPITAL AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

CRICHTON-SMITH AND OTHERS . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *Aug.* 31; *Nov.* 14.

Rich, Starke, Dixon and McTiernan JJ.

Satisfaction—Equitable presumption—Deed of separation—Covenant by husband to pay annual sum to wife dum casta*—Bequest of annuity of same amount to wife during her life or until remarriage—Surrounding circumstances—Intention of husband—Election.*

By a deed of separation made in 1922, a husband covenanted that during her life and so long as she should remain chaste he would pay to his wife a clear annuity of £630 by equal quarterly payments in advance on four special quarter days, without any deduction whatever, for her separate use. The husband died in 1937. In his will, made in 1931, he directed that the income of a share of his residuary estate up to but not exceeding £630 per annum should be paid, on the same special quarter days, to his wife during her life or until she should marry. There was not any direction in the will to pay debts. No evidence was tendered as to the actual intention of the testator.

Held that, notwithstanding differences between the two provisions, the legacy given by the testator was intended to be in satisfaction of the gift of the annuity contained in the deed of separation and the widow should be put to her election.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

Alexander Asher-Smith, who died on 6th March 1937, made his will on 6th March 1931. The will, so far as it is material, was in

the following terms :—" I give devise and bequeath the residue of my estate both real and personal of whatsoever nature and wheresoever situated to which I shall be entitled or over or in relation to which I shall have any power of disposition at the time of my decease unto my said trustees upon trust to sell call in and convert the same into money at such time or times and in such manner as my said trustees shall in their absolute discretion think fit and upon further trust to divide the net proceeds arising from such sale calling in and conversion (hereinafter called my trust fund) into ten equal shares And upon further trust to invest six of such equal shares in and upon such securities and investments as are prescribed by the Trustee Act or Acts for the time being in force in the State of New South Wales And upon further trust to pay unto my wife Elsie Asher-Smith the income arising from the investment of the said six equal shares in my said trust fund up to but not exceeding the sum of £630 per annum during her life or until such time or times as she shall remarry upon which event such annuity shall cease And I direct such annuity to be payable by quarterly instalments on the first day of the months of January, April, July and October in each year from the date of my decease." The trustees were further directed to invest the remaining four shares of " such equal shares " and to pay to two specified persons the income arising from such investment " up to but not exceeding " a stated amount in respect to each of the two specified persons, the annuities " to be payable by quarterly instalments on the first day of the months of January, April, July and October in each year from the date of my decease." And from and after the determination of the aforesaid annuities the testator directed that his trustees should stand possessed of his said trust fund together with any undistributed or surplus income on trust to sell, call in and convert the same and to divide the proceeds arising therefrom among the Burnside Presbyterian Orphan Homes, the Royal North Shore Hospital, the Royal Prince Alfred Hospital, the Deaf, Dumb and Blind Institution of New South Wales and the Royal Alexandra Hospital for Children.

By a codicil dated 17th November 1936 the testator, after making an immaterial alteration, confirmed his will.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

The will contained no express provision for the payment of debts or legacies.

Probate of the will and codicil was granted to George Crichton-Smith and Cecil Roy Deane, the executors and trustees named therein.

By an indenture dated 15th November 1922, to which the parties were the testator and Elsie Asher-Smith, his wife, after a recital that "unhappy differences have arisen between the said husband and the said wife and they have mutually agreed to live apart from each other, and the said husband has agreed to pay the said wife a clear annuity of £630 during her life for the maintenance and support of his said wife," it was provided that "the said husband will yearly during the life of his said wife (on condition that and so long as she shall continue to lead a chaste life) pay or cause to be paid free of exchange to her or to such person or persons as she shall from time to time direct or appoint in writing a clear annuity of £630 by equal quarterly instalments in advance on the first day of January, April, July and October in each and every year without any deduction whatsoever for the separate use and maintenance and benefit of his said wife."

The testator remained separated from his wife until his death and the separation deed remained in force.

The net value of the testator's estate, after making provision for payments in respect of debts, duties, costs, commissions and other similar charges, was the sum of £30,116 4s. 5d. The investment of six-tenths of this sum, namely, £18,069, at 3½ per cent per annum would produce at least £630 per annum. On an actuarial calculation the annuity of the testator's widow was valued at the sum of £5,302.

The trustees of the will took out an originating summons for the determination of the question whether they were justified in paying to the testator's widow the income provided for her in the will in addition to the annuity payable to her under the indenture.

The defendants to the summons were the testator's widow and the five charitable institutions named in the will.

The summons was heard by *Nicholas* J., who held that the trustees were justified in paying both amounts to the widow.

From that decision the Royal North Shore Hospital and the Royal Prince Alfred Hospital appealed to the High Court, the respondents to the appeal being the other defendants to the summons and the plaintiffs thereto.

Although served with notice of the appeal there was not any appearance at the hearing by or on behalf of the three respondent charitable institutions.

Maughan K.C. (with him *Stephen*), for the appellants. The covenant is in all important respects identical with the covenant considered by the House of Lords in *Kirk* v. *Eustace* (1). A decision of the House of Lords is not, technically, binding on, but would be followed by, this court, and could be reviewed by the Privy Council upon an appeal from this court. The doctrine of satisfaction depends upon the intention of the testator. Indications which have been accepted by the courts as evidencing the intention of the testator for or against satisfaction are shown in *Wathen* v. *Smith* (2); *Atkinson* v. *Littlewood* (3); *In re Rattenberry*; *Ray* v. *Grant* (4); *In re Hall*; *Hope* v. *Hall* (5); *Fitzgerald* v. *National Bank Ltd.* (6). *In re Hall*; *Hope* v. *Hall* (5) shows that the so-called rule in respect to residue is only one of the indications which guide the court; it is not a rule of law at all, and what the court has to do is to examine the liability, its nature *inter vivos*, and then to examine the will to ascertain whether the testator intended that the liability he had incurred should be satisfied through his executors in a particular way, or to give a benefit in addition to meeting his liability. The similarities between the liability under the deed and the gift by the will, and the setting under which the will was made, clearly indicate that the testator intended that the gift by the will should be in satisfaction of the liability under the deed. The will does not otherwise provide for the payment of this debt. An expression similar to the expression "without any deduction whatsoever" was considered in *Atkinson* v. *Webb* (7). That case shows that the existence of a tax or duty does not affect the doctrine of satisfaction.

(1) (1937) A.C. 491.
(2) (1819) 4 Madd. 325; 56 E.R. 725.
(3) (1874) L.R. 18 Eq. 595.
(4) (1906) 1 Ch. 667.
(5) (1918) 1 Ch. 562.
(6) (1929) 1 K.B. 394.
(7) (1704) Pr. Ch. 236; 24 E.R. 115.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

The tax the annuitant would be required to pay if she took the legacy is quite irrelevant on the question of what the testator meant. This is not a gift of a share of residue, nor a gift of the income of a share of residue; it is a gift out of the income of a share of residue of an annuity of the same amount as the annuity secured by the deed. *Thynne* v. *Glengall* (1) and *Barret* v. *Beckford* (2), do not lay down any hard and fast rule that a gift of residue will not be held to be a satisfaction of a debt. The testator's widow should be put upon her election as between the annuity under the deed and the gift by the will.

Dudley Williams K.C. (with him *Emerton*), for the respondent Elsie Asher-Smith. There is a definite distinction between satisfaction and performance (*Goldsmid* v. *Goldsmid* (3)). *In re Hall*; *Hope* v. *Hall* (4) is a case of performance and is not a case of satisfaction. The two payments are independent payments and, unless caught by the doctrine of satisfaction, which is disputed, this respondent is entitled to both. Having regard to the different conditions attached thereto the legacy is not equal to or greater than the amount of the debt under the deed; it is considerably less, therefore it is not satisfaction of that debt or annuity (*Halsbury's Laws of England*, 2nd ed., vol. 13, p. 171, par. 158). A gift of income of a part of residue cannot be presumed to be a satisfaction of a debt because it is uncertain whether the share of residue, whether income or corpus as the case may be, will be equal to or greater than the amount of the debt (*Thynne* v. *Glengall* (5); *Devese* v. *Pontet* (6)), e.g., the residuary estate may be called upon to meet orders made under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916. The exception to the doctrine of satisfaction that a share of residue cannot be satisfaction of a debt is a rule to which effect must be given (*In re Horlock*; *Calham* v. *Smith* (7)). The uncertainty associated with residue prevents a gift therefrom from operating as satisfaction of a debt (*Barret* v. *Beckford* (8)).

(1) (1848) 2 H.L.C. 131; 9 E.R. 1042.
(2) (1750) 1 Ves. Sen. 519; 27 E.R. 1179.
(3) (1818) 1 Swans. 211, at p. 219; 36 E.R. 361, at p. 364.
(4) (1918) 1 Ch. 562.
(5) (1848) 2 H.L.C., at pp. 153, 154; 9 E.R., at p. 1050.
(6) (1785) 1 Cox 188; 29 E.R. 1122.
(7) (1895) 1 Ch. 516, at p. 522.
(8) (1750) 1 Ves. Sen., at p. 521; 27 E.R., at p. 1180.

The position is, however, different as regards portions (*Lord Chichester* v. *Coventry* (1)). The annuity under the deed is dissimilar in many respects to the gift by the will, e.g., payment in advance ; not liable to taxation ; certainty as to *quantum* ; thus the doctrine of satisfaction cannot and does not apply (*Atkinson* v. *Webb* (2) ; *Atkinson* v. *Littlewood* (3)). If the testator was of opinion that the obligation under the deed terminated upon his death then it cannot be presumed that the testamentary provision, which operated only as from the date of his death, was intended to be in satisfaction of a debt believed to be non-existent.

Wickham, for the respondent trustees.

Maughan K.C., in reply. The rule that the legacy must be the same or greater than the debt refers to the amount in *nexus* and not to the conditions attached to it ; it is a question of *quantum* as against conditions. There is not a rule that the conditions must be the same in all respects. A gift, although less advantageous, may satisfy a debt (*In re Rattenberry* ; *Ray* v. *Grant* (4) ; *Fitzgerald* v. *National Bank Ltd.* (5)). Rules of construction must give way to the intention of the testator.

Cur. adv. vult.

Nov. 14.

The following written judgments were delivered :—

RICH J. This appeal raises a very unusual question in the administration of assets. The appellants claim in remainder under the will of Alexander Asher-Smith. By a deed of separation the testator saddled himself and his estate with an annuity payable to his wife *dum casta*. In all probability the testator regarded the operation of the deed of separation as terminating at his own death. *Sed dis aliter visum*. The House of Lords in *Kirk* v. *Eustace* (6) decided on an almost identical covenant that the obligation extended beyond the death of the husband and throughout the life of the wife. The amount of the annuity which the testator bound himself to pay

(1) (1867) L.R. 2 H.L. 71, at p. 84.
(2) (1704) Pr. Ch. 236 ; 24 E.R. 115 ; 2 Vern. 478 ; 23 E.R. 907.
(3) (1874) L.R. 18 Eq. 595.
(4) (1906) 1 Ch. 667.
(5) (1929) 1 K.B. 394.
(6) (1937) A.C. 491.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

Rich J.

to his wife during her life *dum casta* was £630. By a will made some years afterwards he made a similar provision for his wife. He directed that the income of a share of residue up to but not exceeding £630 per annum should be paid to her during her life. This time the annuity was not *dum casta* but *durante viduitate*.

The residuary legatees contend that these two provisions are not cumulative. They say that in making his will the testator intended to make a provision instead of that contained in the deed of separation. There is nothing to suggest such an intention except the circumstances of the case and the close resemblance of the provisions made by the instruments. No extrinsic evidence was given of the existence of such an intention, and unless it was made known to the donee it may be doubted whether positive evidence of such an intention in the first instance would have been admissible. But if the facts of the case raise a presumption of such an intention evidence to rebut the presumption might have been admitted. Upon the merits of the case it is open to remark that no evidence was tendered to negative the existence of an intention to give the annuity under the will as a substitution for that secured by the deed.

The appellants contend that a legal presumption in favour of substitution or satisfaction does arise. They rely upon the well-known principle of equity under which a legacy given by a debtor is considered prima facie to be intended as a satisfaction or discharge of the debt if the legacy is equal to or greater than the debt. The principle has been condemned as artificial and its application has been made the subject of a numerous body of authority, the characteristic of most of which is the displacement of the presumption upon grounds peculiar to the given case as unreal and artificial as the principle itself is said to be. It is to be noticed, however, that the maxim upon which the doctrine is stated to be founded, *debitor non præsumitur donare*, did not appeal to Lord *Herschell* as at all absurd. In *Johnstone* v. *Haviland* (1), a Scottish appeal, Lord *Herschell* said :—" I think the maxim which has been so often referred to is a maxim which embodies common sense ; it is only this : that a debtor is not presumed to make a gift. That is, of course, very far from implying that he may not perfectly well make a gift. I take it to mean this and this only ;

(1) (1896) A.C. 95, at pp. 103, 104.

that where a debtor makes a disposition of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of his obligation. But if there are circumstances which indicate that he did not intend it to be a mere discharge of his obligation, but intended to benefit the creditor and so make that person an object of his bounty, then it is just as effectual as though no such relationship existed between them. It comes then to be a question of fact to be determined in each case, whether there is enough to show that he did not intend the disposition to be in satisfaction of his obligation, but did intend it to be a gift." In this general statement his Lordship left it as a question of fact whether the intention had been rebutted. What may be enough to rebut it is a matter controlled by a long series of judicial decisions to which I have referred. In the judgment under appeal, *Nicholas* J. was guided by the decisions, and found several elements in the present case which undoubtedly exist paralleled by elements which had in one case and another sufficed to rebut the presumption.

It is one thing, however, to say that a particular consideration, if it exists on the face of the testamentary provision, justifies a conclusion, and it is another to say that it compels the conclusion. The present case is not a normal case of debtor and creditor. It is a case of two instruments giving a similar annuity. The one is a covenant creating an obligation *inter vivos*, and this is enough to bring the case under the general purview of the doctrine, which perhaps is too narrowly stated if it is expressed in terms of debtor and creditor. I fully appreciate the force of the view put by *Nicholas* J. on the cases. But at the end of his Honour's judgment the following statement occurs:—"If I were at liberty to speculate I should hold that although the testator did not intend the gift by his will to be a satisfaction of his liability under the indenture, he did not anticipate that his wife would enjoy both annuities, because he thought that liability under the indenture would come to an end at his death." In this I agree, but I would substitute for the word "speculate" the words: "If I were to reason from the probabilities of the case." It seems to me that the testator intended his legacy to take the place of the annuity secured

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

Rich J.

by the deed because he thought that the annuity ended with his death. He definitely intended that his wife should not take both. He did not intend to satisfy the covenant only in the sense that he did not regard it as a continuing liability. He did intend to put the annuity under the will in its place as a provision serving exactly the same objects as the covenant, which he erroneously thought would expire with his death.

The real question in the case is, perhaps, whether the presumption is rebutted by such a state of facts. In my opinion it is not. It is a different case from that, given in *Theobald* on *Wills*, in the reference mentioned by *Nicholas* J. (7th ed. (1908), p. 115), of a testamentary gift proceeding from motives founded upon a mistake. It is different because it is a gift of substantially the same thing for the purpose of serving the same ends in two different instruments under the mistaken idea that the first instrument will not prove effectual after the time when the second is intended to come into effect. I think the doctrine is wide enough to cover such a case. The doctrine is in truth an example of the exercise of jurisdiction of the Court of Chancery to prevent the unconscientious enjoyment of two gifts which it is known were not intended to be cumulative. I do not think that the court is constrained to reach a conclusion opposed to its view of the probabilities and to hold that the artificial considerations relied upon by the respondent compel it to treat the presumption as rebutted.

I think the appeal should be allowed.

STARKE J. A deed of separation was executed in 1922 by Alexander Asher-Smith and his wife Elsie Asher-Smith. It recited the usual unhappy differences and that the parties had agreed to live apart. It contained the following covenant on the part of the husband: "That the said husband will yearly during the life of his said wife (on condition that and so long as she shall continue to lead a chaste life) pay or cause to be paid free of exchange to her or to such person or persons as she shall from time to time direct or appoint in writing the clear annuity of . . . £630 by equal quarterly payments in advance on the 1st day of January, April, July and October in each and every year without any deduction whatever for the separate use, maintenance and benefit of his said

wife." *Kirk* v. *Eustace* (1) is a decision of the House of Lords that the covenant operates during the life of the wife subject to the *dum casta* condition set forth in the covenant.

In March 1937 Asher-Smith died. But he left a will made in 1931 whereby, after a bequest of certain candlesticks to George Henry Asher-Smith, he devised and bequeathed the residue of his estate both real and personal to his trustees upon trust to sell and upon further trust to divide the net proceeds arising from such sale into ten equal shares and upon further trust to invest six of such equal shares in and upon securities prescribed by *Trustee Acts* for the time being in force in New South Wales and upon further trust to pay unto his said wife Elsie Asher-Smith the income arising from the investment of the said six equal shares in his said trust fund up to but not exceeding the sum of £630 per annum during her life or until such time or times as she should marry upon which event such annuity should cease. And the testator directed that the annuity should be payable by quarterly instalments on the first days of the months of January, April, July and October in each year from the day of his decease. He then directed the investment of the remaining four shares and the payment of certain other annuities and from after the determination of the said annuities he directed the trustees to call in the trust fund and any undistributed or surplus income, divide the proceeds into six equal shares for certain charitable institutions including the appellants. There was no trust to pay debts expressed in the will. An originating summons was taken out for the determination of the following question : Whether the plaintiffs, trustees of the will of Asher-Smith, were justified in paying the defendant Elsie Asher-Smith, the wife of the testator, the income provided for her by the testator's will in addition to the annuity payable to her under the deed of separation already mentioned. *Nicholas* J. of the Supreme Court of New South Wales decided the question in the affirmative : hence the appeal by two of the institutions which are interested in the gift over after the determination of the respective annuities. " The general rule, as laid down in *Talbot* v. *Duke of Shrewsbury*, is ' that if one, being indebted to another in a sum of money, does by his will give him a sum of money as

(1) (1937) A.C. 491.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

Starke J.

great as, or greater than, the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that he shall not have both the debt and the legacy ' " (*White & Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 398).

But the cases and the text-books indicate that the rule is not much favoured and that the courts lay hold of " such minute circumstances " to take a case out of the rule that, as *Theobald* on *Wills*, 8th ed. (1927), pp. 855, 856, says, " the general rule has, however, been so often disapproved of, and has been held to be excluded by such slight indications of intention, that it is of small practical importance." But the following illustration may be found in *Talbot* v. *Shrewsbury* (1): Annuities are within the rule but it appears that an annuity payable by half-yearly payments under a covenant is not satisfied by an annuity given by will which will not become payable until a year after the testator's death (Cf. *In re Dowse*; *Dowse* v. *Glass* (2)).

So also the rule is repelled " where the legacy, though in amount equal to or greater than the debt, is payable at *a different time*, so as not to be equally advantageous to the legatee as the payment of the debt " (*White & Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 399).

So a direction in a will to pay all just and lawful debts may repel the rule: Cf. *Edmunds* v. *Low* (3) and *In re Huish*; *Bradshaw* v. *Huish* (4) (*White & Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 401).

So the rule may be repelled where the legacy " is in itself of an uncertain or fluctuating nature, as the gift of the whole or a part of the testator's residuary estate, even though it should prove greater in amount than the debt" (*White & Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 400; cf. *In re Rattenberry*; *Ray* v. *Grant* (5)).

So also we are informed that where the presumption arises merely from the fact of the legacy to a creditor being equal to or greater than the amount of the debt it would appear upon principle that evidence ought to be admitted to rebut the presumption; and if so

(1) White & Tudor's Leading Cases in Equity, 8th ed. (1912), vol. II., p. 399.
(2) (1881) 50 L.J. Ch. 285.
(3) (1857) 3 K. & J. 318, at p. 321; 69 E.R. 1130, at p. 1131.
(4) (1889) 43 Ch. D. 260.
(5) (1906) 1 Ch. 667.

evidence may on the other hand be admitted to fortify it (*White & Tudor's Leading Cases in Equity*, 8th ed. (1912), vol. II., p. 403). But little can be gathered from all this. The cases involve such fine and arbitrary distinctions that they afford, I think, but little assistance and really drive us back upon the generality that we must seek the intention of the testator from his language and the surrounding circumstances.

Here we have a testator separated from his wife providing in the deed of separation an annuity for her which continues during her life so long as she remains chaste. It is possible but not very probable that he will provide an additional annuity for her by his will. But in this case he does provide from the income of a trust fund an annuity during her life or until she remarries up to but not exceeding £630 per annum. The amount, £630, is precisely the same amount mentioned in the deed of separation and payable on precisely the same quarter days. The net value of his estate was about £30,000. According to the learned judge it appeared from an actuarial calculation put in evidence that the annuity of the testator's widow should be valued at the sum of £5,302, or that six-tenths of the net value of the testator's estate invested at $3\frac{1}{2}$ per cent would produce at least £630 per annum. The annuity given by the will may have been due to the testator's belief or to advice given to him by his solicitor that the annuity covenanted to be paid under the deed of separation terminated upon his death. But curiously enough no evidence has been tendered as to the actual intention of the testator, whether because all who knew the facts are dead, or because it was assumed that no such evidence would be admissible. In the circumstances mentioned, however, it is, in my judgment, opposed to all probability that the testator intended that his widow should have two annuities. She had been separated from her husband for nearly ten years at the date of the will and remained separated from him until he died in 1937. During all this time the annuity was apparently considered sufficient. No reason has been suggested for granting her an additional annuity on her husband's death except that the court cannot look into the human mind or understand the depth of affection that a husband may have for his separated wife. This, however, is guesswork or conjecture and fails to satisfy me.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

Starke J.

But the argument is pressed that the view is contrary to decided cases. The point of the rule, " the satisfaction of the debt," is not, however, the payment of the debt or the meticulous performance according to its terms of the covenant, but whether the legacy given by the testator was intended by him to be in lieu of the debt and so in satisfaction thereof. It might well be said, as indeed it was, that the annuity under the separation deed could never be satisfied by an annuity under the will, because the duration of the annuities could never be the same.

Various other arguments were used : one that the annuity under the deed of separation continued for life so long as the wife remained chaste, whilst that under the will was for life or until she married again ; a second that the legacy was of an uncertain or fluctuating nature—a gift of part of the testator's residuary estate although the estate was ample to satisfy it ; a third that the annuity under the deed of separation was not subject to taxation, whereas the annuity given by the will was so subject. But all these arguments rest upon identity in the manner of paying the debt or of the fulfilment of the obligation in respect of the debt, whereas in my judgment the function of the court is to ascertain whether the legacy was intended by the testator to be in lieu of the satisfaction of the debt. In the present case the testator did not, in my judgment, intend that his widow should have two annuities : she may, at her option, take either the annuity under the deed of separation or that under the will, but not both.

The result is that the appeal should be allowed and a declaration made that the trustees of the testator are not justified in paying both the annuities already mentioned but only the annuity that the widow elects to take.

DIXON J. The question for decision is whether the testator's widow takes two annuities or one only.

The separation deed, construed according to the principles applied by the House of Lords to an instrument in the same form (*Kirk* v. *Eustace* (1)), gives her a contractual right to an annuity of £630 during her life. The payment of this annual amount is a liability

(1) (1937) A.C. 491.

of the testator which passed to his executors and bound his estate. Like other liabilities incurred in his lifetime, it must be answered in priority to the dispositions made by his will, and by no testamentary provision could he destroy or impair his widow's right to be paid. But the testator died some years before the House of Lords placed upon the form of separation deed he had executed a construction by which the operation of the covenant to pay his wife an annuity by way of maintenance was not confined to the husband's lifetime but survived him and imposed an obligation upon his estate. Both he and his legal advisers may have supposed that his death would put an end to the operation of the deed of separation. When, therefore, he provided by his will that his widow should receive the income of a share of residue up to but not exceeding £630 per annum payable quarterly and upon the same days as were specified in the deed, it became a question whether the widow could take the testamentary annuity, as it may be called, as an addition to or only as a substitute for that secured to her by the separation deed.

Upon what principle is this question to be determined ?

The two instruments are expressed quite independently of one another. The will contains no allusion to the deed and the deed contains no reference to the wife's claims upon the testamentary bounty of her husband or to the prospect of his making a will. To treat the annuities as cumulative would not involve any inconsistency with the terms of either document and would give effect to each according to its tenor, that is, considered apart from the other. But, once the instruments are placed side by side and the probabilities are regarded to which the circumstances give rise, then, I think, the higher degree of probability is found plainly to be that the testator intended to make a provision by his will replacing the annuity secured by the deed, supposing the operation of the deed to cease upon his death. But would an intention of this description be enough to prevent his widow taking the testamentary annuity in addition to that under the deed ?

The principle which has been invoked for the determination of the question is that of the satisfaction of debts by legacies. According to the doctrine of the Court of Chancery a legacy bequeathed by a debtor to his creditor of a sum equal to or greater than the debt

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

DIXON J.

was presumed to be a satisfaction of the liability. In the seventeenth century it appears clearly to have been the rule of the court, although we do not seem to have an explicit statement of the doctrine earlier than the first decade of the eighteenth century. In 1735, according to the report of *Fowler* v. *Fowler* (1), Lord *Talbot* L.C. "admitted it to have been the general practice, where there is a debt due from the testator to a third person, and the legacy given to such person is as much as or more than the debt, to hold such legacy a satisfaction of the debt." The report proceeds: "and this being established as a rule (notwithstanding were it a new point, he should hardly have come into it) and it had with great reason been urged in opposition to the maxim, *that a man ought to be just before he is bountiful*, that where there are assets, the testator may with as much reason be construed both just and bountiful (*Salk.* 155) yet it must be of very ill consequence to unsettle or alter it; because at that rate no counsel would know how to advise his client."

In the simple case of a legacy bequeathed to a legatee who happened, by some ordinary transaction of business, to have become the creditor of the testator, there is no *a-priori* likelihood that the legacy was meant as a satisfaction of the debt, and a presumption that it was so intended has no natural foundation and contradicts experience. It is not surprising, therefore, that throughout the last two centuries the rule has seldom been formulated in abstract or general terms without some condemnation of its justice or propriety. In case upon case forensic reliance has been placed upon it where its application would have been opposed to the probable intention of the testator. To repel the presumption or exclude the rule considerations arising upon the will or the situation of the parties have been used which, as affirmative indications of an intention both to give the legacy and meet the liability, would scarcely suffice, if it were not that no real reason existed for supposing, to begin with, that the testator might entertain an intention that the debt should be satisfied by the legacy. Thus, if the will contains a direction to pay debts and legacies or even to pay debts without including legacies in the direction; if the legacy is less than the amount of the debt; or is less beneficial or

(1) (1735) 3 P. Wms. 353, at p. 354; 24 E.R. 1098.

advantageous, as, for instance, if it is payable at a later time than the debt, or is not charged on land or is not a first charge, although the debt is; or if the legacy is contingent or uncertain in amount, as is a bequest of residue, the debt being absolutely due or of certain amount; in all these cases the application of the presumption has been displaced. In *In re Hall* (1), after saying that the rule itself was binding upon the court, *Astbury* J. spoke of the character of the considerations allowed as countervailing it and explained their effect as evidentiary only. He said: "A number of circumstances as artificial as the rule itself have from time to time been regarded as excluding the operation of the rule, but excluding it only by affording indication of intention to the contrary." In other words, the presumption exists, but beginning with the presumption the court has been satisfied of an intention of the contrary on grounds the sufficiency of which is established by authority. A text-writer concludes:—"But still the chief cases now where the doctrine applies are where on the facts it clearly was the testator's actual intention that the donee should take the legacy in satisfaction of the debt" (*Strachan, Digest of Equity*, 4th ed. (1924), p. 264).

Artificial and ill founded as the presumption has appeared when the subject of the application is a legacy bequeathed by a testator between whom and the legatee there is an accidental and irrelevant relation of debtor and creditor, its operation extends to many kinds of transactions where it is far from unreasonable. Obligations of a binding character are entered into for the purpose of securing in the lifetime of a donor benefits to others which would naturally find a place in his testamentary dispositions. Settlements, marriage articles and family arrangements contain covenants to be fulfilled by the provision of funds for purposes which might also be served by bequests on the part of the covenantor. In days when bonds were much in use it was not surprising to find that by a legacy a testator had provided for a beneficiary who, directly or indirectly, could claim on his assets under a voluntary bond securing some similar provision for which the legacy must have been meant as a substitution or a fulfilment. Early examples are supplied by two

(1) (1918) 1 Ch., at p. 567.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

Dixon J.

cases in *Gilbert* (*Lechmere* v. *Blagrave* (1); *Davison* v. *Goddard* (2)) and one in *Vernon* (*Brown* v. *Dawson* (3)). *Wathen* v. *Smith* (4) is an illustration from the early nineteenth century, and a modern example is supplied by *In re Hall* (5). When the liability has not been incurred simply as a matter of ordinary commerce or business, but, although sounding in money, forms part of the arrangements affecting in a general sense the enjoyment of property or of the revenues derived from property belonging to the testator or over which he has some dispositive authority, there is sound ground for a presumption against an intention to confer cumulative benefits of the same kind, one by an instrument *inter vivos* and the other by will. Cases of this kind explain why it is that satisfaction of debts by legacies has been a topic treated side by side, on the one hand, with the satisfaction of portions by legacies and, on the other hand, with the repetition of legacies or, as it is sometimes called, the satisfaction of legacies by legacies, in the same or another instrument. Portion debts stand with portions rather than debts in the strength which the presumption receives from the leaning against double portions.

But, in considering whether two legacies of quantity expressed to be given by one will or by will and codicil are cumulative or not, the question whether two gifts ostensibly distinct should both take effect, although a question at bottom depending on the intention of a document, must be answered by reference to considerations akin to those arising when similar or apparently identical benefits are in terms conferred first by an instrument *inter vivos* and then by will. The presumption may be different, as indeed might be expected from the very purpose of testamentary instruments, but the weight attached to identity of amount, conditions, purpose and special motive illustrates a more general mode of reasoning. Courts of equity would not hesitate to infer or imply an intention that an ostensibly independent gift should replace a gift or benefit previously expressed, bestowed or secured; and the inference might be based on circumstances. Where as a matter of interpretation and strict law, as, for instance, under an instrument *inter vivos* and a will,

(1) (1707) Gilb. 64; 25 E.R. 45.
(2) (1708) Gilb. 65; 25 E.R. 45.
(3) (1705) 2 Vern. 498; 23 E.R. 918.
(4) (1819) 4 Madd. 325; 56 E.R. 725.
(5) (1918) 1 Ch. 562.

both benefits might be claimed, the jurisdiction to control the unconscientious assertion of a right attaches. Thus costs were decreed against the plaintiff in *Davison* v. *Goddard* (1) " because he knew in his conscience that J. S. intended satisfaction." The donee is put to his election. In dealing with claims that debts or other obligations have been " satisfied " by legacies, it has not been found necessary to define the intention which is sufficient to put the legatee to his election. The intention has been described in varying terms. " Satisfaction is a substitution of one thing for another; and the question in cases of that kind is whether the substituted thing was given for the thing proposed " (per *Plumer* M.R. in *Goldsmid* v. *Goldsmid* (2)). This definition is capable of covering an intention to substitute another thing because it is supposed erroneously that the thing proposed will end or fail, as well as an intention to give, so to speak, in exoneration and discharge, that is, on condition that a subsisting or continuing thing is given up.

In the present case *Nicholas* J. expressed the opinion that if, as he surmised, the testator bequeathed the annuity by his will supposing that his liability under the deed would end by death, this would not be enough to put his widow to her election. Cases such as *Box* v. *Barrett* (3) and *Langslow* v. *Langslow* (4), which his Honour evidently had in mind, do not, I think, cover the facts assumed, because more than motive is involved. The intention is to give a substitute for what proceeds from the testator himself. He intends to replace a provision that he has made by another provision, his error consisting in a mistaken belief that the earlier provision will cease at his death, the time when his will comes into operation. If then by inference or as a result of presumption it is proper to regard the testator as intending the testamentary annuity to supply the place of that secured by the separation deed, I think that, notwithstanding that he supposed that the operation of the deed terminated at his death, his widow would not be allowed to take both annuities but would be put to her election. The principle is not narrow. It goes further than effectuating an intention to discharge a debt or obligation by means of a testamentary disposition. It prevents the

(1) (1707) Gilb. 64; 25 E.R. 45.
(2) (1818) 1 Wils. Ch. 140, at p. 149; 37 E.R., 63 at p. 66.
(3) (1866) L.R. 3 Eq. 244.
(4) (1856) 21 Beav. 552; 52 E.R. 973.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

DIXON J.

unconscientious claim to enjoy a testamentary provision intended as a substitution for and not as an addition to a provision already made by the testator and it does so independently of his reasons for making the substitution.

The case is one in which a presumption exists that the testator did not intend both provisions. The presumption arises from the identity of the main characteristics of the two provisions. The covenant in the separation deed provides an annuity for a wife during her life; the annuity is of £630 payable quarterly on the first days of January, April, July and October in each year. The provision in the will, made nearly nine years afterwards, names the same amount and the same days of payment. It does not fix £630 absolutely but names it as the annual amount which the income from a share of residue shall not exceed. When in this way it appears that the testator has in his lifetime provided for his wife's maintenance by covenanting to pay an annuity and then by his will has directed to trustees to make annual payments to her closely resembling the annuity, there is sufficient to call into play the established doctrine by which, in the absence of countervailing considerations, an intention is presumed of substituting the legacy for the covenant or "satisfying" the latter.

There remains the question whether there are, as *Nicholas* J. thought, considerations excluding or repelling the presumption.

It must be conceded that a number of matters is to be found in the instruments which have been or might be held sufficient ground for holding that a legacy is cumulative upon a debt or liability. Thus, the fact that the legacy is a share of residue has repeatedly been held sufficient to overturn the presumption. The reason is that a thing given in satisfaction should be certain. Again, the legacy or testamentary annuity is not so advantageous as the covenant. It terminates on remarriage, while the annuity secured by the covenant is for life, subject to a *dum casta* condition. The legacy is subject to Federal estate duty. The share of residue, although at present sufficient to answer an annuity of £630 per annum may be depleted, particularly by applications under the *Testator's Family Maintenance and Guardianship of Infants Act* two of which are actually pending.

The grounds for excluding the presumption of satisfaction have often been applied as artificially as the presumption itself. But behind the unreality in which the subject has been enveloped, there are grounds of substantial justice and sound principle upon which the court remains at liberty to proceed. It is one thing to decide that particular elements or considerations suffice as a foundation for finding an intention to give a legacy otherwise than in satisfaction of a debt. It is another to say that the presence of such considerations always constrains the court to find that an intention exists to give cumulatively, notwithstanding that, in the circumstances of the given case, the more natural or more probable conclusion is that it did not. It is true that in *Bartlett* v. *Gillard* (1) Lord *Lyndhurst* held the presumption repelled and a second annuity to be cumulative, although stating that, if he were at liberty to conjecture, he might possibly conclude that the testator did not by what he had said intend to create a new and additional payment. And to this case there may be fairly added *Charlton* v. *West* (2) and *In re Dowse*; *Dowse* v. *Glass* (3). On the other side may be set *Atkinson* v. *Littlewood* (4) and *In re Rattenberry* (5); cf. *Ross* v. *Ross* (6).

But the peculiarity of the present case lies in the fact that, upon the face of the instruments considered with the situation of the parties and the surrounding circumstances, there is a real reason to suppose that in truth the widow was never intended to take the benefit both of the covenant in a separation deed and the testamentary annuity. In my opinion she should be put to her election.

I think that the appeal should be allowed. So much of the decretal order of the Supreme Court should be discharged as answers the question contained in the originating summons and in lieu thereof a declaration should be made that the trustees are not justified in paying the defendant Elsie Asher-Smith the income provided for her by the will in addition to the annuity payable to her under the indenture.

The costs of the appeal should come out of the estate, those of the trustee as between solicitor and client.

(1) (1827) 3 Russ. 149; 38 E.R. 532.
(2) (1861) 30 Beav. 124; 54 E.R. 836.
(3) (1881) 50 L.J. Ch. 285.
(4) (1874) L.R. 18 Eq. 595.
(5) (1906) 1 Ch. 667.
(6) (1930) 2 D.L.R. 42.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

McTIERNAN J. The question is whether an annuity of "up to, but not exceeding," the sum of £630 bequeathed by a testator to the respondent, his widow, is to be deemed to be a satisfaction of an annuity of £630 which he granted her in consideration of the covenants contained in a deed of separation entered into between them nine years before the bequest was made.

Both annuities are expressed to be payable by quarterly instalments in the same months and on the same days. The relevant provisions of the separation deed and of the will and codicil need not be set out again. The deed of separation operated to entitle the respondent to the annuity for her lifetime, and it is a liability for which the testator's estate is answerable (*Kirk* v. *Eustace* (1)). The deed was in force when the bequest of a like annuity was made. If the testator supposed that the annuity granted by the deed would cease at his death and had stated in his will that the purpose of the bequest was to provide that the respondent should continue to enjoy it after his death for her lifetime, such an expression of intention would bind the respondent's conscience, and she could not insist on the deed and claim any part of the testamentary benefit. In that case she would be put to her election. No such intention is stated in the will, but if, nevertheless, the presumption is that the bequest was *eo animo*, the respondent would also in that case have to elect. There is an old rule, which is said to be founded on the decision in *Sir John Talbott* v. *Duke of Shrewsbury* (2), that, where a testator dies without having paid a debt which he contracted before the date of his will and gives the creditor a pecuniary legacy equal to or greater than the amount of the debt, equity will presume that the testator intended the legacy to be a satisfaction of the debt, unless there are circumstances of sufficient weight to rebut the presumption. The rule applies where two such provisions are made for an annuity and both are left subsisting at the testator's death. An instance is the case of *Atkinson* v. *Littlewood* (3). It was observed by Lord Chancellor *Hardwicke* in *Richardson* v. *Greese* (4) that "the courts have always shown some dissatisfaction at the rule, and endeavour, if there is any room to do it, to distinguish cases out

(1) (1937) A.C. 491.
(2) (1714) Pr. Ch. 394; 24 E.R. 177.
(3) (1874) L.R. 18 Eq. 595.
(4) (1743) 3 Atk. 65, at p. 68; 26 E.R. 840, at p. 842.

of it. They have said indeed they would not break the rule, but at the same time have said, they would not go one jot further, and have been fond of distinguishing cases since, if possible." And Vice-Chancellor *Kindersley*, in *Hassell* v. *Hawkins* (1), described the rule as " a false principle." But he added : " That principle being established, successive judges have said they cannot alter it. But what they have done is to rely on the minutest shade of difference to escape from that false principle." In the cases of *In re Horlock* (2), *In re Rattenberry* (3) and *In re Hall* (4), it is shown that the rule still prevails. But the courts have become astute to find circumstances repelling the presumption that a legacy was a satisfaction of a debt where the presumption is raised by the fact that the debt existed when the will and codicil were made and is equal to or greater than the amount of the debt. Mr. Justice *Astbury*, in the case of *In re Hall* (4), said that the circumstances which the courts have relied on are " as artificial as the rule." He said that they have been regarded as excluding the operation of the rule because they afford an indication that it was not the testator's intention to satisfy the debt by giving the creditor a legacy equal to or greater than the amount of the debt.

In the present case the law presumes from the resemblance between the two annuities that the bequest was intended to supply the place of the contractual obligation (Cf. *In re Fletcher* ; *Gillings* v. *Fletcher* (5)). The presumption will not prevail against the circumstances of the case if they suggest that the testator did not intend the bequest to supply the place of his contractual obligation. Slight circumstances only are sufficient to repel the presumption which the law bases on the resemblance of the two provisions, and these circumstances may be sought in the contents of the will or in extrinsic facts. Circumstances which indicate that the annuity bequeathed is less advantageous to the respondent than that covenanted to be paid and differences, even if small, between the debt and the testamentary benefit, are of evidentiary force in repelling the presumption.

(1) (1859) 4 Drew. 468, at p. 470 ; 62 E.R. 180, at p. 181.
(2) (1895) 1 Ch. 516.
(3) (1906) 1 Ch. 667.
(4) (1918) 1 Ch., at p. 567.
(5) (1888) 38 Ch. D. 373.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

McTiernan J.

The question whether in a given case the circumstances indicate that the testator did not intend a legacy to operate as a satisfaction of a debt is one that " every judge must decide . . . for himself " (Cf. *Lord Chichester* v. *Coventry* (1)).

Nicholas J. expressed the opinion that the circumstances indicated sufficiently that the bequest was not intended to be in substitution for the annuity secured by the deed. His Honour did not attach much importance to the difference between the condition, *dum casta*, in the deed and the condition, *durante viduitate*, in the will. While not, as I apprehend, dismissing the difference entirely, his Honour said that, having regard to the fact that a deed of separation comes into operation during the lives of the parties, and a will after the death of the husband, he would not attach much importance to this distinction if it stood by itself. The way in which the condition in the will varies from that in the deed is to be explained rather as a consequence of the difference in the nature of the two instruments—which is not, of course, a ground for repelling the presumption—than as an indication of any intention on the part of the testator to introduce a discrepancy between the two provisions. A second matter, to which his Honour appeared to attach more importance than to this variation between the conditions of the two provisions, is that the payments under the deed are to be made " without any deduction whatsoever," whereas no words are added to the bequest with the intention of exonerating it, at the expense of the rest of the estate, from estate duty payable under sec. 35 of the Federal *Estate Duty Assessment Act*. It is difficult to see what practical effect the words " without any deduction whatsoever " have (Cf. *De Romero* v. *Read* (2)). Moreover, the argument that the presumption is excluded by those words, assumes that the bequest would, but for them, be liable to duty, and that the annuity under the deed is immune from taxation. In any case, this difference between the two provisions should not be held to prevail against the presumption, unless it could be implied from the use of these words in one case and their omission in the other, that the testator intended to make one provision different from the other. In my opinion, no such intention can be implied. Legacy

(1) (1867) L.R. 2 H.L. 71, at p. 83.

(2) (1932) 48 C.L.R. 649.

duty was imposed in 1796 and no case since then was cited in which the liability to taxation has been held to affect the doctrine of satisfaction. One case, however, prior to 1796, *Atkinson* v. *Webb* (1) was cited, in which a direction in a bond to pay " without any deduction " was regarded as one circumstance which aided in excluding the rule. The Lord Chancellor (Lord *Chelmsford*), speaking of a case analogous to this present case, adopted the view that " previous decisions afford but slight assistance in these cases " (*Lord Chichester* v. *Coventry* (2)). In my opinion, the presence of the words, " without any deduction whatever," in the deed, and their absence from the will, are not circumstances which can be successfully called in aid to rebut the presumption against cumulative gifts in the present case.

What, in his Honour's opinion, told most strongly against the argument for satisfaction was, to quote his words, " that the gift by the will is of the income of a share of residue." There are cases in which it has been held that a gift of residue or a share of residue is not a satisfaction of a debt. Two such cases are *Barret* v. *Beckford* (3) ; *Devese* v. *Pontet* (4). It is important to look at the nature of the alleged satisfactional gifts and to the reasons of the court. In the first case the testator, who was under an obligation to pay an annuity of £300 to M. P., bequeathed " the residue of his estate " for the benefit of his mother and M. P. for life. The Lord Chancellor (Lord *Hardwicke*) said : " It is a general rule of satisfactions that the thing to be considered a satisfaction should be exactly of the same nature, and equally certain : here it is not of the same nature." In the second case the Master of the Rolls (Sir *Lloyd Kenyon*), after observing that " if therefore the slightest circumstances are to be laid hold of, I may take in aid these circumstances to make it doubtful whether he (the testator) meant to satisfy the covenant, and, in that case, I may say, as Lord *Thurlow* did in *Haynes or Hayes* v. *Micoe* (5), *incumbit onus petitori*, that is, the person who says it is a satisfaction," continued :—" Another ground is, that an unliquidated residue has never been taken as a satisfaction. Where a positive sum is given,

(1) (1704) 2 Vern. 478 ; 23 E.R. 907 ; Pr. Ch. 236 ; 24 E.R. 115.
(2) (1867) L.R. 2 H.L., at p. 83.
(3) (1750) 1 Ves. Sen. 519 ; 27 E.R. 1179.
(4) (1785) 1 Cox, at pp. 191, 192 ; 29 E.R., at p. 1124.
(5) (1781) 1 Bro. C.C. 129 ; 28 E.R. 1031.

H. C. OF A. 1938.

ROYAL NORTH SHORE HOSPITAL v. CRICHTON-SMITH.

McTiernan J.

it may be conceived that the testator so intended, but where it is to wait the result, perhaps of a long protracted suit in Chancery, it never can be meant so." After referring to *Barret* v. *Beckford* (1), the Master of the Rolls added: "Here, although what is given the wife is not the general residue, yet the gift of the particular residue may have just the same effect in entangling her in difficulties and uncertainties."

The present case is quite different from each of these cases. In the present case the residue consists of what remains of the testator's estate after the bequest of a pair of silver candlesticks and a legacy of £50, the latter being made by the codicil. The residue is divided into ten equal shares, six of which are directed to be invested and the income from those six shares is directed to be paid to the testator's wife, the respondent, in an amount "up to but not exceeding the sum of £630 per annum during her life" by quarterly instalments. While it may be said that the presumption of satisfaction is often excluded where the bequest of money alleged as a satisfaction of a debt is a bequest of residue or a share of residue, yet each case must depend upon the circumstances incident to the debt and the legacy. In the present case the residue out of which the annuity is directed to be paid is the whole estate diminished only by a specific legacy of a pair of candlesticks and a pecuniary legacy of £50. The bequest of the annuity is in effect the gift of a sum certain, if there is enough to pay it. Every pecuniary legacy no less than this annuity is certain only if there is enough to pay it. The annuity is of a positive sum and it is as substantially certain and advantageous as the annuity secured by the deed. Actuarial calculations were put in evidence showing that the annuity should be valued at £5,302 and that the net value of the estate was £30,116 4s. 5d.; and it appeared that, if six-tenths of that amount were invested at 3½ per cent per annum, it would yield no less than £630. The fact that the annuity is directed to be paid from a share which is nominally a part of the residue is not sufficient, in my opinion, to displace the presumption that the bequest of the annuity is a satisfaction of the testator's contractual liability to pay the like sum.

(1) (1750) 1 Ves. Sen. 519; 27 E.R. 1179.

Other circumstances relied on to defeat the presumption were: the direction in the will to pay "up to, but not exceeding the sum of £630"; that the surplus income from the residue is given over to charities together with the corpus, which is free from any charge for arrears of income; and the circumstances that it appeared that the income of the six-tenths of the residue, which was to provide the annuity bequeathed by the will, only slightly exceeded the sum of £630, although the residue might be broached if pending applications under the *Testators' Family Maintenance and Guardianship of Infants Act* (N.S.W.) for maintenance out of the estate were successful. These considerations are, I think, met by an observation in the reasons for judgment of Mr. Justice *Kekewich* in *In re Wedmore*; *Wedmore* v. *Wedmore* (1). In that case it was held that the principle by which a legacy is given in satisfaction of dower was entitled to priority and did not abate was inapplicable to the case of a legacy given in satisfaction of an ascertained debt. Mr. Justice *Kekewich* observed: "She" (the legatee) "might have avoided that" (the abatement of the legacy) "by electing to claim against the will, but she claims under the will, and she takes the whole legacy subject to the usual rules of administration which affect all legacies" (2).

In my opinion, the doctrine of satisfaction applies in the present case and the respondent cannot insist on the deed if she claims under the will. Equity puts her to an election.

The appeal should, in my opinion, be allowed.

Appeal allowed. Discharge so much of the decretal order of the Supreme Court as answers the question contained in the originating summons. In lieu thereof declare that the trustees are not justified in paying Elsie Asher-Smith the income provided for her by the will in addition to the annuity payable to her under the indenture. Costs of the appeal of all parties out of the estate, those of the trustees as between solicitor and client.

Solicitors for the appellants, *Bowman & Mackenzie.*

Solicitors for the respondent Elsie Asher-Smith, *Creagh & Creagh.*

Solicitors for the respondent trustees, *Crichton-Smith & Innes Kay.*

J. B.

(1) (1907) 2 Ch. 277.

(2) (1907) 2 Ch., at p. 282.