

MIDDLETON, J.:—The testator, who died on the 25th January, 1913, after certain bequests, directs his trustees to pay out of the income of his estate to his wife during her lifetime the annual sum of \$5,000, with certain provisions for the reduction of this sum in the event of her re-marriage. Next, he directs payment out of the income to his sister, Eugénie Turner, during her lifetime, of the annual sum of \$1,000. Then, he directs payment out of the income to his brother Æneas Mackay of the annual sum of \$500. Next, he provides for payment to his niece Mary Victoria Turner of the sum of \$500 a year during the lifetime of his wife.

The annuity to the wife is directed to be in lieu of her right to dower; and all surplus income not required for the annuities is to be added to the capital. Upon the death of the wife, pecuniary legacies are given to a number of persons, including a legacy of \$10,000 to Mary Victoria Turner.

The questions asked are: (1) When is it the duty of the trustees to add to the capital the surplus income not required for the annuities? (2) In the event of the estate not realising enough to pay the annuities at any particular time, is there a right to resort to the accumulated surplus income to make good the deficiency? (3) Is the annuity of Mary Victoria Turner payable only out of income or is it also a charge upon the capital?

The annuities to the wife, sister, and brother are expressly made payable out of the income. The annuity to the niece stands in a different position: it is not payable to the annuitant during her life, but is payable only during the lifetime of the wife, and upon the death of the wife the niece receives \$10,000. This annuity is not directed to be paid out of the income, and I am satisfied that it was the intention of the testator to make this payable in any event, and that it is a charge upon the corpus.

The direction as to the surplus income becomes operative, I think, only *sub modo* during the continuance of the annuities. What is said in *Edwards v. Grove* (1860), 2 DeG. F. & J. 210, is applicable. It is not the intention that each year "all balances should be irrevocably carried to the capital account . . . but leave it open to add *de bene esse* to the principal sum for the purpose of accumulation the sums not wanted in that year but which may possibly be wanted in maintenance in another year." The charge of the annuities upon the income is a charge of the annuity upon the entire income so long as the annuities continue. The surplus to be added to the capital is the surplus