

Macdonald, J.]

[Dec. 4, 1911.]

CARRUTHERS v. CARRUTHERS.

Will—Power of executors to sell real estate when no debts—Postponement of division of residuary estate specifically devised—Annuities charged upon whole estate.

Under a will making provision for the wife and sister of the testator to be secured on the estate and giving the residue both real and personal to his three children in equal shares, the executors have no power to sell the real estate without the consent of the residuary legatees, there being no express power to sell conferred and no debts necessitating a sale.

Such power in the executors should not be inferred from a direction in the will that "no division of the said residue, or payment of their respective shares to my said children shall be made by my executors until five years after the date of my death," or from the further direction that the executors should have power to delay and postpone the payment of the share or shares of the children until such time as in their judgment and opinion it would be advisable to pay such share or shares, as these directions must be read in connection with the clause in the will requiring the executors, during the said five years, to "annually pay to my said children their respective shares of the income arising from the said residue of my estate," and the further clause providing that "if, during the said five years, my executors should have on hand any surplus funds from the residue of my estate, such surplus shall be invested in safe and legal securities," and it should be held that the "payment" mentioned in those directions referred merely to such surplus funds. The intention of the testator can be further arrived at by his direction that the annuities provided for his wife and sister are to be a charge upon his entire estate, and in the event of the period of division arriving before their deaths the executors are directed to set aside from such division sufficient of his estate to secure such annuities. If it was his intention to confer a power of sale upon his executors he would have made a provision for the security of such annuities in the event of a sale and, had he done so, the power of sale would be readily implied.

Galt, K.C., for plaintiff. Taylor, K.C., for defendant.