DEPARTMENT OF PROPERTY.

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BOOMHOWER *v.* BABBITTS' ADM'RS.[1] SUPREME COURT OF VERMONT. MARCH 2, 1895.

Testator bequeathed to his daughter an annuity of $360, and that the payment of the same might be "effectually secured," directed the investment of a sum which at interest would produce the amount of the annuity, and provided that this income should be used in its payment. *Held*, upon a failure of this fund the annuitant was entitled to have the yearly sum made good out of the general estate.

ANNUITIES.

The term annuity has the disadvantage of being employed in two branches of the law—insurance and property. The practice of purchasing annuities for lives at a certain premium is accounted for by Blackstone as arising from the inability of the borrower to give the lender a permanent security. "He therefore stipulates (in effect) to repay annually during his life some part of the money borrowed, together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run of loosing that principal entirely by the contingency of the borrower's death:" 2 Bl. Comm. 461. The real value of the contingency depending on the age, constitution and conduct of the borrower. The risk taken by the lender, that is where the principal is *bona fide* put in jeopardy, prevented such a bargain from being regarded as usurious. But such a device will be unavailing if merely to cover a usurious transaction: *Lloyd* v. *Scott*, 4 Pet. 205.

As, however, an annuity is a not infrequent form of gift and

[1] Reported in 31 Atlantic, 838.

a very common form of bequest, important questions have arisen as to its status as property. The writ of annuity at an early date was closely connected with the writ of debt, being a demand for arrears of annuity which were detained. The writ could be pleaded in the county and in the reign of Edw. I, began as follows: "*Praecipimus tibi quód justicies A quód justè, &c., reddat B decem marcas quae ei à retro sunt de annuo redditû tanti per annum, sicut rationabiliter, &c.*" (II Reves' History of The Common Law, Finalson Ed., Chap. 11 and 16, Fleta, 136). The process in this writ was summons, attachment and distress. Annuities were frequently charged upon land which gave the grantee a power to distrain, and if interrupted in such case, an assize of novel disseizin: Reves, *supra*. "If a man," says Littleton, "grant by his deed a rent charge to another and the rent is behind, the grantee may chose whether he will sue a writ of annuity for this, against the grantor, or distreine for the rent behinde and the distrese detaine until he is paid. But he cannot do or have both together:" 1 Coke Litt. 144 b. Doc. and Stud. Dialogùe 1, c. 30. Further information is supplied by Coke, who defines an annuity as "a yearly payment of a certaine summe of money granted to another in fee, for life or yeares charging the person of the grantor only." This definition has been followed by most writers (Bac. Abr. Tit. Annuity, 1 Bouv. Law Dic., 1 Amer. & Eng. Enc. Law, Tit. Annuity: *Wagstaffe* v. *Lowere*, 23 Barb. 209,) but requires explanation. An annuity is not necessarily a *yearly* payment, the payments may be directed to be made at more frequent intervals. It may be given by deed or will, and if bequeathed is a legacy: *Heatherington* v. *Lewenberg*, 61 Miss. 372. While the grant of an annuity out of whatever payable, "*prima facie*, binds the person of the grantor" (*Horton* v. *Cook*, 10 Watts, 124), yet an annuity may be a charge upon realty where the intention so to charge is either expressly declared or may be fairly inferred: *Robinson* v. *Townshend*, 3 Gill & J. 413; *Owens* v. *Clayton*, 56 Md. 129; *Ramsay* v. *Thongate*, 16 Sim. 575; *Pierce's Estate*, 56 Wis. 560; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525.

An annuity is classed by Blackstone with incorporeal

hereditaments. Of course this will not include such annuities as are granted for life, which in no sense of the word can be called hereditaments (Chitty's Note to 2 Bl. Com. 20). Blackstone further says that "a man may have real estate in it though his security is merely personal." This statement has been criticised. The only authority for it is in some very early cases, where the assignability of an annuity was questioned (Hargreaves' Note to 1 Co. Litt. 144 b.; *Maund's Case*, 7 Rep. 28 b.). The matter may be regarded as settled by the decision in *Aubin* v. *Daly*, 4 B. & Ad. 59. Where an annuity granted "to the use of A, his heirs and assigns forever" was held to be personal property, and to pass under a bequest of all the rest, residue and remainder of the testator's personal estate. Hence, though an annuity descends to the heir, it is for all other intents and purposes than descent personalty, and except in this one particular has none of the incidents or characteristics of real estate: *Theobald on Wills*, 4th Ed., p. 410; *Joynt* v. *Richards*, 11 L. R. Ir. 278; *Gross* v. *Sheeler*, 31 A. 812 (Del.). While an annuity descends to the heir, and at the Common Law did not form assets in the hands of the administrator for the payment of debts, a husband is not entitled to curtesy in it, nor a wife to dower (1 Waits, Actions & Defenses, 323). Nor will a grant of it to a corporation be within the statute of mortmain: 1 Inst. 32 a. 2-6. The interest of an annuitant may be sold or assigned: *DeGraw* v. *Gleason*, 11 Paige, 136. "If," says Sharswood, "the grant be of an inheritance, merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land on some certain place, such inheritance cannot be entailed." The grant of an annuity, therefore, to a man and the heirs of his body, creating a fee simple conditional at Common Law, which, after issue had, the grantee may alien so as to bar the possibility of reverter: (Sharswood's Bl. Comm., Note 40, Bk. II, Ch. 3). See *Bradhurst* v. *Bradhurst*, 1 Paige, Ch. 331. If granted without words of limitation it gives a life interest merely: *Theobald on Wills*, 4th Ed., p. 412; *Butt's Case*, 7 Rep. 23 a.; *In re Gillman's Estate*, 10 Eq. 92. Where, however, a legacy was directed by testator to be paid to S during each year of his wife's life,

and S died in the lifetime of the widow, it was held that the legacy was to be paid to S's children, during the rest of the widow's life: *Stevenson* v. *Stevenson*, 17 S. W. 955 (Ky.). While an annuity is usually granted for life, its duration will always depend on a construction of the instrument creating it. It may be given subject to acceptance and the performance of certain conditions by the grantee: *Seely* v. *Hincks*, 31 A. 833, 65 Conn. 1; *Hewson's Appeal*, 102 Pa. 55; *Crawford* v. *Thompson*, 91 Ind. 266. In Massachusetts, the bequest of an annuity "during widowhood and life" was held to cease upon second marriage by testator's intention, but such intention being *in terrorem* and in restraint of marriage, the restraint could not take effect and the annuity therefore did not cease: *Parsons* v. *Winslow*, 6 Mass. 169; but see, *contra*, *Cornell* v. *Lovett*, 35 Pa. 100.

As stated above, an annuity, if given by will is a legacy and, under a charge of legacies, annuities will be included unless the testator expressly distinguishes between annuitants and legatees: *Cunningham* v. *Foot*, 3 App. Ca. 989; *Heath* v. *Weston*, 3 DeG. M. & G. 601; *Duke of Bolton* v. *Williams*, 2 Ves. Jr. 216; *2 Jarman on Wills*, *1416. Payable from time to time annuities are at each time of payments gross sums to be regarded as separate legacies at each recurring period, and are properly distinguishable from gifts of the income or profits of particular funds. A similar distinction is made by the Civil Law between an annual legacy and the legacy of a usufruct; in the latter the legatee has an uncertain enjoyment and may have, either more or less, or sometimes nothing at all, while the annual legacy of a certain sum is always the same, and "whereas the legacy of a usufruct is only one legacy of a right to enjoy always as long as it shall last, an annual legacy contains as many legacies as it may last years:" Domat's Civil Law, by Strahan, 2 IV, II, 5 art. VI (§ 3572); Mackeldey's Roman Law, § 763; III Colquhoun's Civil Law, § 1170.

In this respect, it is often difficult to determine to which particular class a gift belongs. In *Pearson* v. *Chase*, 10 R. I. 455, a bequest of the income of certain shares of bank stock during

life was held not an annuity, and the devisee was required to pay the tax on the stock, the court admitting the difficulty, and citing *Sewell* v. *Boston*, 18 Pick. 123, as an authority for the opposite view: *Booth* v. *Ammerman*, 4 Brad. 129; *Comstock* v. *Honor*, 55 Fed. 803 (see *Flickwir's Estate*, 136 Pa. 374, *infra*). The importance of the distinction is evident when it is remembered that the gift of the produce of a fund, without limit as to time, has been held to amount to a gift of the fund itself. While an annuity charged upon personalty is usually dependent on the legatee's life, the fund reverting to the residuary legatee: *Theobald on Wills*, 4th Ed. 413; *Prichard on Wills*, § 472; *Hill* v. *Potts*, 8 Jur. N. S. 555; *Hicks* v. *Ross*, 14 Eq. 141; *Shermerhone* v. *Schermerhorne*, 6 Johns. Ch. 70; *Bates* v. *Barry*, 125 Mass. 83; *Morgan* v. *Pope*, 7 Coldw. 541. Where, however, an annuity is given out of the rents and profits, it has been said that the rigid rule has been relaxed and the courts may exercise their judgment; the right to apply the *corpus* to meet deficiencies depending on the intention of the testator: *Delaney* v. *Van Aulen*, 84 N. Y. 16.

An annuity is a general or a demonstrative legacy according as it is given from the general assets or from a particular fund designated as the source of payment, and in either case is governed by the rules of law applied to that particular class to which it belongs. If the testator leaves sufficient personal estate, that ordinarily will be the primary fund for the payment of the annuity: *De Graw* v. *Gleason*, 11 Paige, 136; *De Haven* v. *Sherman*, 131 Ill. 115; *Ingleman* v. *Worthington*, 25 L. J. Ch. 46. As in the case of an ordinary legacy the testator may charge an annuity upon real estate devised, and by accepting lands so charged, the devisee becomes personally liable for the payment. He cannot take the land without conforming to the requirements of the will: *Davis's Appeal*, 83 Pa. 348; *Reeves* v. *Engelbach*, L. R., 12 Eq. L. 25; *In re Parry*, 42 Ch. D. 570; *VanOrden* v. *VanOrden*, 10 Johns. 30; *Wyckoff* v. *Wyckoff*, 48 N. J. Eq. 113; *Nash* v. *Taylor*, 83 Ind. 347; *Brotzman's Estate*, 133 Pa. 478. Although charged generally upon the estate, the court may allow the appropriation and investment by the executors of a sum, the income of

which shall be sufficient to pay the annuity. But the residuary estate is not necessarily exonerated by this appropriation: *Merritt* v. *Merritt*, 48 N. J. Eq. 1; *Davies* v. *Wattier*, 1 Sim. & S. 463; *Miller* v. *Vickery*, 64 Me. 490. In the case of *Denis' Estate*, 32 A. 436 (Pa. 1895), the testator gave his wife an annuity of $5000. On the executor's account, a sum was reserved by the auditor, which was deemed sufficient at the time to produce the income. Subsequently, a deficiency resulted in this income. It was held that the deficiency should be paid from the rents of real estate in the hands of the residuary legatees. The widow, by accepting under the will, was a purchaser for value. "The entire estate," said the court, "real as well as personal, was subject to the charge in her favor, no restraint being placed upon the executors as to the source from which the widow's annuity should be derived." "It is undoubtedly true," it was observed by the court below, "that a legacy, even when charged upon the entire estate of the testator, is payable primarily out of the personalty, and the legatee by permitting an application of the primary fund to some other purpose may thus loose his right to resort to the real estate. But this of course could never be, where the owners of the lands are themselves the persons receiving the real estate which would otherwise have gone to the legatee."

Where the testator himself directs the appropriation by his executors of a special fund to the payment of an annuity, the income of which proves insufficient for the purpose, the will must be examined to determine whether it was the intention to make the gift specific, relieving the *corpus* of the estate, or merely to set apart the fund in order that the annuity may be effectually secured. Unless clearly inconsistent with the terms of the will, the tendency of the courts is to give the annuitant the full yearly sum, without regard to the fund appropriated to its payment, charging the deficiency upon the residuary estate.

In *Boomhower* v. *Babbit*, 31 A. 838 (Vt. 1895), the testator, after bequeathing annuities, directed that $11,000 of the estate be set aside and invested in good real estate securities, and the income used in payment of the annuities. "The language,"

said the court, "points to the security and completeness of the yearly payments, rather than to the relief of the body of the estate from future contingencies. The gift falls within that class of legacies called demonstrative in which the sum given is to be made good out of the general estate upon failure of the particular fund, which is primarily holden for its satisfaction." The court goes on to review the English Navy 5 per cent annuity cases. In *May* v. *Bennett*, 1 Russ. 370, the testator directed his executors to lay out in what government security they pleased as much money as would produce £ 54, S. 12 per year for his wife. The executor purchased Navy five per cent. annuities, but a deficiency occurred by reason of the reduction of the interest from 5 to 4 per cent. The court held that the deficiency should be made good from the general estate of the testator. On the other hand, in *Kendall* v. *Russell*, 3 Sim. 424, where the testator gave yearly sums to issue out of a sum of stock in the 5 per cents. Upon conversion of the stock to 4 per cent., it was held that the annuitants were not entitled to have the deficiency supplied from the residuary estate. The court, in *Boomhower* v. *Babbitt*, distinguishes this case from the one at bar on the ground that, in the former, the testator had designated the stock to be set apart: See also *Carmichael* v. *Gee*, L. R. S. App. Ca. 588; S. C., 9 Ch. D. 151; *Graves* v. *Hicks*, 11 Sim. 551; *Reigard's Appeal*, 125 Pa. 628. Where an annuity is charged on the personal estate, on insufficiency of assets, it will abate rateably with other general legacies: *Univ. of Penna's. Appeal*, 97 Pa. 187. But not in the case of an annuity given to a widow in lieu of dower: *Reed* v. *Reed*, 9 Watts, 263; *McDaniel's Estate*, 47 Leg. Int. 534.

Annuities, if no time is specified, begin from the testator's death: *Gibson* v. *Bott*, 7 Ves. Jr., 96; *Curran* v. *Green*, 27 A. 596 (R. I., 1893); *Craig* v. *Craig*, 3 Barb. Ch. 76; *Waring* v. *Purcell*, 1 Hill (S. C.), Ch. 193; *Cleveland* v. *Cleveland*, 30 S. W. 825 (Tex. 1895). This also coincides with the Civil Law doctrine: *Mackeldey's Roman Law*, § 767. In *Eyre* v. *Golding*, 5 Binn. 472, Chief Justice TILGHMAN said: "There is a difference between a legacy of a sum of money to one for

term of life, and a bequest of a sum to be paid annually for life. In the former case the legacy not being payable till the end of a year from the testator's death, carries no interest for that year. But in the latter the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death or the legatee will not receive the annuity *annually*" While the Chief Justice laid stress on the word annually, later decisions have not maintained the distinction. In *Helyard's Estate*, 5 W. & S., the gift was the trust to put the fund out at interest and pay the interest and income to the beneficiary during her natural life." The court was unable to distinguish this case from *Eyre* v. *Golding*, saying "interest is in its nature an annual profit; and a direction to pay interest makes it payable annually without anything further:" *Spangler's Estate*, 9 W. & S., 135; *Bird's Estate*, 2 Pars. 170; *Booth* v. *Ammerman*, 4 Bradf. 129. In *Fickwir's Estate*, Mr. Justice MITCHELL declares "there is no substantial difference in legal aspect between the gift of an annuity for life and of the interest or income of a fund for life; nor between the gift simply of interest and of interest payable annually. Interest accrues *de die in diem*, but it is calculated at a rate per annum. In the popular understanding it is chargeable annually and payable the same way, unless custom, or contract, or specific direction makes it payable at shorter intervals. The idea is so clearly implied that the actual use or omission of the word annual in the will does not seriously affect the purpose and intent of the testator:" 136 Pa. 374; 7 Pa. C. C. 315; *Eichelberger's Estate*, 170 Pa. 242.

It is also a settled rule that an annuity is not subject to apportionment, so that if the annuitant dies before the fixed day upon which the annuity is payable, his representative is not entitled to a proportionate part of the annuity for the time which has elapsed since the last payment: *Dubbs* v. *Watson*, 2 Pa. D. R. 115. The strictness of the rule, however, has been partially relaxed by the recognition of certain exceptions, as in the case of an annuity given in lieu of dower or for the separate maintenance of a married woman or the support of

minor children: *Stewart* v. *Swaim*, 13 Phila. 185; S. C., 7 W. N. C. 407. In Pennsylvania, the exception in favor of a wife or minor child has been confirmed by a line of decisions: *Gheen* v. *Osborn*, 17 S. & R. 171; *Fisher* v. *Fisher*, 5 Pa. L. J. 178; *McKeen's Appeal*, 42 Pa. 479; *Blight* v. *Blight*, 51 Pa. 420. But the exception seems to have been ignored in Connecticut in the case of *Tracy* v. *Strong*, 2 Conn. 659. In New Jersey, in the *Lackawanna Iron & Coal Co.'s Case*, 37 N. J. Eq. 26, A and his wife conveyed a farm to B, in consideration of B's agreement to pay an annuity to A for life and after his death to his wife. A died and the farm was sold subject to the annuity to the widow. She died five months after an annual payment. It was held that the annuity was to be apportioned to the time of her death, as it was a provision for support.

As previously stated, the writ of annuity lay at common law to enforce the payment of arrears or, if the lands were charged, the remedy might be by distress. These methods have long been superseded by the action of debt or covenant: *Horton* v. *Cook*, 10 Watts. 124; 1 Waits, Actions & Defenses, 325. In Pennsylvania, when an annuity is charged on land by will, an action of assumpsit in the Common Pleas is the proper method for enforcing the personal liability of the devisee, but the jurisdiction of the Orphans' Court is exclusive to enforce a testamentary charge on the land itself: *Dinsmore* v. *Ramsay*, 13 Pa. C. C. 119. The Court of Chancery in England has decided in a case where the personal estate was insufficient to pay an annuity created during testator's life, that the annuity must be treated as a debt of the testator and apportioned between the three devised estates: *In re Harrison*, 43 Ch. D. 55; *In re Eart of Lucan*, 45 Ch. D. 470. Arrears of annuity, it may be added, do not, as a rule, carry interest: *Theobald on Wills*, 4th Ed. 155; *Torre* v. *Brown*, 5 H. L. 555; *Wheatley* v. *Davies*, 24 W. R. 818.

A bill in equity will lie to enforce the payment of an annuity charged upon land or to compel an additional appropriation from the residuary estate to meet a deficiency in the fund upon which the annuity is secured: *Merritt* v. *Merritt*, 48 N. J.

Eq. 1; *Marshall* v. *Thompson*, 2 Munf. 412. In a recent English case, where an annuity charged upon the *corpus* of settled real estate was in arrear, the opinion of the court was that it had power to order the arrears to be raised by sale or mortgage of sufficient part of the estate: *In re Tucker* (1893), 2 Ch. 323. But the making of such an order is a matter not of course but of discretion: *Cupit* v. *Jackson*, 13 Price, 721; *Hambro* v. *Hambro* (1894), 2 Ch. 564; *Graves* v. *Hicks*, 11 Sim. 551. Application for the construction of wills involving annuities may also be made under the Conveyancing Act of 1881, 44-5 Vict., c. 41, § 5; *In re Fremes' Contract* (1895), 2 Ch. 256. WM. H. LOYD, Jr.