

Eng. Rep.]

BIRCH V. SHERRATT—SMITH V. TEBBITT.

[Eng. Rep.]

will. No doubt that was the desire which would have been effectuated by the construction which he gave to the will. I should be glad if I could arrive at that conclusion, but I am unable to do so. I think therefore that the annuitant is entitled to an order confirming her right to be paid the annuity of £100 and the arrears, and to have the payment made not merely by the continuing receipt of the income of the money, but by payment out of the *corpus*. I think we are not at all here in the difficulty, which sometimes arises with regard to the rents of real estate, as to whether the sale of the real estate was authorized. I think the tendency of the Court has always been stronger in modern times to say—where it found the purpose to be answered was that which would continue to exhaust the income of the trust fund—that the Court has ample power to apply the *corpus* or trust fund, and I think that is clear here from the words “subject thereto,” that is, the *corpus* afterwards given over is subject to the payment of the annuitant.

ROLT, L.J.—Having also had the opportunity (of which I have availed myself) of considering the argument which the counsel for the appellant addressed to us yesterday, and the argument of the leading counsel for the respondent, who also argued yesterday, and having examined all the cases which have been cited, except the cases of *Perkins v. Cooke*, *Earle v. Bellingham*, and *Miller v. Huddleston*, which were cited this morning, and having had an opportunity of considering the argument raised this morning, I think also that the case may now be disposed of.

If the annuity is given out of rents and profits, or dividends and interest, and if the capital or *corpus* is given intact from and after the annuitant's death to another, it is, in the event of the deficiency of the income to pay the annuitant, the case, or the equivalent of the case, of a life interest with remainder over. But if the capital is given over not in terms, “from and after the annuitant's death” but “from and after satisfaction of the annuity, and subject to the annuity,” I think then it is the case, or the equivalent of the case, of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate or the trust fund. This view of the principle of construction, appears to me, not to be inconsistent with any one of the cases which have been cited.

Now in the present case the capital is in terms given “from and after the payment of the said annual sum of £100,” and it is given “subject thereto.” But it is said (and the argument is entitled to great weight, it is the whole of the argument on the other side, and it is the judgment of the Vice-Chancellor) that the words “subject thereto” mean subject to the payment of the annuity out of the income. It is, therefore, said that the annual sum is to come out of interest and dividends, that it is only “subject to the payment thereof” out of the interest and dividends, and that the whole capital fund spoken of as “the said trust moneys” is in this case given over. Even if that be the construction of the gift of the annuity, I doubt whether the conclusion drawn from it is well founded. If an annuity for life be given out of the interest

of trust funds only, and then the trust funds are given after and subject to the satisfaction of the annuity, I should prefer the construction which gives the annuitant the benefit of the full payment, if necessary, out of the capital. But is it accurate in this case to say that the annuity is only given out of dividends and interest? I think that is very doubtful. What are the trustees to do with the rents and profits of the trust fund? To levy and raise the annual sum of £100, and then the annual sum thus levied and raised is directed to be paid to the annuitant for life. This admits, without any violence to the words, of a construction which makes the annuity a charge on the *corpus* or capital. It is not a mere gift out of the income. It is a direction to levy and raise out of income, the sum of £100, and that sum of £100 is to be paid to the annuitant. I am aware that the direction to levy and raise an annuity out of the rents and profits is to be found in some of the cases which have held the annuity only charged on the income, but the language of the direction in these cases will be found, in comparison with the words here, not to be nearly so strong in favour of a charge on the *corpus*, or capital, as the language before us. On the whole therefore I think that the annuitant is entitled to the capital of the fund, and that the order must be varied in that respect

Costs of all parties out of the estate.

PROBATE.

SMITH AND OTHERS V. TEBBITT AND OTHERS.

Will—Testamentary capacity—Insanity, its tests—Religious enthusiasm—Its limits.

[August, 1867.—16 W. R. 18.]

The following is, in effect, the judgment of—

THE JUDGE ORDINARY.—The law of England permits a larger exercise of volition in the disposal of property after death than any other country, but coupled with this condition, that this volition should be that of a mind of natural capacity not unduly impaired by old age, enfeebled by illness, or tainted by morbid influence. Such a mind as the law calls a “sound and disposing mind.”

A person who is the subject of monomania, though apparently sensible on all subjects and occasions other than those which are the special subject of his apparent infirmity is not in law capable of making a will.

Decided cases have established this proposition, that if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only on a certain subject, or that on all other subjects the action of the mind is apparently sound and the conduct even prudent, the testator must be pronounced incapable, even though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the Court.

The test of this disease is the existence of mental delusions. A mental delusion has been defined “to be the pertinacious adherence to some delusive in opposition to plain evidence of its falsity.”