

DIVISIONAL COURT.

DECEMBER 23RD, 1912.

RE JOHNSON.

Will—Construction—Bequest of Personalty—Absolute Bequest or Bequest of Life Interest—Implied Contingent Power to Encroach upon Capital for Maintenance.

Appeal by Agnes Johnson from the judgment of MULOCK, C.J.Ex.D., noted ante 153.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

N. B. Tudhope, for the appellant.

D. Inglis Grant, for Janet Ratcliffe, a beneficiary, and an executor.

BOYD, C.:—The testator made his will in June, 1909, and died in August, 1911, his financial condition between these two years being much the same.

He left a widow and grown up children—married and doing for themselves. His wife was at the date of the will weak and with failing eyesight—she is now old, infirm, and stone-blind. After paying debts his estate consists of land with house and its belongings, and personal property. The latter is chiefly made up of mortgages aggregating \$4,400, notes amounting to \$1,125, and money equal to \$1,550, in all about \$7,000 yielding (say) \$350 a year.

The frame of his will is to give the whole of his property, real and personal, to his wife for life or widowhood (this last alteration may be dismissed). After her death the house and furniture or any live stock or chattels to one of the daughters, and after the wife's death legacies are to be paid to various sons, amounting in the whole to \$3,200, and this clause contains the crucial words—at her death, then, "the legacies shall be paid forthwith if there is sufficient to pay the same; if not, then a corresponding deduction shall be made in every case."

All the residue of the estate is given among the daughters.

Upon the construction of the will the Chief Justice has held that the widow has a life estate only and not an out-and-out ownership. I agree that this is a right result, but would carry the benefit intended for the widow a little further, and say that she has a life estate and interest in all the property, with an implied contingent power to encroach on the capital for the purposes of maintenance. This aspect of the case was not presented