

[Eng. Rep.]

BIRCH V. SHERRATT.

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cient to pay the arrears of the annuity. Under these circumstances the annuitant contended that the annuity was charged on the *corpus* of the estate and that she was entitled to the whole of the residue. The Vice-Chancellor held that the annuity was only payable out of income, and from this decision the annuitant appealed.

Kay, Q. C., and Rigby, for the appellant.

Cole, Q. C., Cotton, Q. C., Lindley, Cracknall, and Procter, for the different persons entitled in remainder.

Fuber, for the trustees.

The following cases were cited:—*Playfair v. Cooper*, 1 W. R. 216, 376, 17 Bea. 187; *Foster v. Smith*, 1 Ph. 629; *Baker v. Baker*, 6 H. L. C. 618, 6 W. R. 410; *Phillips v. Gutteridge*, 11 W. R. 12; *Boyd v. Buchle*, 10 Sim. 595; *Wroughton v. Colquhoun*, 1 DeG. & S. 36; *Picard v. Mitchell*, 14 Beav. 103; *Croly v. Weld*, 3 DeG. M. & G. 993; *Forbes v. Richardson*, 1 W. R. 320, 11 Ha. 354; *Torre v. Browne*, 5 H. L. C. 577; *Stellfox v. Sugden*, Joh. 234; *Perkins v. Cooke*, 2 Joh. & H. 393; *Clifford v. Arundel*, 1 DeG. F. & J. 307; *Sheppard v. Sheppard*, 32 Beav. 194; *Earle v. Bellingham*, 24 Beav. 445; *Miller v. Huddleston*, 3 Mac. & G. 513.

July 25.—Lord CAIRNS, L. J.—As this case has been argued so fully before us, and we have had an opportunity of considering it since yesterday, we need not trouble you, Mr. Kay, in reply.

There is no doubt that the will like every other will, must be judged of by the proper construction of the language the testator has used. The cases which have been cited are of little value except so far as they show that some definite construction has been put upon any word or set of words which may be found in this will as they have been found in other wills before.

Now I quite agree with what has been said, that the first and principal object very probably in the testator's mind was to deal with his income, and having directed the conversion of his estate, and the investment of it, he declared that out of the income £100 a year should be paid to his mother for her life, and it is very possible that the testator may have been perfectly satisfied in his own mind that the income would be sufficient, and continue to be sufficient, to pay that sum. And it is also possible, if it had been pointed out to the testator that the income might become deficient, that he might have made arrangements of a different kind from those which he has made in his will. We cannot speculate on any of those matters, but we must take the words he has used. The first words that occur are, "Upon trust that they the trustees do and shall, with and out of the interest dividends and annual proceeds of the said trust moneys, stocks, funds, mortgages, and securities, levy and raise the annual sum of £100 of lawful money of Great Britain and Ireland, and pay the same by four equal quarterly instalments to my dear mother or her assigns during her natural life." Those first words, if the will had stopped there, would not as at present advised appear to me sufficient to constitute a continuing charge upon the income or a charge upon the *corpus* for the payment of this £100 a year. I do not mean to say that there may not be cases in which a direction to pay out of a recurring income or out of rents

may not indicate an intention to create a perpetual charge; but taking these words I have read, and judging of them alone, I think if they had stood alone there would have been nothing more than the direction to pay this annuity while the annuity lasted, namely, during the life of the mother, and out of the income, if the income was sufficient. But then come the very important words of the gift over. "From and after the payment of the said annual sum of £100, and subject thereto, I do hereby declare that my trustees for the time being shall stand possessed of the said trust moneys, stocks, funds, mortgages and securities upon trust for the ends, intents, and purposes hereinafter-mentioned. There is, therefore, from and after a certain event, or certain purpose, which I will consider presently, as it were a revesting of the trustees with whatever may be capital or *corpus* of the trust-moneys, stocks, funds, mortgages, and securities for certain further purposes, which were for division among the members of the testator's family as tenants for life and tenants in remainder. Now the view the Vice-Chancellor has taken of those words "from and after the payment of the said annual sum of £100, and subject thereto," is that they are merely referential words, and that they do not in any way go beyond what would be the proper construction of the preceding words, if the preceding words stood alone, and the construction that his Honour has adopted is first, to construe the preceding words and to hold that they indicate payment out of income merely, if the income should be sufficient, and then to construe the words I have referred to "from and after, &c.," as referential words, intended to express by way of reference the same idea and no greater idea than the preceding words express. If I were able to satisfy myself that those were referential words merely, I should be satisfied with the construction his Honour has put upon the will, but I cannot satisfy myself that they are referential words. I think we have no right to curtail the natural meaning of the words, or to read, "from and after the payment of the annual sum," as if it were "from and after the *chance* of payment of the annual sum," or the words "subject thereto," that is to say, "subject to the payment of the annual sum of £100," as if they meant subject to the possibility of the payment of £100 if the income were sufficient. I think the natural meaning of the words "from and after the payment of the annual sum," is "from and after full and complete payment of the annual sum of £100," and the natural meaning of the words "subject thereto," is "subject to the payment of the annual sum." That is to say "subject to the full and complete payment of the annual sum." Then, if that is so, this is a fresh trust created in favour of the beneficiaries, to take effect as a trust which does not commence until, and is only created subject to, the payment of the preceding gift of the annual sum of £100, which as I said before, must mean the full payment of the annual sum of £100. I, therefore, with great respect to the Vice-Chancellor, cannot arrive at the construction he has done, with every desire to do that which one is in a little danger of leaning too much to, a desire of giving provision to every one beneficially entitled under the