

[Eng. Rep.]

LLOYD V. LLOYD—CRAVEN V. SMITH.

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Will—Construction—"Property"—Real Estate.

A testator specifically devised his real estate, and devised and bequeathed all his other property to his brother and nephew upon trust, to continue the same in its then state of investment, or to call in and invest the same in Government or real securities, and apply the income of his residuary estate as therein mentioned.

The testator became entitled to real estate other than that specifically devised after the date of his will.

Held, that such real estate passed by the devise of all his other property.

The court relied chiefly on the absence of the words "executors and administrators" in the gift to the trustees, and the use of the words "devise and bequeath" and "income of residuary estate."

[M. R. 17 W. R. 702]

Edward Lloyd, by his will dated in January, 1863, devised his house and lands in the parish of Naburn to his wife for life, and at her decease to his eldest daughter, Georgina, her heirs and assigns, or in the event of her dying before her mother without issue, to his second daughter Edith, her heirs and assigns; and bequeathed certain personal effects to his wife, and then proceeded thus: "I devise and bequeath all my other property whatsoever and wheresoever, to my brother the Reverend Yarburgh Gamaliel Lloyd, and my nephew Yarburgh George Lloyd upon trust, to continue the same in the investments on which it shall be standing at the time of my decease, or at their discretion to call in the same and invest it in their names on Government or real securities, or debentures of railways and municipal corporations, and to apply the same in manner following:—To set apart such a portion of the said residue, as with the sum of £300 a year settled on my said wife, will amount to one half of the total income arising from my residuary estate, and the said settled property united and to pay the interest of such sum to her during her natural life, and I bequeath the income of the remainder of my said residuary estate to my said two daughters, whom I commit to the care of their mother as their sole guardian. And I direct that my trustees shall pay to my said wife, and after her decease shall apply for their maintenance and education such part of their income as they shall think proper until they attain respectively the age of twenty-one years, or marry with their mother's consent, and that on respectively attaining that age or marrying as aforesaid, the said remaining trust fund shall be equally divided between them, and the sum reserved as aforesaid for their mother's life shall be divided in the same manner at her decease. Should I leave any other children, they shall take equal shares with their sisters in the furniture and property bequeathed to them."

The testator at the date of his will had no real estate, except the house and lands specifically bequeathed. Between the date of his will and his death, however, he became entitled to real estate of considerable extent and value.

On the death of the testator, his daughters, as his co-heiresses-at-law, claimed to be entitled to the residuary real estate, on the ground that he died intestate as to it, and this suit was accordingly instituted by them to obtain the opinion of the court as to the construction of the will.

Sir R. Baggally, Q.C., and *Brodrick*, for the plaintiffs, submitted that the residuary real estate did not pass by the gift of all his other property, the terms in which the limitations as to it were

declared being inconsistent with the testator having meant to include real estate: *Coard v. Holderness*, 3 W. R. 311, 20 Beav. 147.

Jessel, Q.C., and *Babington* for the testator's widow and executors.—We contend that the residuary real estate did pass. *Coard v. Holderness* goes very far. *Stokes v. Salomons*, 9 Ha. 75, contains almost every element in this case. The directions which are applicable only to personal estate, ought to be construed as referring only to such portions of the residuary estate as may consist of personalty, to which such directions may be applicable. As a general rule the residuary devise of "property" does pass real estate, especially when, as here, the testator has just made a specific devise of real estate, and may therefore be supposed to have had it in his mind: *Saumarez v. Saumarez*, 4 My. & Cr. 331; *Re Greenwich Hospital Improvement Act*, 20 Beav. 458.

Sir R. Baggally in reply.

LORD ROMILLY, M.R.—I think that the residuary gift here does pass the real estate. The testator begins by giving real estate specifically, then he devises and bequeaths all his other property whatsoever and wheresoever to trustees. It is true he does not devise it to them and their heirs, but then on the other hand he give it to them *simpliciter*, and does not use the words executors and administrators, which weighed with me in deciding *Coard v. Holderness*. And then he speaks of the income arising from his residuary "estate." I think, therefore, that I must hold that the real estate does pass.

CRAVEN V. SMITH.

Costs—Slander—Damages under £10—30 & 31 Vict. c. 140 s. 5—Record before the Court.

The fifth section of 30 & 31 Vic. c. 146, which enacts "that if in any action commenced after the passing of the Act in any of the superior courts the plaintiff shall recover a sum not exceeding ten pounds, if the action be founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at Chambers shall by rule or order allow such costs," applies to all actions, and the fact of the county court having concurrent jurisdiction in an action affords a *prima facie* presumption for granting a certificate for costs in such action.

The court will make use of its own records to inform itself of a matter which may not have been brought formally before it on affidavit.

[Ex. 17 W. R. 710.]

This was an action of slander, in which a verdict went by default for the plaintiff.

A writ of enquiry was executed on the 7th December, 1868, before Mr. Under-Sheriff Burchell, in the Sheriff's Court, Red Lion Square, and damages to the amount of £5 were awarded by the jury.

The Under-Sheriff was asked to certify for costs, but, under the belief that he had no such power, he refused, but expressed his opinion that, as a matter of right, the plaintiff was well entitled to costs, using these words, "I would certify if I could."

Application was made to Mr. Justice Blackburn at Chambers, to allow the plaintiff's costs, and on the learned judge's refusal, a rule to the following effect was obtained by *Anderson*: "that the defendant show cause why the plaintiff should