

TEETZEL, J.—. . . Does the language of the testator import that \$800 at all events is annually to be paid out of his estate to each annuitant, or only the interest to that amount of a capital sum which is to be set apart or retained?

I am convinced that with reference to these 4 annuitants the controlling intention of the testator was that the annuitants should each receive \$800 per annum in any circumstances.

This is strongly evidenced, I think, by the following facts and circumstances to be gathered from the will:

(a) Clause 3, directing the annuities to be paid, contains no limitation or condition.

(b) Testator had an estate more than sufficient to provide for these annuities out of income, and, after directing his executors out of the residue to pay his debts, etc., directs them to divide the residue among his sons and the children of one daughter, "after retaining in their hands . . . a sufficient portion of my estate to produce annually by way of dividends, interest, or otherwise howsoever, a sufficient sum to pay the said annuities," etc.

(c) He directs the annuities to be paid quarterly . . . no regard being had to whether the executors would have sufficient in hand in the shape of interest to pay the annuities at the quarterly periods.

(d) He makes no express disposition of any surplus revenue which might be earned upon the moneys retained after paying the annuities.

(e) An absence of any clear intention to constitute the annuitants life tenants only of the estate retained by the trustees or of an intention that such estate should pass in its entirety to remaindermen.

It seems to me that the provisions made for paying the annuities out of income were intended chiefly as a means to secure the payment of the annuities, but not the only means. . . .

A perusal of all the cases cited leads me to the conclusion that this particular will resembles more the wills in question in *May v. Bennett*, 1 Russ. 370, *Wright v. Calendar*, 2 DeG. M. & G. 652, *Carmichael v. Gee*, 5 App. Cas. 588, and *Kimball v. Cooney*, 27 A. R. 453, than the wills in the cases of *Baker v. Baker*, 6 H. L. Cas. 616, and *Wilson v. Dalton*, 22 Gr. 160.

I think, therefore, the shortage in the annuities still current, after crediting the income derived from the securities