[HIGH COURT OF AUSTRALIA.]

PEARCE . . . . . APPELLANT;
PLAINTIFF,

AND

WRIGHT AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1926.

SYDNEY, *Nov.* 11.

Knox C.J., Isaacs and Higgins JJ.

Will—Construction—Gift of land subject to payment by beneficiaries of annuity—Charge on land.

A testator, who owned a half interest in certain land, by his will gave and devised that half interest to his son and two daughters in unequal shares and he declared that the said gift and devise of the half interest should be "subject to the payment" by his son and daughters to his wife during her life of an annuity payable by monthly instalments. The value of the half interest was at all material times more than sufficient to provide for the payment of the annuity.

Held, that the annuity was charged upon the half interest and was payable by the beneficiaries, as between themselves, in proportion to the respective shares devised to them.

Decision of the Supreme Court of New South Wales (*Long Innes* J.): *Pearce* v. *Wright*, (1926) 26 S.R. (N.S.W.) 515, affirmed with a variation.

APPEAL from the Supreme Court of New South Wales.

Edward Wright died on 19th July 1920, having made his last will dated 25th June 1920. The material provision of the will was as follows: "Whereas I hold one half interest in the real estate where the business of E. Wright & Co. Ltd. is to be carried on and also land and garage opposite in Cleveland Street Redfern together with a shop premises adjoining E. Wright & Co. Ltd. Now I hereby give and devise one-sixth of my said half interest in the said land to the

said Horace Gilbert Wright and one-sixth of my said half interest in the said land to the said Florence Emily Boulton Wright and the remaining four-sixths of my half interest in the said land to the said Louisa Eliza Jane Pearce and I declare that the said gift and devise of my half interest in the said lands shall be subject to the payment by my said son and daughters to my said wife during her life of the sum of two hundred and fifty pounds per annum payable by monthly instalments." In the year 1911 the testator had given to his son, Horace Gilbert Wright, and his daughter Florence Emily Boulton Wright a partnership interest of one-fourth each in the business which the testator was then carrying on under the name of Wright & Son. All the land mentioned in the will belonged to that partnership and the title to it at the testator's death was in the names of the testator, Horace Gilbert Wright and Florence Emily Boulton Wright as tenants in common in the shares following, that is to say, the testator one-half and the other two one-fourth each. E. Wright & Co. Ltd. had been formed in 1920, shortly before the testator's death, to carry on the business theretofore carried on by Wright & Son, and the land on which the partnership had carried on business was leased to that company. That land and the land on which the garage was erected brought in a rent of about £900 per annum. The testator left him surviving his widow, Sarah Maria Wright, his son, Horace Gilbert Wright, and his two daughters, Florence Emily Boulton Wright (afterwards Garvan) and Louisa Eliza Jane Pearce. The executors and trustees of the will were Horace Gilbert Wright and Leonard Alfred Wilson Pearce.

An originating summons was taken out by Louisa Eliza Jane Pearce for the determination by the Supreme Court of certain questions and *Long Innes* J. made a decretal order thereon which, so far as is material, was as follows:—"This Court doth declare that upon the true construction of the above-mentioned will of Edward Wright deceased and in the events which have happened the annuity of £250 given to the widow of the said deceased (a) does not impose a joint personal liability upon the plaintiff and the two defendants Horace Gilbert Wright and Florence Emily Boulton Garvan to pay the same; (b) is charged upon the interests given to the plaintiff and the said two defendants in the half interest of the deceased.

H. C. OF A. 1926.

PEARCE v. WRIGHT.

the real estate in Cleveland Street Redfern mentioned in the said will; (c) does not impose a trust to pay the same upon the plaintiff and the said defendants binding the interests of the plaintiff and the said two defendants in the said land And this Court doth further declare that the said annuity is payable out of the interests of the plaintiff and the said two defendants in the said half interest of the said deceased in the said real estate in the proportions of four-sixths, one-sixth and one-sixth respectively" : *Pearce* v. *Wright* (1).

From that decision Louisa Eliza Jane Pearce now appealed to the High Court.

Dudley Williams (*Teece* K.C. with him), for the appellant. Under the declaration in the will as to payment of the annuity a personal liability was imposed on the devisees to pay the annuity and they became jointly bound under an implied contract to pay the sum subject to payment of which the gift was made to them. Primarily the liability is a personal one although the property may be charged as an aid to the personal liability. If primarily there is a personal liability the annuity should be paid by the devisees in equal proportions. [Counsel referred to *Re Williames*; *Andrew* v. *Williames* (2); *In re Loom*; *Fulford* v. *Reversionary Interest Society Ltd.* (3); *Jay* v. *Jay* (4); *Messenger* v. *Andrews* (5); *Rees* v. *Engelback* (6); *Re Oliver*; *Newbald* v. *Beckitt* (7); *In re Kirk*; *Kirk* v. *Kirk* (8); *Re Cowley*; *Souch* v. *Cowley* (9); *Wilson* v. *Wilson* (10); *Gill* v. *Gill* (11); *Cunningham* v. *Foot* (12).]

[HIGGINS J. referred to *Preston* v. *Preston* (13); *Alcock* v. *Sparhawk* (14).]

Hammond K.C. (with him *McDonald*), for the respondents Horace Gilbert Wright and Florence Emily Boulton Garvan. There is no case in which words like those in the present case have been held to impose a personal obligation (see *Re Hawkins*; *Hawkins* v. *Argent* (15); *Jillard* v. *Edgar* (16)).

(1) (1926) 26 S.R. (N.S.W.) 515.
(2) (1885) 54 L.T. 105.
(3) (1910) 2 Ch. 230, at p. 233.
(4) (1924) 1 K.B. 826.
(5) (1828) 4 Russ. 478.
(6) (1871) L.R. 12 Eq. 225, at p. 229.
(7) (1890) 62 L.T. 533.
(8) (1882) 21 Ch. D. 431.
(9) (1885) 53 L.T. 494.
(10) (1847) 1 DeG. & Sm. 152.
(11) (1921) 21 S.R. (N.S.W.) 400.
(12) (1878) 3 App. Cas. 974.
(13) (1856) 2 Jur. (N.S.) 1040.
(14) (1691) 2 Vern. 228.
(15) (1913) 109 L.T. 969.
(16) (1849) 3 DeG. & Sm. 502.

Knox C.J. I think that the learned Judge came to the right conclusion in this case. The material words of the will are "I hereby give and devise one-sixth of my said half interest in the said land to the said Horace Gilbert Wright and one-sixth of my said half interest in the said land to the said Florence Emily Boulton Wright and the remaining four-sixths of my half interest in the said land to the said Louisa Eliza Jane Pearce and I declare that the said gift and devise of my half interest in the said lands shall be subject to the payment by my said son and daughters to my said wife during her life of the sum of two hundred and fifty pounds per annum payable by monthly instalments." The words of that declaration to my mind clearly make the annuity a charge on the half interest in the land. That being so, the son and the two daughters only take the half interest given to them subject to that charge. They get nothing beneficially out of the rents and profits of the land until the annuity is satisfied. If they receive between them more than enough to satisfy the annuity, their first duty is to pay the annuity and then they may divide the balance between themselves in proportion to their shares of the half-interest in the land. Whether they do it in that way or whether they divide the whole of the rents and profits between themselves and then contribute towards the annuity in proportion to their shares in the half interest does not matter: the result is the same in each case.

I think it would be well to strike out the declaration (a) in the decretal order, because it clearly is not necessary at the present time to decide that question. We express no opinion upon it but leave it open to be decided, if necessary, at some future time. The only contest at present is in what proportions the parties are liable as between themselves to contribute to the annuity. That can be settled by the answers to the other questions. I think also that declaration (b) should be altered by striking out the words "the interests given to the plaintiff and the said two defendants in," and that the further declaration should be altered so as to read: "This Court doth further declare that as between the plaintiff and the said two defendants the annuity is payable in proportion to their respective shares in the half interest devised to them by the said will." Otherwise the decretal order should be affirmed.

H. C. OF A. 1926.

PEARCE v. WRIGHT.

Higgins J.

ISAACS J. I agree.

HIGGINS J. Mr. *Williams* has done all, I think, that could be done for his client; but the order dismissing the appeal, as proposed by the Chief Justice, must be made.

The judgment of the learned primary Judge is, in my opinion, right as to the vital question—that the annuity is a charge upon the whole of the half interest devised, and, as the shares of the beneficiaries in that half interest are unequal, it necessarily follows that the incidence of the annuity must be unequal, in the same proportions.

There are two steps:—(1) The devise of the half interest, the property devised itself, is "subject to the payment by my said son and daughters" of the annuity. The words "subject to" are words which are normally and ordinarily used to create a charge on property. If authority is required for this statement it is put as plainly as possible by Lord *Cairns* in *Birch* v. *Sherratt* (1). The question usually arises as between corpus and income; but that case has been followed, under circumstances which are not nearly as strong as in the present case, in *In re Howarth* (2) and *In re Watkins' Settlement*; *Wills* v. *Spence* (3). In the latter case *Cozens-Hardy* M.R. said (4):—"What does 'subject thereto' mean? As I read the settlement it means subject to the annuity of £400. If that be the true construction, it is absolutely settled by *Birch* v. *Sherratt*, which was in no way qualified by the Court of Appeal in *In re Boden* (5), and which has since been followed by this Court in *In re Howarth*, that these words 'subject thereto' are not merely referential, but mean subject to the full and complete payment of the annuity, and that the effect of them is to make the annuity a charge on the corpus."

The second step is this: Having ascertained that there is a charge created upon the half interest, the beneficiaries take, not the gross income from the half interest, but the net income after satisfaction

(1) (1867) L.R. 2 Ch. 644, at p. 648.
(2) (1909) 2 Ch. 19.
(3) (1911) 1 Ch. 1.
(4) (1911) 1 Ch., at p. 4.
(5) (1907) 1 Ch.132.

of the charge, and they must necessarily suffer in unequal proportions, the proportions in which they are entitled to the devised property.

For instance, if the gross income were £1,000, after payment of the annuity the net income to be divided among the beneficiaries would be £750; and that £750 would be divided between them in the proportions of four-sixths, one-sixth and one-sixth.

I agree in the alterations proposed to be made to the decree.

Decretal order varied as stated in judgment of Knox C.J. Otherwise decretal order affirmed and appeal dismissed. Appellant to pay costs of appeal.

Solicitor for the appellant, *Walter Dickson.*

Solicitors for the respondents, *G. M. Laurence & Son*; *Walter Dickson.*

B.L.