NATIONAL BANK OF COMMERCE *v.* RITTER.

Opinion delivered March 31, 1930.

1. WILLS—INTENTION OF TESTATOR.—In construing wills, the intention of the testator should be carried out, and that intention should be gathered from the will itself, whenever it is possible to do so.
2. REMAINDERS—WHEN CONTINGENT.—It is the uncertainty of the right of enjoyment, and not the uncertainty of actual enjoyment, which renders a remainder contingent.
3. WILLS—NATURE OF REMAINDER INTEREST.—Where a testator devised property in trust to pay the income to designated beneficiaries, and after the widow's death to divide the estate among the testator's three children, providing that the issue of any deceased child should take the place of the parent, and that "the interest of any child dying without issue prior to the termination of said trust shall lapse and revert to the estate," *held* that the children took a contingent remainder, it being uncertain who would take under the will until death of the widow.

4. EXECUTION—CONTINGENT REMAINDER.—Where a testator devised property to trustees to pay the income to certain legatees until death of the widow, and then to distribute the property among his children, the children took no interest which they could convey, and therefore had no interest which could be sold on execution or subjected to payment of their debts.

Appeal from Poinsett Chancery Court; *J. M. Futrell*, Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees to subject an alleged interest of one of appellees in certain real estate to an execution of appellant.

E. A. Ritter died testate in Poinsett County, Arkansas, and his will was filed for probate on May 9, 1921. After making several specific bequests, the paragraphs of the will necessary for a determination of the issue raised by the appeal read as follows:

"9. I give and devise and bequeath all of the residue of my estate, real and personal and mixed, wherever located, to C. A. Dawson, L. V. Ritter, my son, Harry Ritter, my son, and Louis Ritter, my brother, as trustees, and I do hereby empower them as such trustees to continue the operation of all of my properties along lines of my policies as far as possible, only deviating therefrom in such cases as they may deem essential to the welfare of said properties, and I direct that said trustees shall pay over to my wife, Anna Ritter, the sum of three hundred ($300) per month out of the income arising from the operation of said properties, and after so doing I direct that the balance shall be divided into four equal parts and paid over one-fourth to my wife, Anna Ritter, one-fourth to my son, Louis Ritter, one-fourth to my daughter, Mrs. Edna Newson, one-fourth to my son, Harry Ritter; settlements annually or so often as their necessities may require."

"10. I direct that the trusteeship hereby created shall extend throughout the lifetime of my wife, Anna Ritter, and at her death the same shall cease and terminate, provided my youngest son has attained the age of thirty years, if not, said trusteeship is to continue until

my said youngest son has become thirty years of age, at which time the principal of my said estate shall be equally divided between my daughter and two sons, the issue of any deceased child to take the place of their parents, and share in said division *per stirpes* and not *per capita,* the interest of any child dying without issue prior to the termination of said trust shall lapse, and revert to the estate, and the income which would go to said child who may die without issue shall be equally divided among the survivors, or their children, such children to take *per stirpes* and not *per capita.*"

Paragraph 11 of the will authorizes the trustees to make mortgages or deeds whenever necessary or to sell any of the real estate according to their best judgment. On the 14th day of May, 1928, appellant obtained judgment in the circuit against L. V. Ritter, a son of E. A. Ritter, and one of the legatees named in his will. An execution was issued on the judgment, and there was a return of *nulla bona* by the sheriff. Then the present suit was instituted in order to subject the interest of L. V. Ritter under the will to the payment of the judgment against him in favor of appellant. Anna Ritter, the widow of E. L. Ritter, deceased, is now living, and was made a party to the action. Harry Ritter, the youngest son of E. A. Ritter, is now thirty years of age, and is without issue. L. V. Ritter is married and has children.

The chancellor found the issues in favor of appellees, and it was decreed that the complaint of appellant should be dismissed for want of equity. The case is here on appeal.

G. B. Segraves, for appellant.

J. G. Waskom and *N. F. Lamb,* for appellees.

HART, C. J., (after stating the facts). It is conceded that the only question presented by the appeal is whether L. V. Ritter has a vested interest under the terms of his father's will which may in equity be subjected to the payment of appellant's judgment against him. Counsel for appellant insist that the proper interpretation of the

will is that L. V. Ritter took under the will a vested remainder upon the death of the testator, and that his interest could be sold under execution issued in favor of appellant under its judgment against him during the life estate of the widow. On the other hand, counsel for appellee insist that L. V. Ritter took only a contingent interest under the will in his father's estate depending upon his outliving the life tenant.

The correctness of the decree of the chancery court, therefore, depends entirely upon what estate the remaindermen took under the will. It is a cardinal rule in the construction of wills that the intention of the testator should be carried out, and that the intention must be gathered from the will itself whenever it is possible to do so. The general plan of the will is to be considered by reading all of its provisions together, so that the intention of the testator may be gathered from the language he used, and the court may not substitute a new will for the one so made. It has been frequently said that it is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent.

It is clear from the provisions of paragraph 10 of the will that the testator did not intend that his sons or daughter, living when he made his will but not living when his widow died, should take any interest in his estate, that he or she should dispose of in the meantime, cutting off the other children. The will expressly provides that the children of the dead sons or daughter shall take and be substituted *per stirpes,* and not *per capita* for their parents. This would be impossible if the parents of such children could convey away their contingent share in the estate or if the same could be sold under execution against such parent during the period of the life estate. By the express language of paragraph 10 of the will, unless L. V. Ritter survived his mother, whatever interest he would have taken in that event went to his issue who were substituted in his place under the

will. Harry Ritter is unmarried, and has no issue. If he should die without issue before the widow, his interest would revert to the estate. Under the terms of the will, there can be no termination of the trust until the death of the widow, and the settlement or distribution of the estate cannot take place until that time. Hence, it is a case where the persons who may take under the will are uncertain and cannot be known until the death of the widow occurs. The children do not take a vested remainder, but a contingent one. The objects of the trust, as created by the testator, have not been accomplished and will not be accomplished until the death of the widow.

Until that event occurs, it cannot be known who will be the beneficiaries under the will. L. V. Ritter has no interest which he could convey, because it is not certain what his interest will be, if any, until the death of his mother, and it is clear that no sale could be made under execution against him of any greater interest than he could convey by deed or will. Page on Wills, (2d Ed.) vol. 2, § 1119; *Liberty Central Trust Co.* v. *Vaughan,* 167 Ark. 219, 267 S. W. 361; *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379; *Hurst* v. *Hildebrandt,* 178 Ark. 337, 10 S. W. (2d) 491.

Counsel for appellant rely upon the case of *Jenkins* v. *Packingtown Realty Co.,* 167 Ark. 602, 268 S. W. 620. In that case there was a devise to a son and wife for their lives with remainder to their children. There was a contingent remainder in the afterborn children of the devisees, which became vested upon the coming into being of a child of such union.

In the present case the estate in remainder is limited to take effect upon the death of the widow, and it is limited to such of the children designated in the will as shall be living at her death. Whether any of such claims will vest, or, if so, how many, is uncertain and cannot be known until the event occurs. *Augustus* v. *Sebolt,* 3

Met. (Ky.) 155; and *Brandenburg* v. *Thorndike,* 139 Mass. 102, 28 N. E. 575.

Therefore, the decree will be affirmed.