

STIEFT *v.* W. B. WORTHEN COMPANY.

Opinion delivered May 14, 1928.

1. WILLS—JURISDICTION OF EQUITY.—A court of equity will not entertain a suit brought solely for the purpose of interpreting a will, or to interpret a will disposing of purely legal estates, but will take jurisdiction when trust relations are created with reference to property devised under the will.
2. WILLS—JURISDICTION OF EQUITY—ENFORCEMENT OF TRUST.—A suit by testamentary trustees to determine whether the *corpus* of the estate should be sold to pay the widow's annuity where the net income from the property charged with the payment thereof proved insufficient, *held* within the jurisdiction of equity, and, as an incident thereto, the court had jurisdiction to interpret the will.
3. WILLS—CONSTRUCTION.—Whether a will is to be treated as a demonstrative legacy or one dependent on a particular fund is a question of construction to be determined according to what may appear to have been the general intention of the testator, as deduced from the material provisions of the will and the extrinsic circumstances as they probably presented themselves to the testator.

4. WILLS—CONSTRUCTION.—Where the language of a will is clear and unambiguous, it must be so construed as to ascertain the intention of the testator.
5. WILLS—PAYMENT OF ANNUITY.—When an annuity is given out of the net income of certain designated property, and such income proves insufficient for full payment, the deficiency cannot be made up from the *corpus* of the estate.
6. WILLS—PAYMENT OF ANNUITY.—If a will provides for the payment of any deficiency in an annuity from the body of a certain designated part of the estate, that shows a clear intention on the part of the testator that the legacy is not to be paid out of the general assets of the estate.
7. WILLS—RULE OF CONSTRUCTION.—The primary rule of construction in the interpretation of wills is to ascertain the intention of the testator according to the meaning of words he used, deduced from consideration of the whole will and a comparison of its various clauses in the light of the situation and circumstances which surrounded the testator when the instrument was executed.
8. WILLS—PAYMENT OF WIDOW'S ANNUITY.—Under a will providing that the net income from certain improved real estate should be applied to payment of the widow's annuity of \$5,200, and any deficiency should be made out of the net earnings of a certain partnership of which testator was a member, and, if not sufficient for that purpose, such deficiency shall become a first charge upon all the property of the testator's estate, *held* that the income of the designated real property should first be applied to pay such annuity; if insufficient, then the net earnings of the partnership interest of testator shall be resorted to; if that be insufficient, then it shall be paid out of the general assets of the estate.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*, Chancellor; modified.

STATEMENT OF FACTS.

W. B. Worthen Company and Emmet Morris, as executors of the will of Charles S. Stiff, deceased, filed a complaint in the chancery court, in the nature of an action in interpleader, to obtain a construction of said will so as to enable them to properly and safely execute the trust imposed upon them. In their complaint they allege that Sophia Leon Stiff, the widow of said testator, claims that the *corpus* of the estate should be sold to

pay her a legacy of \$5,200 a year, as left her under the will, and that they are advised that, under the will, they can only pay said legacy out of the net income thereof.

Sophia Leon Stiff filed a response, in which she claimed that Charles S. Stiff left her a legacy of \$5,200 per year, payable quarterly; that said legacy was left her in lieu of dower, in accordance with the provisions of an antenuptial contract; that, under the will, said legacy is payable out of the net income of certain property, and that, in the event of the failure of that income to pay said legacy, it is payable out of the body of the estate. It is further alleged that the income of said property is not sufficient to pay said legacy annually, and that it is necessary to resort to the body of the estate to pay said legacy.

Perry W. Stiff and others, children of Charles S. Stiff by a former marriage, and legatees and devisees under his will, filed a response that, under the will, Sophia Leon Stiff was only entitled to a legacy of \$5,200 annually provided it could be paid out of the net income of the estate.

The record shows that Charles S. Stiff and Mrs. Sophia Leon Cohen entered into a contract in contemplation of marriage on the twenty-second day of January, 1921, in which he agreed to deliver to her certain specified corporate stock and life insurance policies, and also to pay her \$5,200 annually during her widowhood, in case she should survive said Charles S. Stiff. The payment of said \$5,200 annually was made a charge upon the income of certain real estate of said Charles S. Stiff in Little Rock, Arkansas. The contract also provided that said Charles S. Stiff should execute a will, after their marriage, looking to the carrying out of the contract. The parties to the contract married, and subsequently Charles S. Stiff executed a will, the construction of which is the subject-matter of this lawsuit.

The will is dated March 30, 1926, and in it W. B. Worthen Company and Emmet Morris are named exe-

cutors and designated trustees of the will, with power to convey any of the property of said estate, when they may deem it to the best interest of the estate to do so. In the first clause of the will two sisters of the testator are left small legacies, to be paid out of the income of certain real property in Little Rock; subject only to a charge imposed upon said property in favor of his wife. We copy items two, six and eight of the will, because upon their interpretation depends the result of the lawsuit. They are as follows:

"2. I will and devise the apartment house and storerooms owned by me at the northeast corner of Fourth and Center Streets, in the city of Little Rock, Arkansas, and the following described lots: The west 75 feet of lots 4, 5 and 6, of block 83, in the city of Little Rock, Arkansas, to my executor and trustee, hereinafter named, in trust for the following purposes: To maintain, lease and manage said property for the best interest of my estate, applying the income, first, to the payment of all overhead expenses in the operation and maintenance of property, including taxes, insurance of every kind, and, after paying all such overhead expenses, costs of operation and maintenance, taxes and insurance, \$5,200 of the net income of said property to be paid quarterly to my wife, Sophia Leon Stiff, during her natural life, or widowhood, pursuant to and for the purpose of carrying into effect an antenuptial agreement executed between me and my wife, Sophia Leon Stiff, dated January 22, 1921, the same to be a first charge on the income of said property; subject, however, to a mortgage thereon to secure an indebtedness owing by me to the Union & Mercantile Trust Company, but to cease and determine upon her death or remarriage."

"6. It is my intention that the provisions in paragraph 2 of my will, directing that \$5,200 of the net income of the apartment house and storerooms owned by me at the northeast corner of Fourth and Center Streets, in the city of Little Rock, Arkansas, shall be paid in quarterly

installments of \$1,300, amounting in the total to \$5,200 per year, to my wife, Sophia Leon Stiff. If the net income of said property should not be sufficient to pay my wife said sum of \$5,200 per year, or to meet any one of said quarterly installments of \$1,300, I direct that the deficiency at any time it may occur be made up out of the net earnings of the Charles S. Stiff Company, and to that end that the same be made a first charge on such net earnings, or, if said earnings shall at any time not be sufficient to meet said charge, or if said business be discontinued, or any change take place in the organization thereof that might have the effect to defeat said charge on the net income thereof, I direct in that case that any such deficiency or deficiencies as may at any time occur in the payment of said annual sum of \$5,200 as aforesaid, shall become a first charge upon all the property and assets of said Charles S. Stiff Company, subject only to the claims of creditors, and, if necessary, that a sufficient amount of the assets of said company be set apart and invested by my trustees to secure a sufficient sum out of which to discharge any such deficiency or deficiencies, the amount of the fund so necessary to be set apart and invested for such purpose and the necessity for setting the same apart to be determined by my said trustee, and my said trustee's determination as to the setting apart of such fund from said business and the amount thereof to be final, conclusive and binding on all the beneficiaries of my will."

"8. I hereby direct that the mortgage or deed of trust to the Union & Mercantile Trust Company on the property described in paragraph 2 hereof be paid out of the net income from said property remaining after the payment of the aforesaid charges herein imposed thereon and out of the general assets of my estate for the exoneration of said property and for the protection of the charges imposed thereon under the provisions of paragraphs 1 and 2 of my will."

Charles S. Stiff died September 26, 1926, and his will was duly probated by said executors, and they entered upon the discharge of the trust imposed upon them. The record shows that the income from the property charged with the payment of the legacy of \$5,200 annually to Sophia Leon Stiff was insufficient to pay same, and Mrs. Stiff demanded the payment of the same out of the *corpus* of the estate. The executors sold the interest of said Charles S. Stiff in the partnership of Charles S. Stiff Company for the sum of \$32,500, but they were advised that they could only pay the legacy of Mrs. Stiff out of the net income of the estate, and could not resort to the *corpus* of the estate for the payment thereof. Hence this lawsuit.

The chancellor was of the opinion that the legacy to Mrs. Stiff was a charge upon the net income of the real estate designated in item two of the will; and, if that was not sufficient, then upon the net income derived from the sale of the interest of Charles S. Stiff in the mercantile business known as the Charles S. Stiff Company, a partnership; and, if the net income was not sufficient, then the executors might resort to the *corpus* of the estate for the payment of said legacy. A decree was entered in accordance with the findings of the chancellor, and the case is here on appeal.

*Cockrill & Armistead*, for appellant.

*Frauenthal & Johnson, Rose, Hemingway, Cantrell & Loughborough*, for appellee.

HART, C. J., (after stating the facts). The first ground relied upon for a reversal of the decree is that the chancery court had no jurisdiction. It is the settled rule in this State that a court of equity will not entertain suit brought solely for the purpose of interpreting a will, or to interpret a will disposing of purely legal estates, but it is equally well settled that equity will take jurisdiction when trust relations are created with reference to the property devised under the will. *Williamson v. Grider*, 97 Ark. 588, 135 S. W. 361; *Heiseman v. Lowenstein*, 113

Ark. 404, 169 S. W. 224; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524; *Le Flore v. Handlin*, 153 Ark. 421, 240 S. W. 712; *Gaines v. Arkansas National Bank*, 170 Ark. 679, 280 S. W. 993; and *Norris v. Johnson*, 151 Ark. 189, 235 S. W. 804.

In the instant case it cannot be said that only legal rights are involved. The executors are specifically designated as trustees of the will, and are expressly given the power to dispose of any part of the property when it is for the best interest of the estate to do so. The legacy to the widow was first made a charge on certain real property, and the income from this property failed to pay the legacy. Then it was made a charge upon the partnership property, and the net income from it was not sufficient to pay the legacy. The widow demanded payment out of the body of the estate, and her demand caused actual litigation in respect to matters which were purely of equitable cognizance. It required the intervention of a court of chancery to enforce the trust in favor of the widow under the will, and, as an incident to the exercise of that jurisdiction, the chancery court was required to interpret the will in order to properly enforce the trust. So it will be seen that the performance of the duties of the executors as trustees under the will was directly affected, and this gave jurisdiction to the chancery court.

This brings us to a consideration of the clauses of the will giving a legacy of \$5,200 annually, payable quarterly, to Mrs. Sophia Leon Stiff, the widow of the testator. Her rights under the will directly involved the interpretation of items two and six, which are set out in full in our statement of facts, and which need not be repeated here.

Counsel for appellants rely for a reversal of the decree upon the ground that the legacy of Mrs. Stiff was payable solely out of the net income to be derived from the real property designated in item two of the will, or, in event there was a failure or deficiency from that

source, from the net income of the partnership business of the Charles S. Stiff Company. On the other hand, counsel for Mrs. Stiff seek to uphold the decree on the theory that the will gave to Mrs. Stiff a demonstrative legacy, and that, upon the failure to pay the legacy out of the net income of the property upon which it was charged, the legatee will not be deprived of her legacy, but will be permitted to receive it out of the general assets.

The three different kinds of legacies are clearly defined in 3 Pomeroy's Equity Jurisprudence, 4th ed., §§ 1130-1133 inclusive, and in 2 Page on Wills, 2d ed., §§ 1230-1231.

In other words, it is contended that this was a demonstrative legacy, payable out of the net income from certain designated property; but, like a general legacy, it is payable out of the general assets of the estate if the particular fund should fail or there should be a deficiency in it. The authorities bearing upon the question are very numerous, and many illustrative cases on the subject are cited and reviewed in the briefs of counsel for the respective parties. The most important of these cases are collected and reviewed in a case-note in 4 Ann. Cas. 163. No useful purpose could be served by reviewing and distinguishing many of them from the case at bar. An examination of the cases shows that no positive rule applicable to every case can be laid down, but each case must be determined upon a consideration of the material provisions of the will to be construed and the extrinsic circumstances as they probably present themselves to the testator, which may be brought to bear in arriving at his intent. The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy or as one dependent upon a particular fund, is a question of construction to be determined according to what may appear to have been the general intention of the testator. Where the language of a will is clear and unambiguous, all the courts hold that the will must be

construed so as to ascertain the intention of the testator, and, when that is done, his intention must be carried out. So each case must depend upon the meaning of the language used by the testator in his will.

From these cardinal rules it seems clear that, when an annuity is given out of the net income of certain designated property, and such income turns out to be insufficient for full payment, the deficiency cannot be made up from the *corpus* of the estate.

On the other hand, if the will itself provides for the payment of the deficiency from the body of a certain designated part of the estate, that shows a clear intention on the part of the testator that the legacy is not to be paid out of the general assets of the estate.

In the application of these well-settled rules to the case at bar, the terms of the will of Charles S. Stiff must be examined in the light of the circumstances surrounding him at the time he executed the will. The primary rule of construction in the interpretation of a will is to ascertain the intention of the testator according to the meaning of the words he had used, deduced from a consideration of the whole will and a comparison of its various clauses in the light of the situation and circumstances which surrounded the testator when the instrument was executed. *Wooldridge v. Gilman*, 170 Ark. 163, 279 S. W. 20.

When this is done, we perceive no difficulty in arriving at the intention of the testator. He was a successful business man, and in partnership with some of his children by a deceased wife, when he desired to marry again. He entered into an antenuptial contract with the woman he intended to marry. He promised to give her certain personal property and also to provide an annuity of \$5,200 per year for her, in case she outlived him, and to make the payment of it a charge upon the income of certain designated property. After his marriage, he executed the will which we are asked to interpret. Under item two of the will, he devises certain business prop-

erty in the city of Little Rock to his executors in trust with directions to apply \$5,200 of the net income quarterly to Sophia Leon Stiff, pursuant to and for the purpose of carrying into effect an antenuptial agreement entered into between said parties on January 22, 1921. Item six provides that it is the intention of the testator that the provisions in item two directing that \$5,200 of the net income of a certain designated apartment house shall be paid in quarterly installments of \$1,300 to Sophia Leon Stiff. It further provides that, if the net income from said property should not be sufficient to pay his wife said sum of \$5,200 per year or to meet any one of said quarterly installments of \$1,300, said deficiency shall be made out of the net earnings of the Charles S. Stiff Company. It further provides this shall be a first charge on said net earnings, and, if said earnings are not sufficient to meet said charge, or if said business be discontinued, such deficiency shall become a first charge upon all the property and assets of said Charles S. Stiff.

Continuing, the clause reads: "And, if necessary, that a sufficient amount of the assets of said company be set apart and invested by my trustee to secure a sufficient sum out of which to discharge any such deficiency or deficiencies, the amount of the fund so necessary to be set apart and invested for such purpose and the necessity for setting the same apart to be determined by my said trustee, and my said trustee's determination as to the setting apart of such a fund from said business and the amount thereof to be final, conclusive and binding on all the beneficiaries of my will."

Item seven gives the residue of his property to his children.

We think it is plain that it was the intention of the testator, from the language used, that he only intended that any failure or deficiency in the payment of the legacy to his wife, after the failure of the particular fund, should be made up out of the *corpus* of the property of the Charles S. Stiff Company, a firm of which the

testator was a member, and not out of the general assets of his estate.

In other words, it is our opinion that the quarterly payments of the \$5,200 annuity should be paid, first, out of the net income of the designated apartment house; and, if that income should not be sufficient, then out of the net earnings of the Charles S. Stiff Company; and, if the net income from both of these sources should not be sufficient, the deficiency shall be paid out of the interest of the testator in the *corpus* of the property of the Charles S. Stiff Company, which, under the terms of the sale of the executors, amounts to \$32,500.

The result of our views is that the decree of the chancery court should be modified, and, to that end, the decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion. The costs will be paid by the executors out of the general assets of the estate.