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Jurisdiction in Will Contest Cases

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MR. Chairman and gentlemen: I am fully conscious of the honor which has been conferred upon me in inviting me today to stand before you as a representative of the Chicago-Kent College of Law. It is an honor which is very dear to me, and which I cherish highly.

It happens that in my experience, I can look back to the time when the Chicago-Kent College of Law was beginning its existence. I knew personally both of the men who were the founders of the Chicago College of Law, Judge Bailey and Judge Moran. Judge Bailey was on the bench of the Supreme Court at the time I was admitted to the Bar. I knew also rather well Mr. Marshall D. Ewell, who was connected with Chicago-Kent. I only hope that I may be found worthy to follow in their footsteps.

In my experience in the teaching of law, I have had it borne in upon me more times than I like to think of, by young students, that they come to us with some ideas in their minds which they have acquired outside of law school, with respect to the subjects which we are teaching. That has been especially true with regard to the subject of Wills. I will not undertake to say how many times I have had men come to me with this statement, that, "I understand that it is the law that in order that a will be valid, where a man disposes of his property,"
leaving children, that he must give at least one dollar to each of his children, by his will, in order that the will may be enforcible." There is that notion that there must be some specific thing or object given to each of the children; I meet that very often.

I have encountered another impression, which has led me to think about a subject which I shall discuss with you today, and that is this, that in some way, or for some purpose, a court of chancery has innate jurisdiction in cases involving the contest of wills; that somehow it was peculiarly appropriate that a court of chancery should try such cases, and that that court, as a matter of course, had that sort of jurisdiction.

That led me to think about this question, and, turning it over in my mind, I thought I would see what could be done in the way of taking the leading decisions in our own state on the subject, and trying to find out how this subject of jurisdiction in will contest cases had developed.

May I say, by way of definition, at the start, that by jurisdiction, as I shall use the term, I mean the power of a court to hear and determine a legal controversy, using the word "jurisdiction" in its strict and narrow sense, meaning jurisdiction as a matter of law; and I shall use the words "contest of a will" to mean proceedings in any court in which the validity of a will may be questioned, whether it is done by bill in chancery, by action in ejectment, as between heir and devisee, or whatever the form may be.

You will find my text today in the Gospel according to Callaghan & Company, page 7803, of the Illinois Statutes Annotated, in the footnote to Section 7 of the Wills Act, where we find this language:

"This statute was originally adopted from Virginia through Kentucky. In Virginia, by statute of 1748, the English chancery remedy was adopted by the House of Burgesses, and the period of limitation cut down from thirty years to ten years."

It was certainly a very wise and able commentator on the law who secreted those few sentences. In this par-
agraph there are three errors. First, the Virginia statute, which was the forerunner of section 7 of our Wills Act, was the statute of 1711, and not the statute of 1748. Secondly, courts of chancery in England had no jurisdiction over will contest cases as such; and thirdly, that the limitation of the right to contest a will was thirty years at the common law. I will dispose of that last suggestion briefly, because it is the other two that I wish to especially refer to.

So far as the provision with regard to contesting a will thirty years after the death of the testator was concerned, that was purely a rule of evidence. At common law, the presumption was that documents more than thirty years old proved themselves. It simply meant that a document more than thirty years old would be presumed to have been executed by the one whose name it bore, and would be valid for the purposes therein set forth.

In order to arrive at the facts as to jurisdiction in cases of this nature, it will be necessary to consider in some detail how a will might be contested at the common law, and upon what terms and conditions, and in what courts.

When the term "common law" is used, it is needless to say that it is intended here to apply it as a short way of saying the practice in any English court or courts prior to the American Revolution.

With regard to the contest of wills in England, at the very beginning, I want to draw a distinction, because it is of the utmost importance here, between a will and a testament. Today those terms signify nothing. We speak of the last will and testament of John Doe, deceased, and we do not discriminate between the two ideas. But at common law, a testament was the only instrument by which a disposition could be made of personalty, to take effect upon the death of the owner, while a will came into existence by virtue of the statute of Henry VIII, and was an instrument by which realty was devised.

A will, therefore, was an instrument disposing of realty only, while a testament was an instrument disposing
of personalty. The importance of that distinction is that the Ecclesiastical Courts were the only courts where there could be a contest of a will relating to personalty, for those courts alone had anything like true probate jurisdiction; and so far as devises of realty were concerned, there was no court that as such had jurisdiction of them, and the validity of a will dealing with vast estates could be tested only in an action brought at common law, in the action of ejectment, as to which I shall say more later.

It will be necessary, therefore, very briefly, to take up the question of the jurisdiction of the Ecclesiastical Courts, with regard to the disposition of personalty.

We oftentimes forget that these Ecclesiastical Courts have a pedigree as old and as distinguished as the courts of common law. They came into existence by virtue of what I may call a statute or a ruling of William the First, who did in fact set up such Ecclesiastical Courts; and those courts were in existence and had jurisdiction in all of the dioceses, over which a Bishop presided, or some other person duly appointed by him.

However, where there were subdivisions of the dioceses, a subordinate officer presided over the courts.

We start out, therefore, with the Court of the Arch-Deacons, presided over by the Arch-Dean.

In reading the cases, we oftentimes come across references to the Consistory, or Prerogative Courts, and with respect to them, it is sufficient to say that they were Ecclesiastical courts of appeal.

From these diocesan courts, an appeal lay to the Provincial Courts of Canterbury and York, the first known as the Court of the Arches, and the latter as the Chancery Court of York.

In addition to this, and right alongside, were the Manorial Courts, which had ecclesiastical jurisdiction in the various manors, the Lord of the Manor having the power of presentation; and a representative of the Lord of the Manor presided in such courts. There were some three hundred of them, more or less.

On top of that, we have the Prerogative Courts of Canterbury and York, and as you will recall, if you are famil-
iar with your Dickens and your David Copperfield, you will recall that Mr. Holdsworth in his very interesting book on Dickens as a legal writer, refers to Doctors' Commons in London.

At the time of the Reformation these courts were succeeded by the High Court of Delegates, to prevent appeals to Rome. In course of time they were in turn succeeded by the judicial committee of the Privy Council, with of course, an appeal to the House of Lords as a supreme court.

In any of these courts there might be a contest of a testament. In none of these cases was there any question as to the power of a court of chancery to prescribe the procedure. The procedure was clearly procedure sanctioned by the canon or the civil law. The civil law governed as to the procedure, and the canon law as to the substantive provisions.

When we come to the contest of wills involving reality, we find ourselves using the action of ejectment at common law. This is a fictitious action. I shall have occasion a little bit later to emphasize something which may not have occurred to you, as to whether or not there is still the possibility of this action being in force in Illinois.

The only mode of contesting a will disposing of reality was by action of ejectment, in which the heirs of the testator were plaintiffs, and the devisees under his will were defendants.

Without going into the fiction which exists in such cases, it will be quite sufficient for us to consider the issue raised in such actions. Always and invariably it was the same; namely, did the testator, or did he not, make the will in controversy, and upon which the defendants rely?

With regard to the burden of proof in such cases, we find, according to the authorities, that upon the trial, the plaintiffs as heirs of the decedent, the testator, made out a prima facie case by showing the fact of seisin in a common ancestor, the testator. Thereupon the devisees had the burden of proof of showing whether or not the will
was or was not valid. Being an affirmative defense,—(if we do not like the phrase, "the burden of proof," we may substitute for it, "the risk of non-persuasion") the burden of proof was upon the devisees under the will, and in a contest in chancery under our statute, the burden of proof is upon the proponents of the will, the devisees in the common law action being in the same position with regard to the issue, that the proponents of the will are under our Chancery Act in Illinois.

I shall use a few cases today for the purpose of supporting the statements that I make. We have two cases in Illinois in which our Supreme Court has taken up the question of the historical development of will contests. The first is the case of *Luther v. Luther*, in 122 Ill. 558, and the second case is that of *Dibble v. Winter*, 247 Ill. 243. I shall refer to a case in Virginia where the court, when upholding the Virginia statute, gives us an interpretation which should be followed in Illinois.

In *Dibble v. Winter*, the Court said:

"Where the question was as to the devise of lands the probate of the will as to real estate amounted to nothing. The devisee produced the will, and in such controversies had to prove it as any other paper, as well as the capacity of the testator to devise, on every trial."

And in the case of *Coalter's Executor v. Bryan*, 1 Grattan (Va.), page 76, which is a case, involving a construction of the will of John Randolph of Roanoke; and which is one of the most interesting will cases that I have ever come across, we find this language:

"In England there is no court of probate for wills of realty; and consequently the validity of the instrument must be decided incidentally in controversies concerning the rights of property, claimed under or against it. These controversies must be settled in the appropriate jurisdictions. The title of the heir is in its nature legal, and may be asserted in an action of ejectment; and he cannot go into equity for any other purpose than to remove impediments to a full and fair trial at law. If the devisee has the legal title, he may, and the better opinion seems to be, must, in most cases sue at law."
Passing on now, we come to the next question, as to the relation between will contests and the mode of probating a will.

It is often said that the contest of will corresponds to the probate of a will in solemn form.

As I have already indicated, the only contest of a will possible was by proceedings in the ecclesiastical courts. Will probate in solemn form might take place either with respect to a will, of personalty or a will of realty, generally in the latter case, and then only in an action of ejectment at common law.

Swinburne gives us what we may call the common law with regard to testaments, and as to this question of the mode of probate. I am reading from his text. I am using the Fourth Edition, of 1677.

"The vulgar or common form is more compendious or brief than the other, for, after the death of the testator, the executor presenteth the testament to the judge, and in the absence, and without citing or calling of such as have an interest, produceth witnesses to prove the same, who, testifying upon their oaths, that the testament exhibited is the true, whole and last testament of the party deceased, the judge doth thereupon, and sometimes upon lesser proof, annex his probate seal to the testament, whereby the same is confirmed. When the testament is to be approved in form of law, it is requisite that such persons as have an interest, that is to say, the widow and next of kin of the deceased, to whom the administration of his goods ought to be committed, if he had died intestate, are to be cited, to be present, at the probation and approbation of the testament, in whose presence the will is to be exhibited to the judge, and petition to be made by the party which preferreth the will, enacted for the receiving, swearing and examining of the witnesses upon the same, and for the publishing and confirming thereof. Whereupon witnesses are received and sworn accordingly, and are examined, every one of them secretly and severally, not only upon the allegations or articles of the party producing them, but also upon interrogatories administered by the adverse party, and
their depositions committed to writing afterwards, the same to be published; and in case the proof be sufficient, the judge doth by his sentence or decree pronounce for the validity of the testament."

In the case of Luther v. Luther, 122 Ill. 558, at page 563, Judge Magruder, writing the opinion of the court, used this language:

"In England the probate of wills of personal property was exclusively vested in the ecclesiastical courts. There were two modes of probate one *ex parte*, the other *inter partes*. One was proof of the will "in common form"; the other was proof thereof "in solemn form" or "*per testes*". When a will was proven "in common form", it was taken before the judge of the proper court of probate, and the executor produced witnesses to prove it to be the will of the deceased without citing or giving notice to parties interested; it was admitted to probate in the absence of such parties. When, however, a will was proven "in solemn form", it was done upon petition of the proponent for a hearing, and all such persons as had an interest, such as the widow, heirs, next of kin, etc., were notified and cited to be present at the probating of the testament; interrogatories were propounded to the witnesses by those producing the will and by the adverse party. The executor of the will, proved "in common form", might, at any time within thirty years, be compelled by a person, having an interest, to prove it *per testes* "in solemn form."

The mistake, as I see it, is in confusing probate in solemn form with the contest of a will. This overlooked the fact that there could be a contest in the ecclesiastical courts only, and that such contests in those courts did not take the place of a contest by bill in chancery.

I will refer now only to this fact, that in Illinois, prior to 1897, our probate of wills was in what was known as the common form. There could not be any such thing as a contest in the probate court. However, in 1897 a statute was passed which provided for notice to all parties interested; and since that time, as held by the court in *Pratt v. Hawley*, 297 Ill. 244, all the provision has been
changed so as to require notice to all parties interested; and the statute makes the proceeding one *inter partes*. If, therefore, it is *inter partes*, then we have this interesting question, can we not now, under the statute, have a contest in the Probate Court, and if so, to what extent?

What are you going to say about the provision with regard to fraud and compulsion, and now, by recent change, forgeries in the execution of the will, as to which you are not limited to the testimony of the witnesses to the will, but may introduce the testimony of third persons and outsiders, for the purpose of proving those facts?

Now we are coming to what I think is the most interesting question that I want to discuss with you, and that is the question as to whether a court of chancery as such had any jurisdiction by virtue of its position, in contested will cases.

So far as I can find, in going through the authorities, there are four cases in which a court of chancery as such may have the question brought before it, involving a will; first, in what was known at common law as administration bills. We do not have them to a large extent in this country, but they did exist at common law.

Second; there might be a will which involved the question of a trust or the appointment of a trustee. It may be that in that case, on account of jurisdiction over trusts, the court would have power to act.

Third; a bill for the construction of a will.

And lastly, cases of marshaling of assets and equitable exoneration.

In these cases, in the citation in Callaghan's Annotated Statutes, to which I have referred, there is only one case that supports the contention that a court of equity as such has jurisdiction in will contest cases. That was the case of *Boyse v. Rossborough*, which was heard on appeal by the House of Lords, 6 H. L. C. 2, the appeal being taken from the decision of the Chancery Court. It is an Irish case, and that may explain the fact that it is a revolutionary decision.

What do the American decisions tell us with respect to that subject?
In the United States Supreme Court—and I am not going to read it; I will simply give the title of the case, because my time is running short, and I want to get to another point:

In Gaines v. Chew, 2nd How. 619, and in Kiely v. McGlynn (Broderick's Will), relating to the will of Senator Broderick, 21 Wall. 503.

Gaines v. Fueenes, 92 U. S. Supreme Court, page 10.

I will read what the court says in Luther v. Luther on this question:

"Outside of the statute, however, no right existed in favor of the heir to go into a court of chancery to contest the validity of the will. He could not go into equity for any other purpose than to remove impediments to a full and fair trial at law. The power to entertain bills of this character is not embraced among the general equity powers of a court of chancery.

"Therefore, as the jurisdiction of courts of chancery in this State to entertain bills to set aside the probate of wills is derived exclusively from the statute, such jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute.''

In the last case, Havill v. Havill, in which our Supreme Court has passed on this question, in the 332d Illinois at page 14, it is said:

"The right to contest a will is not cognizable by a court of chancery in the exercise of its ordinary equitable jurisdiction. The right is purely statutory. * * * It was a personal privilege extended to those interested pecuniarily, to be exercised in the manner and time fixed. It was not assignable by deed or otherwise, did not pass by inheritance or devise, and could not be maintained by anyone except a person interested at the time the will was admitted to probate.''

What is the origin of Section 7 of our Wills Act?

I wonder what we should say about this Act of Virginia of 1711, which you will find in Hening's Statutes, Volume 4, page 13.

"Jurisdiction was given to the county courts, to hear and determine all causes, matters, suits and controversies
testamentary. It provided that when a will devising lands shall be offered for proof, the court shall appoint a time for proving it, and cause the heirs to be summoned and to show forth anything that may be lawfully alleged against such proof, with the right to parties interested to contest the said proof at any time within ten years.'"

There is the statute of 1711; thirty-seven years before the statute of 1748. Both in Luther v. Luther, and in Dibble v. Winter, the courts have made the statement that our statute was based on the Virginia statute of 1748. There was still another earlier Act than 1748; that of 1744, which amended the Act of 1711, by providing that where the lands of the testator "shall be devised away from the heir or heirs at law, such proof as to them shall not be binding, and they shall be at liberty to contest the validity of such will in the same manner as if the Act had not been made.'"

As to the Virginia Act of 1748, I will say that our Section 7 of the Wills Act is substantially the same as the similar provision in the Act of 1748. This Act was amended into its final form by the Act of 1785.

The purpose of this Act was, first, to recognize the ex parte probate of wills, both of realty and personalty; second, to extend the privilege of contest to include both kinds of property; third, to prescribe a period of limitation for such contests; and fourth, to change the status of the parties; the parties suing being those that were interested in sustaining rather than in overturning the will; fifth, to shift the final probate to courts of chancery; that is, to permit the use of documentary proof of the original probate of the will, and in that respect being in line with section 7 of our own Wills Act.

In passing upon the Virginia statute, in the case of Coalter’s Executor v. Bryan, supra, the Supreme Court of Virginia says:

"The jurisdiction is merely that of a court of probate, and to be exercised, not by the court, but by a jury under its supervision.'"

We have something still more important. As you know, Illinois was at one time part of the Northwest Ter-
ritory, and as part of the Northwest Territory, it was in turn, part of Indiana. Then it became a territory by itself. The Ordinance of 1787 provided, among other things, that the judges of the Northwest Territory should prepare a code of laws for the Territory, and that such laws should be taken from the laws of the Thirteen Original States. We find now, in Maxwell’s Code of 1795, a very significant provision, which clearly indicated that there could be a contest of a will. I am referring to the Act of the 19th of June, 1795:

“If any will shall, within seven years after the testator’s death, appear to be disproved or annulled before any judge or officer having cognizance thereof, then it shall be lawful for the party aggrieved, or his or their heirs, executors or assigns, to have their action for what shall be taken or detained, or have their writ or writs of error for reversing the judicial proceedings thereupon.”

This clearly indicates that originally the Probate Court under this section had the power to entertain the contest of a will.

This Act of the Northwest Territory was taken from the laws of the State of Pennsylvania, and we find the Act in Reed’s Digest of Pennsylvania Laws, (1801) at page 384. This Act of the Northwest Territory was adopted by the judges of Indiana Territory, and included in the Indiana territorial laws of 1807-11, at pages 84 to 88. It again was adopted by the judges of the Territory of Illinois, and included in Pope’s Laws of Illinois Territory, pages 215 and 216.

It was the basis of the Act which we find in the statutes in 1819. And so you see that Section 7 of the Wills Act has, if I may use the phrase, two parents. It has, on the one side, an origin which can be traced back to the laws of Pennsylvania, which gave power to entertain contests to the probate court, and it also came from Virginia through Kentucky—and I may say that the Virginia statute of 1748 was adopted by Kentucky and was made the law of that jurisdiction, and that you will find in the Acts of Kentucky of 1797, page 611. This statute was construed in the case of Rogers v. Thomas, 1 B. Monroe, 390.
In view of this, I wish to call your attention to a decision of Judge Pinckney Walker, of our own Supreme Court, in the case of Duncan v. Duncan. You will find this in 23 Ill. 306, where it says:

"From these several provisions, when considered together, it is apparent that the legislature designed to permit parties in interest, to contest the validity of the will, testament or codicil as well in the probate court as by a bill in chancery. It could not have been the intention to confine it to the latter mode, or the provisions of the second and thirty-fifth sections would not have been adopted, but the design must have been to authorize both modes."

I am aware of the fact that in the case of Berger v. Berger, in 317 Ill. at 406, Judge Dunn, who wrote the opinion of the court, said that he does not know how the mode of contesting suits, as stated in Duncan v. Duncan, is possible.

One last word in regard to the form of action. The action to probate a will, whether in the Probate Court or elsewhere, is in form an action in *rem*. The *res* involved is whether or not the instrument is in fact, the will of the testator. That is the only issue upon the original probate of the will, or upon appeal to the Circuit Court from an order either granting or denying probate, or upon a contest in chancery.

I will sum up.

1. At common law testaments of personalty could be contested only in the ecclesiastical courts, and a devise of realty only in an action of ejectment in a suit at law.

2. There is no connection whatever between the mode of probate, common and solemn, and the contest of a will or testament.

3. There was no court having jurisdiction of wills relating solely to realty. The will had to be proved every time and in whatever court its validity was questioned, and a contest was possible on every such occasion.

4. The court of chancery as such had no jurisdiction of the contest either of wills or testaments, by virtue of its existence as a court of chancery. The origin of our
Statutory provisions with regard to will contests came partly from Pennsylvania, partly from Virginia, and partly from Kentucky.

Under our statute, a will contest is in substance, an action at law, a substitute for the old action of ejectment. The issue is *devisavit vel non*, as in that case.

Lastly, under our Ejectment Act, Section 1 it is provided that wherever the action of ejectment could be maintained at common law, the same shall be preserved under Section 2, which section says that it may also be brought in the same cases in which a writ of right may now be brought by law, to recover land, tenements or hereditaments, by any person claiming an estate therein, in fee, for life or for years, either as heir, devisee or purchaser.

If this is true, then it ought to be possible today to contest a will of realty in an action of ejectment at common law, the remedy by ejectment being in addition to and not exclusive of the right to contest in chancery.