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175-456

Record No. 2226

In the
Supreme Court of Appeals of Virginia
at Richmond

IN RE; WILL OF SUSAN BENTLEY

FROM THE CHANCERY COURT OF THE CITY OF RICHMOND.

RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. SIZE AND TYPE. Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records. The record number of the case shall be printed on all briefs.

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND.

Record 2226

IN RE: WILL OF SUSAN BENTLEY,

IN THE MATTER OF PROVING THE LAST WILL AND
TESTAMENT OF SUSAN BENTLY, DECEASED.

*To the Honorable Judges of the Supreme Court of Appeals
of Virginia:*

Your petitioner, J. Thomas Hewin, nominated Executor of the last will and testament, dated February 7th, 1922, of Susan Bently, deceased, respectfully represents unto your Honors that he is aggrieved by the final order of the Chancery Court of the City of Richmond, entered July 7th, 1939, in the exercise of its probate jurisdiction, which shows that the Court refused to consider testimony on his motion to probate as such executor, the last will and testament of Susan Bently, deceased, aforesaid, because on April 1st, 1934, a prior will, dated January 19th, 1917, had been admitted to probate in said Court.

STATEMENT OF FACTS.

On said motion your petitioner was prepared to introduce evidence:

(1) That the propounder of the prior will at the time of offering it for probate knew of the existence of said subse-

quent will which revoked the same in whole or in part, but that your petitioner in whose possession such subsequent will was, did not discover or have the means of discovering such fraud upon the Court of Probate until just prior to offering said subsequent will for probate in said Court in the month of July, 1939;

2* *(2) That the devisee of the real estate in the prior and subsequent will, is a different person; and

(3) that both paper writings constitute a single testament, although inconsistent as to the disposition of the real estate (Record, pp. 5 and 6).

ERROR ASSIGNED.

Failure of Court to hear evidence as to such matters and admit to probate said subsequent will.

(The Court's attention is called to an affidavit, herewith filed as Exhibit A.)

THE LAW OF THE CASE.

I.

The Court of Probate for fraud practiced on the court has jurisdiction to revoke and probate another will, if the latter is the true last will.

“So if the will be fraudulently proved, either in common form, that is to say by the oath of the executor” (which in Virginia is no longer in use) “or more solemnly by the examination of witnesses, on such fraud being shown, the spiritual court will revoke the probate.”

Toller's Law of Executors (Am. Ed.), pages 72-73.

“So it may be vacated on proof of the revocation of the will on which it was granted, or of the making of one subsequently.”

Ibid., p. 73.

Devisees and others may file a bill in equity to establish the validity of a will, in the nature of a bill of peace, upon which an issue of *devisavit vel non* is triable.

See II Story's Eq., Sec. 1447.

But the jurisdiction of the probate of a will being exclusively in the probate courts, the proceeding is in the nature of a proceeding *in rem*, and neither courts of law nor equity may disturb its judgments, which are binding on 3* every person and *every court.

Connolly v. Connolly, 73 Va. (32 Gratt.) 657.

By legislation early in Virginia, it was provided that a bill in equity might be filed to contest the invalidity of a will, and an issue of *devisavit vel non* tried as an issue at law, within seven years from the probate of the will, with certain exceptions as to infants and non-residents. The time within which such a bill might be filed has by successive legislation been gradually reduced, until now in Section 5259 of the Code of Virginia, 1936, the limitation is one year from probate. But if fraud was not discovered until after the limitation had expired there was jurisdiction in the probate court and in equity independent of the Statute, to revoke the prior will.

“After the probate of a will any person interested, who had not appeared and contested such probate, may within seven years ‘now one year’, file a bill in equity to contest its validity; and such person even though he appeared and contested the probate may file a bill as aforesaid, on the ground of fraud, to the existence of which he was a stranger at the time of the probate.”

Ford v. Gardner, 11 Va. (1 H. & M.), p. 72-73.

The Statute (Sec. 5259) goes on to provide: “If no such bill be filed within that time, the sentence or order shall be forever binding”. The legislature never intended thereby to deprive a court of probate upon whom fraud had been practiced from revoking a probated will and probating a subsequent will, nor to deprive a court of equity from enjoining persons from obtaining an unlawful advantage through fraud practiced on the court itself.

4*

*II.

Even where there is no fraud, if the subsequent will contains an express clause revoking the probated will, the probate court should receive it and admit it to probate.

“It is contended that after the will had been admitted to probate in common form, its validity could only be impeached upon a petition filed and an issue awarded of *devisavit vel non*, to be tried by a jury. * * * But we do not consider this a just view of the Statute. It is undoubtedly true, that the probate in common form, as it is called, is merely an incipient step to be taken in order to give the court jurisdiction of the matter, and is not conclusive upon the parties interested in the estate, but may be opened up and set aside upon sufficient legal grounds shown.”

Wall v. Wall, 30 Miss. 91.

III.

The jurisdiction of a court of probate is not exhausted by the admission to probate of a known last will and testament, if another paper writing executed subsequently may stand as a part thereof, although inconsistent with some of the provisions and terms of the prior probated will.

Gordon v. Whitlock, 92 Va. 723.

* * * “The question whether a former will is revoked by one of later date, whether because the latter contains an express clause of revocation of all former wills, or because from its general frame and structure, it was intended to be a new and perfect will, and to replace any that might have been previously made, or because its provisions are incompatible with those of a previous will, is one to be submitted to a court of probate. Nor can it be any good or sufficient reason why that court should be deprived of its authority to pass upon a subsequent paper, that it might have already admitted to probate a paper of previous date, which, from the lights then before the court, appeared to be the true last will and testament of the deceased. * * * And so it seems to me, if the latter will contains an express clause of revocation of former wills, or contains a disposition of the estate incompatible with the provisions of the former, or from its general character may be inferred to be an entire new instrument intended to supersede the former, the court of probate should receive and admit it to probate, leaving it to have such effect as the law would necessarily attach to it. And I can scarcely think that it is necessary in such case to file a bill under the

Statute to set aside the former will, if indeed such a proceeding could be sustained.”

5* **Schultz v. Schultz*, 51 Va. (10 Gratt.), 358, *et seq.*

The essential difference in the statute law when the case of *Schultz v. Schultz*, *supra*, was decided is the limitation on the filing of a bill in equity as a collateral attack on a probated will—then of seven years—and now, one year. The provision in the present statute making the probate binding, unless bill is filed within one year to impeach a will is declaratory of the probate law, that a probate proceeding is conclusive upon all courts and persons and cannot be collaterally attacked. That the Court has a right to admit to probate, a later will than the one already admitted to probate, and made by the same party, the following authorities sustain this view:

Cousens v. Advent Church, 93 Me. 292 (45 Atl. 43).

Waters v. Stickney, 12 Allen, Mass. 1 (90 Am. Dec. 122).

Cochran v. Young, 104 Pa. 333.

107 A. L. R., pp. 249-261, and cases cited.

This, however, does not mean that the probate court is forever afterwards without jurisdiction to probate the true last will and set aside the spurious one.

“Our statutes nowhere recognize in express terms the power of our courts of probate to revoke a probate once granted by them. Such a practice would have delay and expense of double proceedings and enable the court to revoke or modify the old probate, as the old will utterly conflicted, or was capable of partially standing with the new one. No one can suppose, however, that such power of revocation does not exist in them, else, if probate of a will be granted, and the time of appeal be passed, inasmuch as their jurisdiction is exclusive, there would be no mode in which a later will of the testator subsequently found could be proved, without the inconvenience of having out at the same time, conflicting authorities issuing from the same source, and with regard to the settlement of the same estate.”

6* *The cases of *Campbell v. Logan*, 2 Bradf. 90, and of *Schultz v. Schultz*, 10 Gratt. 358, (60 Am. Dec. 355), are

not only in point as to the exercise of the courts of probate of the power of revoking the probate of a former will, as incidental to taking probate of a later one of the same testator under legislation similar to our own, but as we understand them, to do this upon a mere application to prove the latter will.”

Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 52.

We respectfully submit that courts of probate have always had jurisdiction to admit to probate and registry a subsequent will thereby revoking a prior paper writing, if such was inadvisedly probated without knowledge of the existence of a true last will and testament.

Your petitioner, for the foregoing reasons, submits that the Order of the Court in this proceeding dated July 7th, 1939, is erroneous, and should be reversed, and he prays for an appeal from said Order.

And he will ever pray, etc.

(1) Counsel for petitioner desires to present this petition before some Judge to be designated by counsel at Richmond.

(2) Counsel for petitioner hereby certifies that he delivered a copy of this petition to Thomas I. Talley, Esquire, counsel for contestant, on the 14 day of Sept., 1939.

(3) Counsel for petitioner will rely on his petition as an opening brief in case an appeal is awarded.

Respectfully submitted,

J. THOMAS HEWIN, SR.,
Petitioner.

7* *I, Alfred E. Cohen, an Attorney, practicing in the Supreme Court of Appeals of Virginia, am of the opinion it is proper that the said Court should review the Order complained of in the foregoing petition.

ALFRED E. COHEN,
Travelers Building,
Richmond, Virginia.

Dated—Travelers Bldg., Richmond, Va., Sept. 8, 1939.

Received September 14, 1939.

M. B. WATTS.

October 9, 1939. Writ of error awarded by the Court. No bond.

M. B. W.

8* *State of Virginia,
City of Richmond, To-wit:

I, J. Thomas Hewin, Sr., a Notary Public, for the City of Richmond, in the State of Virginia, do certify that there personally appeared before me, Amanda Roots, whose name is hereto subscribed, and being duly sworn according to law, made affidavit as follows:

(1) That at the time of the probate of the will of Susan Bently, dated the 19th day of January, 1917, Susie Emily Massie, who offered said will to the court, for probate, knew at that time of the existence of the last will and testament, which was dated the 7th day of February, 1922.

(2) Of this fact she was ready to testify, when the will of February 7th, 1922, was offered for probate, but the Court declined to hear the testimony.

AMANDA ROOTS.

Subscribed and sworn to before me, this 5th day of Sept., 1939.

J. THOMAS HEWIN, SR.,
Notary Public.

Copy received Sept. 14, 1939.

THOS. I. TALLEY,
Attorney for Contestants.

(EXHIBIT A.)

RECORD.**VIRGINIA:**

In the Chancery Court of the City of Richmond, sitting as a Court of Probate and Record.

Pleas before the Hon. William A. Moncure, Judge of the Chancery Court of the City of Richmond, (sitting as a Court of Probate and Record) held at the courtroom thereof, in the City Hall in said City, on the 7th day of July, 1939.

In the Matter of the Will of
Susan Bentley, deceased.

Be it remembered that heretofore, to-wit: on the 3rd day of April, 1934, the following order was entered by the Court, viz:

Virginia:

In the Chancery Court of the City of Richmond, the 3rd day of April, 1934.

A paper writing, bearing date the 19th day of January, 1917, purporting to be the last will and testament of Susan Bentley, deceased, was this day produced to the Court and offered for proof.

It appearing to the Court that the said Susan Bentley was a resident of the City of Richmond, and that she departed this life on the 28th day of February, 1934; and Pinkie Taylor Williams, Louis Bridgeforth and Thomas I. Talley, the subscribing witnesses thereto, being first duly sworn, severally deposed that they were present together at the same time, and in the presence of the said Susan Bentley, when she, the testator, signed, sealed, acknowledged and declared the said paper writing to be her will, and that at the
page 2 } request of the testator, in her presence, and in the
presence of each other, they, and each of them, signed their names as attesting witnesses thereto, and they further deposed that the said Susan Bentley was of sound mind and memory, and capable of making a will.

Thereupon the said paper writing bearing date the 19th day of January, 1917, is established and ordered to be recorded as and for the true last will and testament of the said Susan Bentley, deceased.

On motion of the Executor named in said will, she was permitted by the Court to qualify as such; thereupon Susie Emily Massie, named in said will as Executor thereof, this day appeared in open Court, made oath as the law directs, and, together with the National Surety Corporation, her surety, by Nellie Runge, its duly authorized attorney-in-fact (the Court being first satisfied, however, from an examination of the said Nellie Runge, on oath, as to the sufficiency of said Corporation) entered into and acknowledged a bond as such Executor in the penalty of Sixteen Hundred Dollars, payable and conditioned according to law.

And certificate is granted the said Susie Emily Massie for obtaining a probate of the said will in due form.

It is ordered that W. G. Bragg, Bernard W. James, James C. Page, H. M. Ratcliffe and W. C. Miller, or any three of them, being first duly sworn for the purpose, do truly and justly appraise in current money the personal estate of Susan Bentley, deceased, and return their appraisal under their hands as the law directs.

COPY OF WILL.

KNOW ALL MEN BY THESE PRESENTS: That I, Susan Bentley, of Richmond, Virginia, being of legal
page 3 } age and sound and disposing mind, memory and understanding, do make, ordain, publish and declare this to be my last will and testament:

FIRST, I order and direct that my executrix, hereinafter named, shall as soon after my death as conveniently may be, sell and dispose of all of my estate, both real and personal, in which I may, at my death own any interest, legal or equitable, and especially the real estate lying on the North side of Beverly Street, in the City of Richmond, Virginia, between Granby and Meadow Streets, with the improvements thereon known as numbers 1906, 1908 and 1910 Beverly Street.

SECOND: It is my desire that my executrix as soon after my death as she shall have in her possession sufficient proceeds for the purpose, pay all of my legal debts and funeral expenses.

THIRD: From the proceeds of my property I desire and direct my executrix to pay the following legacies, to-wit: Henrietta Brown, daughter of my deceased daughter, Mary Smith, twenty-five dollars; James Smith and John Smith, sons of my deceased daughter, Mary Smith, ten dollars each.

FOURTH: To my daughter, Mandy Julia Roots, to whom

I have made advancements from time to time, I give and devise the sum of one dollar.

FIFTH: All the rest and residue of the proceeds from the sale of my property, as hereinbefore provided, after the payment of the *bequeaths* above specifically set out, I give, devise and bequeath to my three daughters, Dolly Ann Smith, Bettie Frances Goodwin and Susie Emily Massie in equal shares. I direct my executrix to procure a settlement of my estate and divide the proceeds in accordance with this will, as soon after my death as practical.

page 4 } I hereby appoint and nominate my daughter,
Susie Emily Massie as my executrix, and it is my
desire that she be the sole judge of the

her
Susan X Bentley
mark.

selling price of said property, and she is authorized to dispose of same at either public or private sale. My said executrix is hereby empowered to sell all my property, and to execute deeds and do all acts necessary or proper to convey full and complete title to same.

IN TESTIMONY WHEREOF, I have to this, my last Will and testament, contained on two sheets of paper, the first sheet bearing my signature in the lower left-hand corner, and both sheets being without interlineations or erasures, subscribed my name and affixed my seal, this nineteenth day of January, one thousand nine hundred and seventeen.

her
SUSAN X BENTLEY (Seal)
mark.

The above signature of the testator, Susan Bentley, was made, and the foregoing will was acknowledged, published and declared by the said Susan Bentley, as and for her last will in the presence of us, three competent witnesses, present at the same time; and we, the said witnesses, do hereby subscribe the said will in the presence of the said testator, and of each other, at the request of the said testator, this nineteenth day of January, one thousand nine hundred and seventeen.

PINKIE TAYLOR WILLIAMS,
LOUIS BRIDGEFORTH,
THOS. I. TALLEY.

page 5 } And at another day, to-wit:

On the 7th day of July, 1939, the following order was entered, viz:

In the Matter of the Will of
Susan Bentley, deceased.

This day came J. Thomas Hewin, Sr., and presented to the Court and offered for probate as and for the true last will and testament of Susan Bentley, deceased, late of the City of Richmond, a paper writing, bearing date the 7th day of February, 1922, in which paper said J. Thomas Hewin, Sr., was named as Executor thereof, (said paper being marked "Exhibit A", as part of the record in this matter), and moved the Court to be permitted to qualify as such Executor.

And came also Thomas I. Talley, counsel for Susie Emily Massie, and others, and opposed the probate of said paper, and the motion of J. Thomas Hewin, Sr., the Executor therein named.

On consideration whereof, it appearing to the Court from the records thereof, that Susan Bentley was a resident of the City of Richmond, and that she departed this life on the 28th day of February, 1934, and that on the 3rd day of April, 1934, a paper writing bearing date the 19th day of January, 1917, was presented to the Court, and in an *ex parte* proceeding, was fully proved in all respects to the satisfaction of the Court, and duly established and ordered to be recorded as and for the true last will and testament of Susan Bentley, deceased, disposing of all of her property, and the Executor therein named duly qualified as such.

And no bill or other proceedings having been filed, within two years, (that being the time limit fixed by Statute existing 3rd April, 1934) from the order of probate and ad-
page 6 } judication of April 3rd, 1934; and the Court being of opinion that the order of April 3, 1934, is forever binding as stated in Section 5259 Code of Virginia, doth refuse to consider the paper writing dated February 7th, 1922, and this day presented and offered for probate.

MEMO:

At the hearing this day the proponents were ready to offer evidence to prove the due execution of the said paper writing of February 7th, 1922; and the opponents were also

ready to offer evidence to prove that the testator was on February 7th, 1922, not of sound mind, and was incapable of making a will.

EXHIBIT "A"—

made part of the record.

COPY OF WILL—

I, Susan Bently, of the City of Richmond, in the State of Virginia, being of sound mind and memory, do make this my last will and testament, hereby revoking all other wills by me at any other time made. I direct my executor to give me a burial out of my estate in keeping with my rank, station, and condition in life. I give, devise, and bequeathe unto my beloved daughter—Amanda Roots—my house and lot No. 1908 Beverly Street, in fee, for her kindness and attention to me during my lifetime. I direct my executor to sell my house and lot No. 1910 Beverly Street, and out of the proceeds of the said sale, he is to pay my debts and funeral expenses, the residue, he must divide the same equally amongst my daughters, whose names are as follows; Dolly Smith, Bette Goodman and Susan Massey.

page 7 } Lastly, I nominate J. Thomas Hewin, executor of this my will, and ask that no appraisement of my estate be made, but my executor shall be required to execute a bond with sufficient surety to guarantee a faithful performance of his duties under this my will.

Given under my hand this 7th day of Feby. 1922.

her
SUSAN X BENTLY
mark

Witness

VINCENT J. MURRAY
R. S. ELLYSON

The foregoing will was signed by Susan Bentley, in our presence, and we, at her request, in her presence, and in the presence of each of us, have subscribed our names as witnesses this 7th day of Feby. 1922.

VINCENT J. MURRAY,
R. S. ELLYSON.

CLERK'S CERTIFICATE.

I, Charles O. Saville, Clerk of the Chancery Court of the City of Richmond, do hereby certify that the foregoing is a true transcript of the record as ordered by counsel, and that notice in obedience to Section 6339, Code of Virginia, has been duly given.

CHAS. O. SAVILLE, Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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