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# Record No. 1374

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## DEMURRER TO THE PETITION FOR A WRIT OF PROHIBITION

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**CLARENCE W. COWPER**

VS.

**WILLIAM H. SARGEANT, JUDGE**

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“The 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 along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

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

H. STEWART JONES, Clerk.

160 Va 562

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

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DEMURRER TO THE PETITION FOR A WRIT OF PROHIBITION.

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DEMURRER.

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Said William H. Sargeant, Judge of the Corporation Court of the City of Norfolk, says that the petition for writ of prohibition, and each part thereof, is not sufficient in law.

Grounds of demurrer are:

Said petition shows that the Corporation Court of the City of Norfolk has jurisdiction to try the will contest in question, under the following laws:

Prior to the creation of the Court of Law and Chancery of the City of Norfolk, said Corporation Court had general jurisdiction of both criminal matters and cases at law and in chancery, and retains all jurisdiction, except what was taken away by the statute creating said Court of Law and Chancery. The relevant statutes are mainly contained in Chapter 246 of the Code of 1930, section 5934, *et seq.*

Section 5934 creates said Court of Law and Chancery of the City of Norfolk separate from the Corporation Court, with a separate judge.

Section 5935 reads:

“The said Court of Law and Chancery shall have *concurrent* jurisdiction with the circuit court *and the corporation court of the said city of Norfolk in all matters concerning the probate and recordation of wills*, the appointment, qualifications and removal of fiduciaries and the settlement of their accounts and in granting and hearing writs of mandamus, prohibition and *quo warranto*, or information in the nature of *quo warranto*, and original and general jurisdiction, concurrent with the circuit court and exclusive of the corporation court in said city, of all suits and proceedings in chancery and of all such civil cases at law, within said city, as are cognizable by the circuit court of the city of Norfolk, including motions to recover money, and excepting actions of forcible or unlawful entry and detainer and appeals from justices.”  
\* \* \* (Italics added.)

Section 5936, after excluding jurisdiction in some matters from said Court of Law and Chancery, provides in its last sentence:

“And the said *Corporation Court*, and the judge thereof in vacation, *shall retain all the powers and jurisdiction possessed by the Corporation Court of the City of Norfolk*, and discharge all the duties devolving upon the said Corporation Court of the city of Norfolk on the day before the first day of January, in the year eighteen hundred and ninety-five, *except such as are herein expressly conferred upon the Court of Law and Chancery.*” (Italics added.)

Section 5259 emphasizes the jurisdiction, reading:

“Section 5259. MOTION FOR PROBATE MAY BE *EX PARTE*; WHEN AND BY WHOM SUIT MAY BE BROUGHT IN SUCH CASE, TO IMPEACH OR ESTABLISH WILL. Any court having jurisdiction of the probate of wills under section fifty-two hundred and forty-seven may, however, without summoning any party, proceed to probate and admit the will to record, or reject the same. After a sentence or order under this section or under section fifty-two

hundred and forty-nine, a person interested, who was not a party to the proceeding, may proceed by bill in equity to impeach or establish the will, on which bill a trial by jury shall be ordered to ascertain whether any, and if any, how much of what was so offered for probate, be the will of the decedent. The court may also, if it deem proper, require all testamentary papers of the same decedent to be produced, and direct the jury to ascertain whether any, or if there be more than one, which of the papers produced, or how much of what was so produced, be the will of the decedent. If the sentence or order be made by the court in the exercise either of its original jurisdiction or on appeal from the clerk, such bill shall be filed within two years from the date of such order made by the court. If no appeal be taken from a sentence or order made by the clerk under section fifty-two hundred and forty-nine, the bill shall be filed within two years from date of such order or sentence by the clerk. If no such bill be filed within that time, the sentence or order shall be forever binding. *No bill shall be filed under this section except in the court in which, or in the clerk's office of which, the will was admitted to probate.*" (Italics added.)

*Kirby vs. Kirby*, 84 Va. 627, distinctly holds that in will contests the court acts as a court of *probate* under special statutes, the opinion by Lewis, P., saying:

"The defendants, the appellants here, contend, and the position is well taken, that the decree is erroneous, because the court, in entering it, exceeded its jurisdiction. It is contended that in a suit of this description, a court of equity **DOES NOT PROCEED UNDER ITS GENERAL JURISDICTION**, with all the powers incident thereto, but can **EXERCISE ONLY THE SPECIAL AND LIMITED POWERS CONFERRED UPON IT BY THE STATUTE; THAT IT ACTS AS A COURT OF PROBATE**, with a single object in view, namely, to ascertain by a jury trial whether the paper in question is, or is not, the will of the decedent; that it can perform no other act nor grant any further relief; that it has no jurisdiction over the estate of the decedent, and can make no order respecting it.

“THIS POSITION IS FULLY SUSTAINED BY THE DECISIONS OF THIS COURT.

“In *Coalter's Ex'or vs. Bryan*, 1 Gratt. 18, in which the bill was filed to impeach the will of John Randolph of Roanoke, and also to compel the defendants to account for and surrender the estate, it was held that the jurisdiction of the court was confined by the statute to the simple question whether the paper admitted to probate was the true last will and testament of the decedent, and could not be extended further; THAT THE JURISDICTION IS MERELY THAT OF A COURT OF PROBATE, TO BE EXERCISED NOT BY THE COURT, BUT BY A JURY UNDER ITS SUPERVISION, AND FOR THE DECISION OF A COMMON LAW ISSUE. And in the same case it was said that the jurisdiction of a court of probate differs from that of other civil tribunals in this, that its province is not to ascertain and enforce the rights of property, but to establish, preserve, and perpetuate some important muniment of title.

“To the same effect is *Lamberts vs. Cooper's Ex'or*, 29 Gratt. 61, in which case the court said that the issue *devisavit vel non* is the sole object of the suit, the PROCEEDINGS BEING PURELY STATUTORY, IN WHICH A PROBATE JURISDICTION IS EXERCISED BY THE JURY IN ORDER TO THE FINAL PROBATE OF THE WILL. And while it was held in *Connolly vs. Connolly*, 32 Gratt. 657, that the court so far performs the functions of a court of chancery as to enable it to ENTERTAIN A BILL OF REVIEW, yet the doctrine of the above-mentioned cases was recognized, and the court in express terms declared that the jurisdiction is limited to matters of a probate nature, and to securing *the specific relief authorized by the statute.*” (Capitals added.)

Also sections 5254 and 5257 of the Code give the Corporation Court jurisdiction in the first instance for admitting wills to probate, including trial by jury; and it would seem absurd to give the Corporation Court this jurisdiction, yet to withhold jurisdiction from it to try a contest over a will already admitted to probate before this very court, especially where the spirit of the laws on the subject plainly intends to prevent courts from conflicting with each other, and section 5259 expressly says “No bill shall be filed under this section ex-

cept in the court in which, or in the Clerk's Office of which, the will was admitted to probate''.

An additional reason which seems to make the jurisdiction of the Corporation Court clear, is that where a will is admitted to probate by its Clerk, the Corporation Court has jurisdiction of an appeal from the Clerk, and tries the appeal with a jury, in all substantial particulars like a *devisavit vel non*, and with the same effect, and there could be no substantial reason for permitting jurisdiction in the one case and excluding it in the other.

WILLIAM H. SARGEANT,  
Judge of the Corporation Court of  
the City of Norfolk.

JAS. G. MARTIN, Counsel.

A Copy—Teste:  
H. STEWART JONES, C. C.