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Wills - Probate - Devisavit Vel Non - Jury Trial in Pennsylvania

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vesting clause or a contingency that the beneficiary survive to the designated age. When one person is or becomes the sole beneficiary, the trust terminates if no trust purpose remains to be accomplished. The trust becomes terminable whenever its purpose is wholly completed. It will also terminate whenever all interested, competent beneficiaries consent thereto. A trust under which active duties remain such as carrying out a spendthrift trust provision, is not terminable.

The subsection of the 1947 Estates Act previously referred to, specifies that the Pennsylvania decisions relating to revocation and termination should still be applied. Practical considerations prevented the legislature from attempting a detailed specification of rules for revocation and termination, and hence the field was left to existing case law. No doubt, a specific set of rules would have given rise to more problems than they would have solved. The purpose of the Estates Act of 1947 was to simplify the law of trusts and to solve by statute the major problems, while leaving the solution of the minor problems to case law. At the present time there doesn't appear to be a need for such a detailed set of rules, and it is not likely that such a need will arise within the foreseeable future.

Donald W. Grieshober

WILLS—PROBATE—DEVISAVIT VEL NON—
 JURY TRIAL IN PENNSYLVANIA.

The Pennsylvania Orphans' Court Act of 1951¹ provides that any party in interest is entitled to a trial by jury when a substantial dispute of fact arises concerning the validity of an alleged testamentary writing.² It further declares that the verdict of the jury shall have the same effect as the verdict of a jury in a case at law in a court of common pleas.³ Prior to this act the judges of the orphans' court could regard a verdict as advisory only. This change in procedure has been attacked on the grounds that it unduly hampers the administration of justice in the orphans' courts, and hence should be repealed. However, further research into the problem indicates that the constitutional provision requiring that the right to trial by jury remain "as heretofore" would demand that disputes of fact in probate cases be submitted to a jury in a court of law when title to real estate is involved. The proposed repeal would, in many cases, seem to deny this right and violate one of the specific guarantees of the Pennsylvania constitution. But the Supreme Court of Pennsylvania in the leading case of *Fleming's Estate*⁴ has declared that trial by jury on the issue

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1. PA. STAT. ANN. tit. 20, § 2080.101 (Supp. 1954).
 2. PA. STAT. ANN. tit. 20, § 2080.745(a) (Supp. 1954).
 3. PA. STAT. ANN. tit. 20, § 2080.746(c) (Supp. 1954).
 4. *In re Fleming's Estate*, 265 Pa. 399, 109 Atl. 265 (1919).

*devisavit vel non*⁵ is not a constitutional right. The court, in the face of a strong dissenting opinion, overlooked the historical distinction between probate proceedings involving title to personalty and those involving title to realty. It appears that the court in this case was seeking to change the meaning of a specific constitutional provision. Therefore, those proposing repeal are faced with the problem of whether the Pennsylvania constitution is to be treated as superior to the decisions interpreting it, or whether greater force should be given to amendments imposed by the supreme court acting as "a continuing constitutional convention."

At common law, if a devisee wished to have his title determined in chancery, that court's jurisdiction was limited to framing an issue *devisavit vel non*,⁶ to have the question determined at law before a jury.⁷ The issue was held to be demandable as of right by an heir, since he could only be disinherited by the verdict of a jury.⁸ The Pennsylvania Orphans' Court Act of 1917 declared that orphans' courts should have the jurisdiction and powers of courts of chancery.⁹ It further stated:

"Whenever a dispute upon a matter of fact arises before any orphans' court on appeal from any register of wills, or on removal from any register of wills by certification, the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas. . . ." ¹⁰

An amendment in 1937 gave the orphans' courts authority to draw their own juries and for the judge thereof to preside over the trial.¹¹ This combination of chancery and jury trials may have caused some confusion as to the effect of a verdict in the orphans' court. If the trial were before a judge sitting as chancellor, the verdict of the jury would be merely advisory, and the constitutional guarantee of trial by jury would be violated. Ample evidence exists that the issue is triable only at law, and must be submitted entirely to the jury.

Historically, the power to probate wills belonged to the English ecclesiastical courts,¹² but the jurisdiction of these courts was limited to wills

5. *Devisavit vel non* has been defined as "the name of an issue sent out of a court of chancery, or one which has chancery jurisdiction, to a court of law to try the validity of a paper asserted and denied to be a will, to ascertain whether the testator did devise or whether or not that paper was his will." See BLACK, LAW DICTIONARY 539 (4th ed. 1951).

6. See note 5 *supra*.

7. See SYMES AND BASYE, *The Function of Will Contests*, in PROBLEMS IN PROBATE LAW 686 (1946).

8. SYMES AND BASYE, *op. cit. supra* note 7, at 687, citing ADAMS, EQUITY 249 (2d Am. ed. 1852).

9. Act of June 7, 1917, P.L. 363, § 20(d).

10. Act of June 7, 1917, P.L. 363, § 21(b).

11. Act of July 1, 1937, P.L. 2665 § 1 (amending Act of June 7, 1917, P.L. 363 § 21).

12. 3 BLACKSTONE, COMMENTARIES 98; see generally, SYMES AND BASYE, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965 (1944).

of personalty.¹³ Matters concerning real property were ordinarily for the common law-courts.¹⁴ If a will disposed of both personalty and realty, admission to probate by the ecclesiastical courts did not determine the validity of the devise,¹⁵ and if the will was solely concerned with real estate, the ecclesiastical courts had no jurisdiction to admit it to probate. The validity of a devise of real estate could be tested by an action to try title, such as trespass or ejectment.¹⁶ When Parliament restricted the powers of the ecclesiastical courts, chancery succeeded to jurisdiction over matters of administration of decedents' estates. If that court were confronted with the question of the validity of a devise of land, or asked to enjoin an heir from interfering with the enjoyment of the devise, special procedure was used. Story describes that procedure in this manner:

"If the will is of real estate, and its validity is contended in the cause, the court will, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law, and will govern its own judgment by the final result. . . . In every case of this sort, the court will, unless the heir waives it, direct an issue of *Devisavit vel non* . . . to ascertain the validity of the will."¹⁷

Numerous Pennsylvania cases prior to the 1951 Orphans' Court Act have asserted the rule that trial by jury on an issue *devisavit vel non* was a matter of right where real estate was concerned, and where there was a substantial dispute of fact.¹⁸ Whether a dispute of fact existed was determined by the judge of the probate proceedings when petition was made for an issue. If the evidence was such as to require setting aside a verdict against the will as contrary to the manifest weight of evidence, an issue would not be granted.¹⁹ However, these cases, for the most part, did not depend on the common law, or on the constitutional right to trial by jury, but rather were decided according to specific legislative enactments governing probates in the register's courts.²⁰ These same enactments came to govern actions in the orphans' courts when, in 1874, the register's courts were abolished, and all the jurisdiction and powers formerly vested in them were granted to the orphans' courts.²¹

13. SYMES AND BASYE, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965, 968 (1944).

14. 2 PAGE, WILLS § 563 (3d ed. 1941).

15. In *Goods of John Bootle* [1875] L.R. 3 P. & D. 177 (1874).

16. See SYMES AND BASYE, *op. cit. supra* note 13, at 971.

17. 2 STORY, EQUITY JURISPRUDENCE 671 (1st ed. 1836).

18. *In re Conway's Estate*, 257 Pa. 315, 101 Atl. 652 (1917); *In re Phillips' Estate*, 244 Pa. 35, 90 Atl. 457 (1914); *Crawford v. Schooley*, 217 Pa. 429, 66 Atl. 743 (1907); *Appeal of Knauss*, 14 Pa. 10, 6 Atl. 394 (1886).

19. *In re Conway's Estate*, 257 Pa. 315, 101 Atl. 652 (1917); *In re Phillips' Estate*, 244 Pa. 35, 90 Atl. 457 (1914); *In re Fuller's Estate*, 222 Pa. 182, 70 Atl. 1005 (1908); *Crawford v. Schooley*, 217 Pa. 429, 66 Atl. 743 (1907).

20. Act of March 15, 1832, 41 P.L. 146.

21. PA. CONST. art. V, § 22; Act of May 19, 1874 § 6, P.L. 206; see *Crawford v. Schooley*, 217 Pa. 429, 66 Atl. 743 (1907).

Prior to 1856, the common law governed wills of real estate in Pennsylvania, and probate was not conclusive as to them.²² The judgment was merely prima facie evidence of validity, subject to be controverted in ejectment.²³ This was so even if an issue had been granted in probate and the jury had returned a verdict thereon.²⁴ Recognition had thus been given early in the history of Pennsylvania probate practice that an interested party had the right to contest a will of real estate in one or more actions of ejectment, in which, of course, he had a right to trial by jury. In 1806 an act of the legislature declared that two successive verdicts in ejectment should be conclusive as to real estate,²⁵ and in 1907, one verdict was made conclusive.²⁶ Legislative action was necessary in this situation, since, in its early form, an action of ejectment was not conclusive as to title because of the special form in which it was raised. After a verdict and judgment, theoretically, any number of subsequent ejectments could be brought.²⁷ This defect was gradually limited by the English courts by their granting a perpetual injunction after several adverse verdicts;²⁸ and finally the above-mentioned statutes gave complete stability to the action in Pennsylvania, recognizing the propriety and applicability of this remedy in cases involving wills. The Supreme Court of Pennsylvania declared in 1852:

“[The validity of a will] so far as it affects realty, may be contradicted or disposed of in ejectment or partition by showing that it was not legally executed or that the testator at the time of making it was insane, under duress, or influenced by the fraudulent practices of some interested party.”²⁹

That same court had earlier stated:

“[I]t would scarcely comport with the spirit and genius of our law in regard to land titles to hold that the decision of a register or register’s court, unappealed from, whether in favor of or against the validity of a will shall be final and conclusive. . . . There is certainly no other species of writing under which a party can claim title to land, that he has not the right to have at least two trials in ejectment brought for the land, where a full opportunity will be afforded

22. *Cook v. Brown*, June Assizes (Carlisle 1774); *Walmesley v. Read*, 1 Yeates 86 (Pa. 1791); *Coates v. Hughes*, 3 Binn. 498, 506 (Pa. 1811); *Logan v. Watt*, 5 S. & R. 213 (Pa. 1812); *Miller v. Carothers*, 6 S. & R. 221 (Pa. 1820).

23. *Holliday v. Ward*, 19 Pa. 485 (1852); *Thompson v. Thompson*, 9 Pa. 234 (1848); *Smith v. Bonsall*, 5 Rawle 80 (Pa. 1835).

24. *Holliday v. Ward*, 19 Pa. 485 (1852); *Asay v. Hoover*, 5 Pa. 21 (1846); *Spangler v. Rambler*, 4 S. & R. 191 (Pa. 1818).

25. Act of March 21, 1806, c. 2682, P.L. 326 (4 Smith) (Supplemented by Act of April 13, 1807, c. 2872, P.L. 476 [4 Smith]).

26. PA. STAT. ANN. tit. 12 § 1553 (1950).

27. See AMRAM, COMMON PLEAS PRACTICE § 5 (5th ed. 1948).

28. *Barefoot v. Fry*, Bunn. 158, 145 Eng. Rep. 631 (Ex. 1723).

29. *Holliday v. Ward*, 19 Pa. 485 (1852).

upon each trial of testing its validity; and nothing short of two decisions against him by a court and jury in such actions will conclude him." ³⁰

Here the court has illustrated not only the rule that probate of a will of realty should be contested in ejectment, but has clearly enunciated the underlying principle that in actions involving real estate the interested parties had a right to trial by jury.

This right antedated the Pennsylvania constitution and was included among those rights which it guaranteed. The constitution of 1776 provided, "That in controversies respecting property and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred." ³¹ This provision was in effect when the constitution of 1790 was adopted. That constitution and its successor, the present constitution, provide that "Trial by jury shall be as heretofore and the right thereof remain inviolate." ³² It has been held that the jurisdiction of the orphans' court over estates existed prior to the constitution, hence such cases are not within the constitutional provision of trial by jury. ³³ However, this is not applicable to cases involving realty, since the power of the orphans' court prior to 1856 extended only to personalty. Subsequently, the Act of April 22, 1856 ³⁴ made probate conclusive as to realty as well as to personalty. It provided, "That the probate by the register of the proper county of any will devising real estate shall be conclusive as to such realty, unless within five years from the date of such probate those interested to controvert it shall by caveat and action at law duly pursued, contest the validity of such will as to such realty." One construction of this act holds that:

"Caveat is not used in its usual sense [i.e. to stop proceedings] since the act does not require caveat to be filed until after probate. If the devisee is not in possession, the will may be contested within five years from probate by an issue *devisavit vel non*. If the devisee is in possession, the act does not prohibit the adverse party from contesting devisee's title by an action in ejectment. Indeed the act takes away none of the remedies existing at the time of its passage, but merely limits a period within which those remedies may be invoked." ³⁵

If this were the correct interpretation of the act, there would be no necessity for preserving the right of trial by jury in an issue *devisavit vel non*, since contestants' right would still be available in ejectment.

30. *Smith v. Bonsall*, 5 Rawle 80 (Pa. 1835).

31. PA. CONST., *Declaration of Rights*, §11 (1776); see generally, *In re Fleming's Estate*, 265 Pa. 399, 415-418, 109 Atl. 265, 271 (1919) (dissenting opinion).

32. PA. CONST. art. IX, § 6 (1790); PA. CONST. art. I, § 7; see also, PA. CONST. art. IX, § 6 (1838)

33. *In re Gallagher's Estate*, 10 Pa. Dist. 733 (1901).

34. Act of April 22, 1856 § 7, P.L. 532.

35. *Stewart v. Austin*, 9 Phila. 141 (D.C. Phila. 1873).

However, the Supreme Court of Pennsylvania in 1879, in the case of *Wilson v. Gaston*,³⁶ conclusively defined the Act of 1856 to mean that the probate of a will of real estate could not be attacked collaterally in ejectment. The decree of the orphans' court is conclusive, not at the end of five years, but immediately. The five year period is not a mere statute of limitations, but refers, rather, to the period during which application for an issue *devisavit vel non*, the only contest now available, could be initiated. Since the act has forbidden collateral attacks on probate, it would seem that, since a right to trial by jury is guaranteed in cases involving realty, that right must be preserved in the issue *devisavit vel non*. This was accurately stated by Justice Simpson, dissenting in *Fleming's Estate*,³⁷ in 1919. He declared that:

“Considering only the ‘trial by jury’ provisions of our several constitutions the legislature is powerless, and the courts equally so to deprive a litigant of a right to trial by jury ‘in controversies respecting property and in suits between man and man’ where facts are really in dispute; and in such cases, therefore, the trial judge, *except where the issue is of an equitable nature*, would have no right to take the case away from a jury, but only to preside as a common law judge, retaining of course, his remedy for a wrongful verdict by the granting of a new trial.” (Emphasis added.)

The question remains whether the issue *devisavit vel non* is of an equitable nature. The Orphans' Court Act of 1951 states that the verdict of the jury in the orphans' court shall have the same effect (in an issue *devisavit vel non*) as the verdict of a jury in a case at law in a court of common pleas.³⁸ The Act of May 5, 1939 declared that *unless and until the orphans' court otherwise directs*, the appropriate rules of the common pleas court of the county should apply to jury trials of issues in the orphans' court.³⁹ Absent these statutes there is little uniformity as to whether the trial is one in law or in equity. It was declared in the House of Lords prior to the American Revolution that a will of real estate could not be set aside in a court of equity for fraud or imposition, but must be tried *at law* on *devisavit vel non*, being a matter proper for the jury's inquiry.⁴⁰ This rule was cited favorably in the United States Supreme Court in the *Case of Broderick's Will*,⁴¹ wherein the court held that a court of equity will not entertain jurisdiction of a bill to set aside a will or probate thereof. The reasoning relied upon was that, in England, after wills devising real estate were authorized, the equity courts refused jurisdiction on the grounds

36. 92 Pa. 207 (1879).

37. 265 Pa. 399, 415-418, 109 Atl. 265, 271 (1919) (dissenting opinion).

38. PA. STAT. ANN. tit. 20 §2080.746(6) (Supp. 1954).

39. Act of May 5, 1939, P.L. 94 § 1.

40. *Bransby v. Kerridge*, 7 Brown P.C. 437, 3 Eng. Rep. 284 (1727).

41. 88 U.S. (21 Wall.) 503 (1874).

that any fraud or duress could be fully investigated and redressed in the courts of common law. The occasional departures from this rule were said to be on special grounds, and they established, rather than weakened the rule. This was adequately illustrated in the case of *Smith v. Harrison*,⁴² where equitable relief was granted on the grounds of fraudulent combinations between proponents and contestants during an issue.

The case of *Fleming's Estate*⁴³ is cited as supporting the view that there is no constitutional right to trial by jury in Pennsylvania in the contest of a will devising real estate.⁴⁴ One of the reasons given in that case was that in a will contest the judge sits as chancellor and must consider all the evidence; therefore, he has the right to decide disputed facts. The case which the court cites in support of this holding, specifically limits itself to cases "tried before a jury in which the trial judge sits as chancellor."⁴⁵ Because of the obvious error of attributing to the English ecclesiastical courts jurisdiction over real property,⁴⁶ and using this as a basis for the decision, the authority of *Fleming's Estate* should not be relied upon. However, Justice Moschzisker in the case of *Phillips' Estate*⁴⁷ held that in cases of an issue sent to the common pleas court, the judge sits as chancellor, and when a case is before the orphans' court on petition for an issue the same rules concerning the duties of the judge apply as would apply upon trial in the common pleas court.⁴⁸ If this view is controlling, then the Act of 1939, by allowing the orphans' court to try an issue itself without sending it to the common pleas court, would demand that the verdict of the jury in the orphans' court be of no more validity than that of any verdict before a chancellor.

However, there is valid authority supporting an opposite view. In the case of *Cross' Estate*⁴⁹ Justice Moschzisker held that after a judgment was entered on a verdict in the common pleas court, so long as the judgment remains undisturbed, the findings of fact of the jury of the common pleas court are *conclusive* on the orphans' court. Moreover, where a substantial dispute of material fact exists, and the evidence is of sufficient probative value, the orphans' court *must* send such issue to the common pleas court when requested to do so by any party in interest. In the early case of *Walmsley v. Read*,⁵⁰ Justice Yeates held that the "point of *devisavit sive non* must be submitted altogether to the jury upon a trial relating to title to lands, on the proofs adduced to them." In *Miller's Estate*⁵¹ in

42. 106 Am. St. Rep. 643, 644 (1906).

43. 265 Pa. 399, 109 Atl. 265 (1919).

44. *Id.* at 408, 109 Atl. at 267.

45. *Keller v. Lawson*, 261 Pa. 489, 104 Atl. 678 (1918).

46. See note 38 *supra*.

47. 244 Pa. 35, 90 Atl. 457 (1914).

48. See also, *In re Geist's Estate*, 325 Pa. 401, 191 Atl. 29 (1902); *Roberts v. Clemens*, 202 Pa. 198, 51 Atl. 758 (1902).

49. 278 Pa. 170, 122 Atl. 267 (1923).

50. 1 Yeates 86 (Pa. 1791).

51. 179 Pa. 645, 36 Atl. 139 (1897).

1897, Justice Dean declared that the question of undue influence is one of pure fact peculiarly within the province of the jury.

“Its disposition properly rests with the jury alone. Even if the trial judge should feel that were he sitting as a juror he could not regard the evidence as sufficient to induce him to find a verdict against the will, that is not enough to justify him in taking the case entirely from the jury.”

In *Conway's Estate*⁵² it was held that “[T]he controversy must be submitted to the jury, even though the judge should feel that were he sitting as a juror he would not draw the inference nor reach the conclusion contended for by the contestants.” In *De Laurentiis Estate*,⁵³ Justice (now Chief Justice) Horace Stern declared:

“It must be borne in mind that the judge of the orphans’ court conducting the hearing is to decide the case as he would if acting in the capacity of an ultimate fact-finding tribunal. . . . [A substantial dispute of fact] exists if a verdict reached by a jury, even if at variance with his own opinion, would not have to be set aside as judicially untenable because contrary to the weight of evidence.”

All of these cases were decided before the legislature declared the conclusive effect of a verdict in the Orphans’ Court Act of 1951, and all declare a theory which cannot comport with a holding that the trial judge sits as chancellor on an issue *devisavit vel non*. The conflict between the two views is clear since it has been stated that:

“In every case tried before a jury in which the judge sits as chancellor, the evidence is addressed to him quite as much as to the jury—it must as a whole be judged by him independently of the jury—must satisfy his—[legal] conscience as well as the jury—and cannot be rightfully submitted to the jury as a basis of any finding which he would not approve; in a word, he cannot permit the jury to do what he as chancellor (after weighing the evidence in the light of the established law upon the subject) would not do.”⁵⁴

In equitable questions jury trials are not, and were not when the first constitution was established, a matter of right.⁵⁵

Although an attempt to reconcile the two lines of decisions would apparently be fruitless, it is sufficient to say that those holding an issue *devisavit vel non* to be a matter of law seem to be the better authority.

52. 257 Pa. 315, 101 Atl. 652 (1917).

53. 323 Pa. 70, 186 Atl. 359 (1936).

54. *In re Fleming's Estate*, 265 Pa. 399, 406, 109 Atl. 265 (1919).

55. *Id.* at 407, 109 Atl. at 268.

The earliest of these clearly antedates the state constitution. Its reasoning was adopted by the Supreme Court of the United States.⁵⁶ The theories underlying such a holding are historically sound. Further, a holding that *devisavit vel non* is an equitable action would, since a contest in ejectment is forbidden, deprive a contestant of his constitutional right to a jury trial in actions to determine the validity of titles to land.

CONCLUSION.

Historically, trials to determine the validity of devises could be had only at law, and required a jury trial. This rule was in effect at the time of the adoption of Pennsylvania's first constitution and for many years thereafter. That constitution and its successors have provided for the retention of the right to trial by jury wherever it existed prior to their adoption. The courts have imposed a contrary rule by holding that the trial judge sits as chancellor in an issue *devisavit vel non*. However, by enacting section 745 (a) of the Orphans' Court Act of 1951,⁵⁷ the legislature has expressed an intention that the clear meaning of the constitution be preserved. The problem is basically one of public law rather than property law. Any decision regarding the proposed repeal of this section would depend upon an adherence to one of two constitutional approaches. Those who support the amendatory power of the supreme court as a "continuing constitutional convention" will logically favor repeal. Such repeal would reinstate a judicially imposed rule denying rights which, historically, were included within the guarantees of the Pennsylvania constitution. On the other hand, those opposed to judicial amendment of the constitution, and favoring its "clear meaning," must oppose repeal of section 745 (a).

James P. Garland

56. See note 41 *supra*.

57. In presenting the Orphans' Court Act of 1951, the Joint State Government Commission declared that the purpose of § 745(a) was to insure that the right to trial by jury is *preserved*. See JOINT STATE GOVERNMENT COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, REPORT—DECEDENTS' ESTATE LAWS OF 1951, 82, comment § 745(a) (1951).