Gaines Vs. Chew

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Appellant : Gaines

Respondent : Chew

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Gaines v. Chew - 43 U.S. 619 (1844)
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Gaines v. Chew

43 U.S. (2 How.) 619

ON CERTIFICATE OF DIVISION OF OPINION IN THE CIRCUIT COURT

OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion.

A bill filed against the executors of an estate and all those who purchased from them, is not, upon that account alone, multifarious.

Under the Louisiana law, the court of probate has exclusive jurisdiction in the proof of wills, which includes those disposing of real as well as personal estate.

In England, equity will not set aside a will for fraud and imposition, relief being obtainable in other courts.

Although by the general law, as well as the local law of Louisiana, a will must be proved before a title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer, touching a will alleged to be spoliated. And it is a matter for grave consideration, whether it cannot go further and set up the lost will.

Where the heir at law assails the validity of the will by bringing his action against the devisee or legatee who sets up the will as his title, the district courts of Louisiana are the proper tribunals, and the powers of a court of chancery are necessary in order to discover frauds which are within the knowledge of the defendants.

Express trusts are abolished in Louisiana by the law of that state, but that implied trust, which is the creature of equity, has not been abrogated.

The exercise of chancery jurisdiction by the circuit court of the United States, sitting in Louisiana, does not introduce any new or foreign principle. It is only a change of the mode of redressing wrongs and protecting rights.

This case was a sequel to that which came before the court twice before, and is reported in 38 U. S. 13 Pet. 404, and 40 U. S. 15 Pet. 9.

It came up again from the Circuit Court of the United States for the Eastern District of Louisiana, sitting as a court of equity, on a certificate of a division of opinion in that court, upon the three following questions:

1. Is the bill multifarious? and have the complainants a right to sue the defendants jointly in this case?

2. Can the court entertain jurisdiction of this case without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?

3. Has the court jurisdiction of this case? or does it belong exclusively to a court of law.

The case was this, as set forth by the complainant, the defendant not yet having answered the bill.

It is stated with some particularity, because the counsel for the complainants dwelt strongly upon the injustice that would follow if such a case (supposed in the argument to be admitted by the demurrer) should prove remediless in a court of chancery. It is proper to refer to the report of the argument of the counsel for the defendants, in which he affirmed that the important facts alleged to exist by the complainant would be denied and disproved, if the court should be of opinion that the cause should go on. Some of the circumstances mentioned came out upon cross-examination.

In the year 1796 there was a French family by the name of Carriere, residing in New Orleans. One of the daughters was named Zuline, and about sixteen years of age. A person by the name of De Grange came there and married her; they continued to live together for several years, until about the year 1800, when it was reported that De Grange had another wife living. A separation took place between him and Zuline. In 1802, she went to New York (where it was said De Grange's former marriage had been celebrated) to obtain proof of it, but the registry of marriages having been destroyed, the proof was not obtained. She then went to Philadelphia, where Mr. Gardette was living, who was one of the witnesses of the prior marriage, and confirmed it. Whilst she was there, she had a daughter, to whom the name of Caroline was given, and who is the same person spoken of in the proceedings in this suit, by the name of Caroline Barnes. Clark treated her as

his child, and afterwards placed her to live with his mother.

In 1803, De Grange's first wife came from France to New Orleans, and he, being there also, was seized and prosecuted for bigamy. He was arrested and thrown into prison, but effected his escape, and never afterwards returned. Clark was married to Zuline in Philadelphia, in the same year, but required the marriage to be kept secret

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until judicial proof could be obtained of the nullity of her marriage with De Grange.

In 1805, Clark having returned to New Orleans and established Zuline in a separate establishment from his own, the commercial firm of Davis & Harper was formed, and rested almost entirely upon the credit furnished by Clark. In 1806, Zuline was about to give birth to another child, and, at the instance of Clark, arrangements were made by Davis for its being received into his (Davis') family. It proved to be a daughter, and was called Myra. She was suckled by Mrs. Harper, who put out an infant of her own to enable her to do so. Clark treated her as his daughter, furnished her with expensive clothing and playthings, and purchased a servant for her use.

Shortly afterwards, Clark became a member of Congress, and was absent from New Orleans for a considerable length of time. During his absence, a report reached New Orleans that he was about to contract a marriage at the north, and Zuline, whose feelings were fretted and irritated by his refusal to promulgate their marriage, sailed for Philadelphia, to obtain the legal proofs of her own marriage. When she arrived there, she was told that the priest who had performed the ceremony, was gone to Ireland. Being informed by counsel, whom she consulted, that she would not be able to establish the validity of her marriage, she determined to have no further communication with Mr. Clark, and soon afterwards married Mr. Gardette, of Philadelphia.

Clark returned to New Orleans. In 1811, being about to visit Philadelphia on a special emergency, he made a provisional will, as follows:

"Daniel Clark. In the name of God: I, Daniel Clark, of New Orleans, do make this my last will and testament."

" *In primis.* I order that all my just debts be paid."

"Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of."

"Third. I hereby nominate my friend, Richard Relf and Beverly Chew, my executors, with power to settle everything relating to my estate."

" *Ne varietur.* New Orleans, 20 May, 1811."

Signed,

"J. PITOT, *Judge* "

"DANIEL CLARK"

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About the time of executing this will, he conveyed to Joseph Bellechasse about fifty lots in the City of New Orleans, in the suburbs or faubourg St. John, near the bayou of that name, in fee simple, with the confidential understanding that they were to remain under his control for the use and benefit of his daughter Myra.

On 27 May, 1811, Clark, being so far upon his voyage, wrote to his friend Mr. Davis, the following letter:

"Dear Sir: We are preparing to put to sea, and I hope I shall have a pleasant passage, my stay will be but short in Philadelphia unless a forced one. In case of any misfortune to me, be pleased to deliver the enclosed to General Hampton; I count on him as a man of honor to pay the amount of notes mentioned in my letter to him, which in that case you will dispose of as I have directed. It will naturally

strike you that the letter to the general is to be delivered only in case of misfortune to me. Remember me kindly to Mrs. Davis and all your family."

"Yours,"

"[Signed] DANIEL CLARK"

"P.S. Of the enclosed letter you will say _____ unless in case of accident, when you may communicate it to Chew and Relf."

"S. B. Davis."

The direction alluded to in the above, was to place the amount of the notes to the best advantage for his daughter Myra's interest. Having arrived safely at Philadelphia and remained there until July, he addressed the following letter to Mr. Davis, on the eve of his sailing for New Orleans, on his return:

"Philadelphia, 12 July, 1811"

"My dear Sir: In case of any accident or misfortune to me, be pleased to open the letter addressed to me, which accompanies this, and act with respect to the enclosures as I directed you with respect to the other affairs committed to your charge before leaving New Orleans. To account in a satisfactory manner to the person committed to your honor, will, I flatter myself, be done by you when she is able to manage her own affairs; until when, I commit her under God to your protection. I expect to said tomorrow for New Orleans in the ship *Ohio,* and do not wish to risk these papers at sea."

"Yours,"

"[Signed] DANIEL CLARK"

"S. B. Davis, Esq. "

Upon Clark's safe arrival in New Orleans, Davis returned to him the package enclosed in the above letter, and also the letter addressed to General Hampton in the letter which he had written from the Balize.

Upon Clark's return, Bellechasse also offered to reconvey the lots, which Clark declined, and Bellechasse continued to hold them until Clark's death, when he conveyed them in equal portions to Myra and Caroline, being influenced to include the latter by the representations of some of Clark's friends.

In 1812, Davis removed to the north with his family, carrying with him Myra, who passed for his daughter, and bore his name. He had then in his hands funds of Clark to the amount of $2,360, the interest of which, by arrangement between them, was to be applied towards her education.

In 1813, Clark died. It was alleged that before his death he made an olographic will, leaving the bulk of his fortune to his daughter Myra. The circumstances under which he is represented to have made it, are thus detailed by some of the witnesses.

Dusuau de la Croix says,

"That he was very intimate with the late Daniel Clark for a great many years, and up to the time of his death; that some few months previous to the death of Daniel Clark, he visited deponent on his plantation and expressed a wish that he, deponent, should become his executor; deponent at first refused, but after a little, from the persuasion of said Clark, he consented to become his executor; that in this conversation, Clark spoke of a young female then in the family of Captain Davis named Myra, that said Clark expressed a wish that deponent should become tutor to this female, and that she should be sent to France for her education, and that Mr. Clark would leave her a sufficient fortune to do away with the stain of her birth; that a month or two after this conversation at the plantation of deponent, he, deponent, called to see Clark at his house on the Bayou road, he there found him in his cabinet, and had just sealed up a packet, the superscription of which was as follows: 'pour etre ouvert en cas de mort.' Clark threw it down in

the presence of deponent and told him that it contained his last will and some other papers which would be of service; deponent did not see the will, nor does he know anything about its contents; he only saw the packet with the superscription on it as before related. "

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Bellechasse says:

"A very short time before the sickness that ended in his death, he, Clark, conversed with us about his said daughter Myra in the paternal and affectionate terms as theretofore. He told us that he had completed and finished his last will. He, Clark, therefore took from a small black case his said last will, and gave it open to me and Judge Pitot to look at and examine. It was wholly written in the handwriting of said Daniel Clark, and it was dated and signed by the said Clark in his own handwriting. Pitot, De la Croix, and myself were the executors named in it, and in it the said Myra was declared to be his legitimate daughter, and the heiress of all his estate. Some short time afterwards I called to see him, Clark, and learned from said Relf that the said Clark was sick in bed, too sick to be seen by me; however, I, indignant at an attempt to prevent me from seeing my friend, pressed forward into his room. He, said Clark, took him by the hand, and with affectionate reprehension said, 'How is it, Bellechasse, that you have not come to see me before since my sickness? I told Relf to send for you.' My answer was that I had received no such message or account whatever of his sickness from Relf. I said further, 'My friend, you know that on various occasions I have been your physician, and on this occasion I wish to be so again.' He looked at me and squeezed my hand. Fearful of oppressing him, I retired and told Relf that I would remain to attend occasionally to Clark. Relf said there was no occasion for it, that the doctor or doctors had ordered that he, Clark, should be kept as quiet as possible, and not be allowed to talk. I expressed apprehension for the situation of Clark, but Relf expressed a different opinion; and on his, Relf, promising to send for me if there should appear to be any danger, I departed. On the next day, without receiving any message from Relf, I went and found Clark dead."

Mrs. Harper (afterwards Mrs. Smyth) says:

"In 1813, some few months before Mr. Clark's death, he told me he felt he ought no longer to defer securing his estate to his daughter Myra by a last will."

"Near this period, he stopped one day at my house, and said to me he was on his way to the plantation of Chevalier de la Croix, for the purpose of requesting him to be named in his will one of his executors, and tutor to his daughter Myra. On his return, he told me with much apparent gratification that De la Croix had consented to serve, and that Judge Pitot and Col. Bellechasse had consented to

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be the other executors. About this time he told me he had commenced making his last will. Between this period and the time he brought his last will to my house, Mr. Clark spoke very often of being engaged in making his last will; he always spoke of it in connection with his only and beloved daughter Myra; said he was making it for her sake, to make her his sole heiress, and to insure her being educated according to his wishes. At the times Mr. Clark spoke of being engaged in making his last will, he told me over and over again, what would constitute its contents; that he should in it acknowledge the said Myra as his legitimate daughter, and bequeath all his estate to her, but direct that an annuity of $2,000 a year should be paid his mother during her life, and an annuity of $500 a year to a young female at the north of the United States, named Caroline De Grange, till her majority; then it was to cease, and $5,000 were to be paid her as a legacy, and that he would direct that one year after the settlement of his estate $5,000 should be paid to a son of Judge Pitot, of New Orleans, as a legacy; at the same period $5,000 as a legacy to a son of Mr. Du Buys, of New Orleans; that his slave Lubin was to be freed, and a maintenance provided for him. In his conversations respecting his being engaged in making his last will, he talked a good deal about the plan of education to be laid down in his will for his daughter Myra; he expressed frequently his satisfaction that the Chevalier de la Croix would be the tutor in his will; he often spoke with earnestness of the moral benefit to his daughter Myra from being acknowledged by him in his last will as his legitimate daughter, and he often spoke

of the happiness it would give his mother; he expressed the most extravagant pride and ambition for her; he would frequently use the emphatic language, that he was making her a bill of rights; he mentioned at these times, that this would contain a complete inventory of all his estate, and explanations of all his business, so as both to render the administration on his estate plain and easy to his friends, Chevalier de la Croix, Judge Pitot, and Col. Bellechasse, and as a safeguard to his estate, in case he should not live long enough to dissolve and adjust all his pecuniary relations with others. About four weeks before his death, Mr. Clark brought this will to my house; as he came in, he said, 'Now my will is finished,' my estate is secured to Myra beyond human contingency,"

"now if I die tomorrow, she will go forth to society, to my relations, to my mother, acknowledged by

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me, in my last will, as my legitimate daughter, and will be educated according to my minutest wishes, under the superintendence of the Chevalier de la Croix, and her interests will be under the care of Chevalier de la Croix, Judge Pitot, and Col. Bellechasse; here is the charter of her rights, it is now completely finished, and I have brought it to you to read;"

he left it in my possession until the next day; I read it deliberately from beginning to end. In this will, Mr. Clark acknowledged Myra Clark as his legitimate daughter and only heir, designating her as then living in the family of S. B. Davis; Mr. Clark in this will bequeathed all his estate to the said Myra, but directed that an annuity of $2,000 should be paid to his mother during her (his mother's) life, and an annuity of $500 should be paid to Caroline De Grange, till she arrived at majority, when the annuity was to cease, and $5,000 were to be paid her as a legacy. He directed that one year after his estate was settled, $5,000 should be paid as a legacy to a son of Judge Pitot, of New Orleans, and that one year after his estate was settled $5,000 should be paid as a legacy to a son of Mr. Du Buys, of New Orleans; he provided for the freedom and maintenance of his slave Lubin; he appointed Mr. Dusuau de la Croix tutor to his daughter Myra; he gave very extensive instructions

in regard to her education; this will contained an inventory of his estate, and explanations of his business relations; he appointed Mr. Dusuau de la Croix, James Pitot, and D. D. Bellechasse, executors; the whole of this will was in Mr. Clark's handwriting; it was dated in July, 1813, and was signed by him; it was an olographic will; it was dated in July, 1813, and was signed by him; I was well acquainted with said Clark's handwriting. The last time Mr. Clark spoke to me about his daughter and his last will, was on the day he came out for the last time (as far as I know) from his house, which was the last time I saw him; he came to my house at noon, complained of feeling unwell, asked leave to have prepared for him a bowl of tea; he made his visit of about two hours' duration, talking the whole time of his daughter Myra, and his last will; he said a burden of solicitude was removed from his mind from the time he had secured to her his estate beyond accident, by finishing his last will; he dwelt upon the moral benefit to her in society from being acknowledged by him in his last will as his legitimate daughter; he talked about her education, said it would be the greatest boon from his God to live to bring her up, but what was next to

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that were his comprehensive instructions in his will in regard to her education, and her being committed to the care of the Chevalier de la Croix, who would be a parent to her.

After Clark's death, the will of 1811 was presented to the court of probate, and proved; letters testamentary were issued to the executors; a power of attorney was given to them by Mr. Clark's mother, and various pieces of property were sold under it and under the will.

In 1832, Myra married William Wallace Whitney, and about the time of her marriage became acquainted with her true name and parentage, and in 1836 filed a joint bill, with her husband, in the Circuit Court of the United States for the District of Louisiana against Relf and Chew, the executors in the will of 1811, the heirs of Mary Clark, and all the purchasers and occupants of the estate of which Clark died in possession, claiming to be the heir and devisee of Clark, and calling

upon them all to account for the rents and profits of the several portions of the estate. The bill charged that the will of 1813 was fraudulently suppressed, that its existence and suppression were notorious, and that all the purchasers did, in their consciences, believe that the will of 1811 had been fraudulently admitted to probate. In addition to the prayer for an account, it prayed for general relief.

In the progress of the suit, Whitney having died, Edmund P. Gaines, sometime afterwards, married the widow and became a party to the suit.

The defendants all demurred, but filed separate demurrers. Barnes and wife demurred upon six grounds:

1. The want of equity in the bill.

3. That there existed a complete remedy at law.

3. Multifariousness and misjoinder.

4. That the will of 1813 was not probated.

5. That forced heirship gave title to but one-third, which was recoverable at law.

6. That the New Orleans and Carrollton Railroad Company, with whom they were conjoined, was not shown to be a corporation.

Chew and Relf demurred generally, and also pleaded to the jurisdiction of the court.

Upon the argument of the demurrers, the three questions arose which are mentioned at the commencement of this statement, and

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upon which the court was divided. These questions were the subject for consideration by this Court.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

This case is brought before the court from the Eastern District of Louisiana, by a division of the judges on certain points, which are certified under the act of Congress.

The complainants in their bill state that Daniel Clark, late of the City of New Orleans, in the State of Louisiana, in the year 1813 died, seized in fee-simple, or otherwise well entitled to and lawfully possessed of, in the district aforesaid, a large estate, real and personal, consisting of plantations, slaves, debts due, and other property, all of which is described in the bill.

That the said Myra was the only legitimate child of the said Clark. That about the month of July, 1813, he made his last will and testament, according to law, and in which he devised to his daughter Myra all his estate, real and personal, except certain bequests named. Col. Joseph Deville, Degontine Bellachasse, James Pitot, and Chevalier Dusuau de la Croix were appointed executors of the will, and the said Chevalier de la Croix was also appointed tutor to the said Myra, who was then about seven years of age. In a few days after making the will the said Clark died.

From her birth, the said Myra was placed, by her father, in the family of Samuel B. Davis, who at the time resided in New Orleans, but in 1812 removed to Philadelphia, where the said Myra resided until her first marriage, being ignorant of her rights and her parentage.

In the year 1811, being about to make a journey to Philadelphia, and fearing some embarrassments from a partnership transaction, the said Clark conveyed property to the said Samuel B. Davis and others, to the amount of several hundred thousand dollars to be held in trust for the use of the said Myra. And about the same time he made a will devising to his mother, then residing out of Louisiana, his property, and appointed Richard Relf and Beverley Chew, two of the defendants, his executors. That afterwards, on his return from Philadelphia, he received back a portion of the property conveyed in trust as aforesaid; and by the

will of 1813 revoked that of 1811.

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The bill charges that immediately upon the death of the said Clark, the will of 1813 came into the possession of the said Relf, who fraudulently concealed, suppressed, or destroyed the same, and did substitute in its place the revoked will of 1811; that the will of 1813 was never afterwards seen except by the said Relf and Chew, and their confederates.

It is further charged that the said Relf fraudulently set up the revoked will of 1811, and obtained probate of the same; that he, with the said Chew, being sworn as executors, fraudulently took possession of the real and personal estate of the deceased, and also his title papers and books. That they appropriated to their own use large sums of money and a large amount of property of the estate, and in combination with the defendants named, who "had some knowledge, notice, information, belief or suspicion, or reason for belief or suspicion and did believe," so that the said Relf and Chew had acted fraudulently in setting up and proving the will of 1811. And the complainants pray that effect may be given to the will of 1813, and that the will of 1811 may be revoked, and that the defendants may be decreed to deliver up possession of the lands purchased as aforesaid, and account for the rents &c.;, and that the executors may be decreed to account. The complainants also represent that the said Myra is the only heir-at-law of the said Clark, and that his property descended to her &c.; In addition to the special relief asked, the complainants pray for "such other and further relief in the premises, as the nature of the case may require."

To the bill, several of the defendants filed a special demurrer. On the argument of the demurrer, the opinions of the judges were opposed on the following points:

1. Is the bill multifarious? and have the complainants a right to sue the defendants jointly in this case.

2. Can the court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed.

3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law. The demurrer is not before the court, but the points certified. In considering these points, all the facts stated in the bill are admitted.

Whether the bill be multifarious or not is the first inquiry.

The complainants have made defendants, the executors named in the will of 1811, and all who have come to the possession of property

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real and personal, by purchase or otherwise, which belonged to Daniel Clark at the time of his death. That a bill which is multifarious may be demurred to for that cause is a general principle; but what shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms, a bill is said to be multifarious, which seeks to enforce against different individuals, demands which are wholly disconnected. In illustration of this, it is said, if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance. Nor could the vendor file a bill for a specific performance against all the purchasers. The contracts of purchase being distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract. It has been decided that an author cannot file a joint bill against several booksellers for selling the same spurious edition of his work, as there is no privity between them. But it has been ruled that a bill may be sustained by the owner of a sole fishery against several persons who claimed under distinct rights. The only difference between these cases would seem to be, that the right of fishery was necessarily more limited than that of authorship. And how this should cause any difference of principle between the cases is not easily perceived.

It is well remarked by Lord Cottenham, in *Campbell v. Mackay,* 7 Sim. 564, and in 1 Myl. & C. 603,

"to lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible."

Every case must be governed by its own circumstances, and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience, in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

In a course of reasoning in the above-cited case, Lord Cottenham observes

"If, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments. That is a proposition

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(he says) to which I do not assent. It would indeed be extremely mischievous if such a rule were established in point of law. No possible advantage could be gained by it, and it would lead to a multiplication of suits, in cases where it could answer no purpose to have the subject matter of contest split up into a variety of separate bills."

The same doctrine is found in Story's Equity Pleading sec. 534; *Attorney General v. Cradock,* 3 Myl. & C., 85; 7 Sim. 241, 254.

In the above case against Cradock, the chancellor says

"The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule, if it were to impose upon the plaintiffs, and all the other defendants, two suits instead of one."

The bill prays that the defendants, Relf and Chew, may be decreed to account for moneys &c.;, which came into their hands, as executors, under the will of 1811, and that the other defendants, who purchased from them real and personal property, may be compelled to surrender the same, and account, &c.;, on the ground that they had notice of the fraud of the executors.

The right of the complainant, Myra, must be sustained under the will of 1813, or as heir-at-law of Daniel Clark. The defendants claim mediately or immediately under the will of 1811, although their purchases were made at different times and for distinct parcels of the property. They have a common source of title, but no common interest in their purchases. And the question arises on this state of facts, whether there is misjoinder or multifariousness in the bill, which makes the defendants parties.

On the part of the complainants there is no misjoinder, whether the claim be as devisee or heir-at-law. And the main ground of the defense, the validity of the will of 1811, and the proceedings under it, is common to all the defendants. Their interests may be of greater or less extent, but that constitutes a difference in degree only, and not in principle. There can be no doubt that a bill might have been filed against each of the defendants, but the question is whether they may not all be included in the same bill.

The facts of the purchase, including notice, may be peculiar to each defendant, but these may be ascertained without inconvenience or expense to co-defendants. In every fact which goes to impair or establish the authority of the executors, all the defendants are alike interested. In its present form, the bill avoids multiplicity of suits

without subjecting the defendants to inconvenience or unreasonable expense. There are, however, two exceptions to this remark, one of which relates to Caroline Barnes and her husband. She is represented to be a devisee in the will of 1813, and consequently can have no common interest under the will of 1811. The other exception is the prayer of the bill that the executors may account. In the rendition of this account the other defendants have no interest, and such a matter therefore ought not to be connected with the general objects of the bill. The bill in these respects may be so amended in the circuit court as to avoid both the exceptions.

We come now to inquire

"whether the court can entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed."

The bill charges that the will of 1813 was fraudulently suppressed or destroyed by Relf, and that he fraudulently procured the will of 1811, in which he and Chew were named as executors, to be provided.

It is contended that the court of probate in Louisiana has exclusive jurisdiction of the probate of wills, and that a court of chancery can exercise no jurisdiction in such a case.

In the Code of Practice, art. 924, it is declared, that "courts of probate have the exclusive power: 1. To open and receive the proof of last wills and testaments, and to order the execution and recording them." There are thirteen other specifications which need not be named. By art. 925, it is declared that

"the courts of probate shall have no jurisdiction except in the cases enumerated in the preceding article, or in those which shall be mentioned in the remaining part of this title."

In regard "to the opening and proving of wills," after providing where application for probate shall be made, and the mode, the following articles are adopted:

"Art. 934. If the will be contained in a sealed packet, the judge shall order the opening of it at the time appointed by him, and shall then proceed to the proof of the will."

"Art. 936. If the petitioner alleges under oath in his petition that he is informed that the will of the deceased, the opening of which and its proof and execution are prayed for, is deposited in the hands of a notary or any other person, the judge shall issue an order to such notary or other person, directing him to produce the will or the packet containing it, at a certain time to be mentioned, that it

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may be opened and proved, or that the execution of it may be ordered."

"Art. 937. If the notary or other individual to whom the said order is directed, refuses to obey it, the judge shall issue an order to arrest him, and if he does not adduce good reasons for not producing the will, shall commit him to prison until he produces it; and he shall be answerable in damages to such persons as may suffer from his refusal."

From the above provisions it is clear that, in Louisiana, the court of probates has exclusive jurisdiction in the proof of wills, and that its jurisdiction is not limited, like the Ecclesiastical Court in England, to wills which dispose of personal property. Has a court of equity power to set up a spoliated will and carry it into effect?

Formerly it was a point on which doubts were entertained, whether courts of equity could not relieve against a will fraudulently obtained. And there are cases where chancery has exercised such a jurisdiction. *Maundy v. Maundy,* 1 Ch. 66; *Welly v. Thornagh,* Pr.Ch. 123; *Goss v. Tracy,* 1 P.Wms. 287; 2 Vern. 700. In other cases such a jurisdiction has been disclaimed though the fraud was fully established, as in *Roberts v. Wynne,* 1 Ch. 125; *Archer v. Moss,* 2 Vern. 8. In another class of cases, the fraudulent actor has been held a trustee for the party injured. *Herbert v. Lawnes,* 1 Ch. 13; *Thynn v. Thynn,* 1 Vern. 296; *Devenish v. Banes,* Pr.Ch. 3; *Barnesly v. Powell,* 1 Ves. 287. These cases present no very satisfactory result as to the question under consideration. But since the decision of

Kenrick v. Bransby, 3 Bro.P.C. 358, and *Webb v. Cleverden,* 2 Atk. 424, it seems to be considered as settled in England that equity will not set aside a will for fraud and imposition. The reason assigned is, where personal estate is disposed of by a fraudulent will, relief may be had in the ecclesiastical court, and at law, on a devise of real property. *Bennett v. Vade,* 2 Atk. 324; 3 *id.* 17; *Gingoll v. Horne,* 9 Sim. 539; *Jones v. Jones,* 3 Meriv. 171.

In the last case, the Master of the Rolls says

"It is impossible that at this time of day it can be made a serious question, whether it be in this court that the validity of a will, either of real or personal estate, is to be determined."

In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very

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satisfactory reason for this exception. The exclusive jurisdiction over the probate of wills is vested in another tribunal is the only one that can be given.

By art. 1637 of the Civil Code, it is declared that "no testament can have effect unless it has been presented to the judge," &c.; And in *Clappier v. Banks,* 11 La. 593, it is held that a will alleged to be lost or destroyed and which has never been proved cannot be set up as evidence of title in an action of revendication.

In *Armstrong v. Administrators of Kosciusko,* 12 Wheat. 169, this Court held that an action for a legacy could not be sustained under a will which had not been proved in this country before a court of probate, though it may have been effective, as a will in the foreign country where it was made.

In *Tarver v. Tarver,* 9 Pet. 180, one of the objects of the bill being to set aside the probate of a will, the Court said,

"the bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal from the court of probate, according to the provisions of the law of Alabama."

The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say that both the general and local law require the will of 1813 to be proved before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants, in regard to the above wills. These answers being obtained may be used as evidence before the court of probate to establish the will of 1813 and revoke that of 1811.

In order that one complainants may have the means of making, if they shall see fit, a formal application to the probate court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And, indeed, circumstances may arise, on this part of the case, which shall require a more definite and efficient action by the circuit court. For if the probate court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or on any other ground, and there shall be no remedy in the higher courts of the state, it may become the duty of the circuit court, having the parties before it, to require them to go before the court of probates, and consent to the proof of the will of 1813 and the revocation

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of that of 1811. And should this procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by establishing the will of 1813. In the case of *Barnesly v. Powell,* 1 Ves.Sr. 119, 284, 287, above cited, Lord Hardwicke decreed, that the defendant should consent, in the ecclesiastical court, to the revocation of the will in controversy and the granting of administration &c.; If the emergencies of the case shall require such a course as above indicated, it will not be without the sanction of Louisiana

law. The twenty-first article of the Civil Code declares that

"in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent."

This view seemed to be necessary to show on what ground and for what purpose jurisdiction may be exercised in reference to the will of 1813, though it has not been admitted to probate.

The third point is, "has the court jurisdiction in this case, or does it belong exclusively to a court of law?"

Much that has been said in relation to jurisdiction on the second point, equally applies to this one. Indeed, they might have been considered under the same general head.

The bill is inartificially drawn, and, to reach its main objects, may require amendment in the circuit court. It presents the right of the complainants in two aspects:

1. Under the will of 1813.

2. As heir-at-law of the deceased.

The first has been examined, and we will now consider the second.

In prosecuting their rights as heir-at-law by the complainants, no probate of the will of 1813 will be required. The complainants must rest upon their heirship of the said Myra, the fraud charged against the executors, in setting up and proving the will of 1811, and notice of such fraud by the purchasers. In this form of procedure, the will of 1811 is brought before the court collaterally. It is not an action of nullity, but a proceeding which may enable the court to give the proper relief without decreeing the revocation of the will. Such a proceeding at law in regard to real estate is one of ordinary occurrence in England. And it is upon the ground that such a remedy is plain and adequate, that equity will not give relief. There can be

no doubt, as between the heir-at-law and devisee, in ordinary

cases, the proper remedy is to be found in a court of law. Without enlarging on this point, at present, we will refer to the doctrine on this subject as established by the Louisiana courts. The case of *O'Donagan v. Knox,* 11 La. 384, was

"an heir-at-law claiming a share of the succession of her deceased sister, who was the wife of the defendant, who holds possession of it under a will, as instituted heir and universal legatee."

The defendant pleaded to the jurisdiction of the district court, on the ground that the court of probates for the parish St. Landry had exclusive jurisdiction of the matters and things set up in the petition.

The district judge held,

"that as the will sought to be annulled had been admitted to probate, and ordered to be executed, the court had no jurisdiction, but that the probate court had exclusive jurisdiction of the case."

After stating the above decision of the district court, the supreme court said,

"The plaintiff sets up a claim under the law of inheritance of lands, slaves, and a variety of movable property; that these are proper subjects for the exercise of the jurisdiction of district courts cannot be doubted. But the petitioner proceeds further, and alleges the nullity of the will, which constitutes the very title under which the defendant holds the property in controversy. Before what court then must the validity of this will be tested?"

The court considered the jurisdiction of the court of probates, and then proceed to say

"It appears that the jurisdiction of the court of probates is limited to claims against successions for money, and that all claims for real property appertain to the

ordinary tribunals, and are denied to courts of probate. The plaintiff in this case was, therefore, compelled, in suing for the property of the succession, to seek redress in the district court, and whether she attacked the will or the defendant set it up as his title to the property, the court having cognizance of the subject must of necessity examine into its legal effect."

"When in an action of revendication a testament with probate becomes a subject of controversy, it will surely not be contended," said the court,

"that a court of ordinary jurisdiction, having cognizance of the principal matter, shall suspend its proceedings until another court of limited powers shall pronounce upon the subject. . . . If the ordinary courts should examine into the validity of testaments, drawn in controversy before them, they will do no more than we have often said a court of limited jurisdiction may do, even in relation to a question it could not directly entertain."

The court cites

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Lewis' heirs v. His Executors, 5 La. 387, and say there is no conflict, as indeed there is none, between that case and the one before it. It says that in the case before it, the functions of the executor had expired, the probate of the will had taken effect, and the devisee had entered into possession under it. The decision of the district court was reversed on the ground that it had jurisdiction of the case.

The above doctrine is fully affirmed in *Robert v. Allier's Agent,* 17 La. 15. "On the question of jurisdiction arising from the state of the case, we understand," said the court,

"the distinction repeatedly made by this court to be that whenever the validity or legality of a will is attacked and put at issue (as in the present case) at the time that an order for its execution is applied for or after it has been regularly probated and ordered to be executed, but previous to the heirs' or legatees' coming into possession of the estate under it, courts of probate alone have jurisdiction to

declare it void. . . . But when an action of revendication is instituted by an heir-at-law, against the testamentary heir or universal legatee who has been put in possession of the estate, and who sets up the will as his title to the property, district courts are the proper tribunals in which suits must be brought."

6 Mart. N.S. 263; 2 La. 23.

The functions of the executors under the will of 1811 have long since terminated, and the property of the deceased, both real and personal, has passed into the hands of purchasers. If the heir-at-law and the devisee were the only litigant parties, a suit at common law might afford an adequate remedy. But the controversy is rendered complicated by the numerous parties and the various circumstances under which their purchases were made. Besides, many facts essential to the complainant's rights are within the knowledge of the defendants, and may be proved only by their answers. Of this character is the fraud charged against the executors in proving the will and acting under it, and the notice of such fraud before their purchase, alleged against the other defendants.

If the fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances, a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a court of chancery,

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in this view, are required to do complete justice between the parties.

This remedy under the Louisiana law and before the Louisiana courts of ordinary jurisdiction would be undoubted. For although those courts cannot annul the probate of a will, when presented collaterally, as a muniment of title, they inquire into its validity. Under the peculiar system of that state, the forms of procedure, being conformable to the civil law, are the same in all cases. But the circuit court of the United States, exercising jurisdiction in Louisiana, as in every other state,

preserves distinct the common law and chancery powers. In either the state or federal court, the relief is the same; the difference consists only in the mode of giving it.

It is insisted that trusts are abolished by the Louisiana code, and that consequently that great branch of equity jurisdiction cannot be exercised in that state.

Art. 1507 of the Civil Code declares

"That substitutions and *fidei commissa* are and remain prohibited. . . . Every disposition by which the donee, the heir or legatee, is charged to preserve for, or to return a thing to a third person, is null, even with regard to the donee, the instituted heir or the legatee,"

&c.;

This abolishes express trusts, but it does not reach nor affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property. In such a case, the Louisiana law affords redress as speedily and amply as the law of any other state. There is therefore no foundation for the allegation that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name, it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust, for the rightful owner.

In answer to the objection that the validity of the will of 1811, collaterally, can only be tested by an action at law and on an issue *devisavit vel non,* it may be said that such an issue may be directed by the circuit court.

Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint. The courts of the United States have involved no new or foreign principle in Louisiana. In deciding controversies in that state, the local law governs, the same as in every other state. Believing that

the mode of proceeding there in the state courts was adequate to all the purposes of justice, and knowing with what pertinacity even forms are adhered to, I was averse to any change of the practice in the federal courts. But I was overruled, and I see in the change only a change of mode which produces uniformity in the federal courts throughout the Union. No right is jeoparded by this, and to say the least, wrongs are as well redressed and rights as well protected by the forms of chancery as by the forms of the civil law.

From the foregoing considerations, the Court answers the first point certified in the affirmative, subject to the amendments of the bill, as suggested. And it answers the second and third points, with the qualifications stated, also in the affirmative.

MR. JUSTICE CATRON.

I agree the points certified must be answered favorably to the complainants, but I do not altogether agree with the reasoning that has led a majority of my brethren to this conclusion.

The answer to the second question controls the answers to the others; it is

"Can the circuit court entertain jurisdiction of this case without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?"

The will of 1813, cannot be set up, without a destruction of the will of 1811; this will has been duly proved, and stands as a title to the succession of the estate of Daniel Clark; nor can the circuit court of the United States set the probate aside; this can only be done by the probate court.

Nor can the will of 1813 be set up in chancery as an inconsistent and opposing succession to the estate, while the will of 1811 is standing in full force. Such is the doctrine in the English Court of Chancery as will be seen by the cases of *Archer v. Mosse,* 2 Vern. 8; *Beale v. Plume,* 1 P.Wms. 388, and which are confirmed by the case of *Kenrick v. Barnsby* in the House of Lords, 7 Bro.P.C. 437. Nor do the doubtful suggestions of Lord Hardwicke in *Barnsby v. Powel,* 1 Ves.Sr. 119, 284,

conflict with the previously settled doctrine, as I understand that case. The argument that a fraudulent probate is a fraud on the living, and therefore chancery can give relief by setting aside such probate, is a mistaken idea of the chancery powers. Surely the probate of a fraudulent or forged paper is a fraud on the living as much as the suppression of the last will and the causing to be proved a revoked one; still, chancery has not assumed

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jurisdiction to set aside the probate of a will alleged to have been forged or to be fraudulent, after the testator's death; as will be seen by the cases cited; although he who committed the fraud, or forgery, procured the probate to be had of the paper, in the probate court.

It by no means follows, however, that the court below has no jurisdiction of the case made by the bill in one of its aspects. Mrs. Gaines claims to be the only child and lawful heir of Daniel Clark. This we must take to be true. By the Civil Code of 1808, ch. 3, sec. 1, art. 19, 212, it is declared

"That donations either *inter vivos* or *mortis causa* cannot exceed the fifth part of the property of the disposer if he leaves at his decease one or more legitimate children or descendants, born or to be born."

By the case made in the bill, Mr. Clark could only dispose of one-fifth part of his property at the time of his death, provided he had no wife living, and if she was living, then only of the one-fifth part of one-half. It follows, if the will of 1811 is permitted to stand as Daniel Clark's last and only will, that Mrs. Gaines can come in as heir for the four-fifths. On this aspect of the bill she can proceed to establish, and enforce her rights as heir, without making probate of the will of 1812 -- and the second question must be answered in the affirmative.

By the will of 1811, Mary Clark is the principal devisee. She made her will and died; by this will, Caroline Barnes is entitled to part of Daniel Clark's estate, and ought to be before the court to maintain her rights. I therefore do not concur that as to her the bill is multifarious. As to the purchasers from the executors, I have

more difficulty. I agree, where there is one common title in the complainant, and this could only be the true source of all the titles in all the defendants, and they have not obtained the first link in the chain of title; that then the true owner may sue them together in chancery although they claim by separate purchases from a spurious source. Such is the general rule; nor do I think the purchasers from Chew and Relf are exempt from its operation, on the ground that they have no concern with the settlement of the accounts growing out of the administration. I therefore concur in answering the first question -- that the bill is not multifarious.

The third question presents no difficulty as to the executors; they are properly sued in chancery for distribution beyond doubt, and so I imagine are the devisees of Mary Clark, they being by the will of

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Mrs. Clark co-distributees with Mrs. Gaines under the will of 1811, as to the one-fifth part of Daniel Clark's estate.

The purchasers are charged with having purchased with knowledge of Mrs. Gaines' superior title; and with having fraudulently purchased from the executors with such knowledge, there being jurisdiction to grant relief against the executors, in chancery, the same court can grant relief against the purchasers, involved in the fraud of the executors. If they could be compelled to account in regard to the real estate when it remained in their hands; purchasers with notice of Mrs. Gaines' rights, and who purchased with the intention to defeat her rights and deprive her of them, can stand in no better situation than the executors, and must account likewise; both being held in a court of equity equally as trustees for the true owner. Therefore, on the face of the bill, a court of equity has jurisdiction, and a court of law has not exclusive jurisdiction, and thus the third point ought to be certified.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and on the points and questions which were certified to this Court for its opinion agreeably to the act

of Congress in such case made and provided, and was argued by counsel. On consideration whereof it is the opinion of this Court that the first question should be answered in the affirmative, but that the bill should be so amended in the circuit court as to avoid both of the exceptions stated in the opinion of this Court, and that the second and third questions should also be answered in the affirmative, with the qualifications stated in the opinion of this Court. Whereupon it is now here ordered and adjudged that it be so certified to the judges of the said circuit court.