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Judicial Function in Will Cases-An Epochal Decision

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NOTE

JUDICIAL FUNCTION IN WILL CASES—AN EPOCHAL DECISION

IN RE LARE'S ESTATE, 352 Pa. 323 (1945) 42 A. 2d. 801.

This was an appeal by Marcellus R. Lare, Jr., husband of Gertrude K. Lare, deceased, and administrator cum testamento annexo of her estate, from the action of the Orphans' Court of Allegheny County, sustaining an appeal from the probate of an instrument as her last will and testament, holding that the instrument was a forgery and refusing appellant's request for the granting of an issue devisavit vel non.

Gertrude K. Lare died June 25, 1942, survived by her husband, Marcellus R. Lare, Jr., appellant; two brothers, Carl E. Maretta and Paul E. Maretta; and a sister, Catherine Sayre, appellees. Although married twice decedent was childless. In 1932 she married George W. Kilpatrick who died July 13, 1935, and in November, 1938, she married appellant. On June 29, 1942, appellant qualified as administrator of her estate, the decedent presumably having died intestate. However, three days later while searching for decedent's automobile registration card, appellant found a writing on the face of a blank check of decedent's signature, which is purported to be her last will and testament, said writing being as follows:

"Pittsburgh, Pa. January 21 1942 No.....

FORBES NATIONAL BANK 8-139

Dear Busser:

Pay to the This is my will. We have shared everything we

Order of have together. I want you to have it a$l so you

may continue to carry out all our plans. You know where I

want to rest. All my love, your Honey Childer. DOLLARS

Gertrude K. Lare "

On July 31, 1942, appellant offered said writing for probate and letters of administration cum testamento annexo were granted. Appeal from said probate was taken by decedent's two brothers and sister to the orphans' court, averring that the alleged will was a forgery and praying that the letters of administration cum testamento annexo be revoked and set aside. An answer was filed averring that the instrument was the will of the decedent. After a hearing appellant petitioned the court to award an issue devisavit vel non for trial of the charge of forgery. The hearing judge held the instrument a forgery and refused to award an issue, stating that "no jury verdict sustaining the will could be permitted to stand." This appeal is from the dismissal of exceptions to the said opinion and decree.

The case was argued before the full court and on May 21, 1945, the decree of the orphans' court was reversed and the appeal from the Register of Wills reinstated with directions, Patterson, J. writing an opinion for the majority court concurred in by Stearne, J. also writing an opinion, and with Maxey, C. J. and Drew, J. filing dissenting opinions.

A rehearing was denied June 29, 1945.

Contestants' evidence established that as a young girl Gertrude K. Lare had become proficient in shorthand and typing. She was employed as stenographer and typist for a number of years and as private secretary to the General Sales Manager of the Crescent Portland Cement Company until 1929. From that date she was never gainfully employed and rarely, if ever, used a typewriter for any purpose although she owned an Underwood portable machine, the one admittedly used in the preparation of the alleged will. All her correspondence was carried on in longhand.

The check upon which the alleged will was written was identified as coming from the back of her check book. She had been in the habit of removing blank checks, signing and carrying them in her wallet. The check in question was withdrawn from the back of the book some time between her admission to the West Penn hospital on May 13, 1940 and May 16, 1940.

Lare sought the advice of appellees' handwriting experts and failed to amply provide his own expert witness with proper samples of deceased's typewriting. At the trial, comparison of Lare's typewriting, made in open court, with that of the reputed will, failed because Lare at that time used an unusually heavy touch. Mr. Nernberg, a handwriting expert, compared the signature on the alleged will with admittedly genuine signatures of the decedent and was of the opinion that the former could not have been that of the decedent.

The evidence adduced in support of the validity of the instrument shows that many unimpeachable witnesses agreed that the signature was that of decedent and genuine. Analysis of Mrs. Lare's signatures show them to have

similar characteristics with regard to size and variation. Only appellees' witness declared it a forgery. Nernberg failed to take into consideration degrees of variation in writing and made no comparison with exhibits made on or near the date of the alleged signature. Mrs. Lare, around the date of the will, used both dark and green ink. Numerous exhibits were put in evidence in which blue ink was used, to disprove appellees' theory that to be genuine the signature would of necessity have been in green ink. Three people saw Mrs. Lare use the typewriter during the last several years of her life. Although having been ill for a number of years she had not typed professionally for thirteen years. The machine she was using was a small portable machine, not the larger business office type. The typing on the check is neat and the margins well arranged, and not crowded. Comparison of the letters of expert typists, made in the court room, reveal the same errors allegedly existing upon the will. An exhibit typed by one of the professional typists in the court room revealed the same misalignment urged by the appellees as evidence of a forgery. Lare had a habit of completing and punctuating dates; Mrs. Lare wrote partial dates. The contested instrument does not contain any punctuation after the date. Exhibits of actual typing by Mrs. Lare were offered, and Leslie, appellant's expert, used the same for comparison in determining the typing to be that of the decedent

Patterson, J., after reviewing the essential facts as above outlined and some incidental matters, concluded:

"We are of opinion that the chancellor erred in concluding that 'no jury verdict sustaining the will could be permitted to stand' and in refusing to grant appellant's petition for an issue devisavit vel non. In so doing he has assumed the province of a jury and has determined material facts upon which there is a substantial dispute."

Nothing appears in the opinion of Patterson, J. to indicate any divergence of view by the members of the Court upon either the facts or the law of the case, but a reading of the concerning opinion of Stearne, J. and the two dissenting opinions discloses a diversity of view on both the facts and the applicable law. The matter is well summarized by Stearne, J. as follows:

"The difference in opinion in this Court concerns the scope of the authority of a hearing judge in the orphans' court as to when he should grant or refuse an issue devisavit vel non. The majority have decided that the exclusive function of such hearing judge is to determine *whether there exists a substantial dispute of fact.* The minority view is that the *hearing judge* may conclude, despite the testimony, that *he* would not support a verdict of a jury and therefore no substantial dispute exists.

"To my mind whatever confusion appears is largely due to inapt and unfortunate expressions in some of the cases. It particularly appears in cases where the orphans' court has been required to determine whether or not the dispute is *substantial.* It is also apparent in defining the function of a *trial judge* with a jury, where, under the cases, such judge acts as a chancellor."[1]

The learned justice also pointed out that the judge of the orphans' court conducting the hearing is not to constitute himself the jury, that is, to decide the case as he would if acting in the capacity of an ultimate fact-finding tribunal. His function is to decide whether there is a substantial dispute upon a material mttter of fact and such a dispute exists if a verdict that might be 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 the evidence. He then concludes:

"A review of this record has convinced me that the learned hearing judge of the orphans' court misconceived his statutory function. He constituted himself a jury and decided the case as he would have done if acting in the capacity of the ultimate fact-finding tribunal. With substantial conflicting evidence, he found as a fact that the proponent had forged the questioned testamentary writing. He then held, in effect, that because of such finding he could not support a verdict of a jury in favor of the will and consequently no substantial dispute existed. He declined to award an issue. This, in my view, was clearly error."

The learned justice closes his opinion sententiously:

"I cannot agree that the minority statement that on this record no verdict sustaining the will offered for probate could possibly be allowed to stand is a sufficient reason to deny the proponent's statutory right to a trial by jury. While a verdict of a jury will not be lightly set aside, the trial judge, sitting as a chancellor and also subject to review by the appellate court (Guarantee T. & S. D. Co. v. Heidenreich, supra), still has complete control over the verdict. In my opinion we should continue to follow, and not depart from, our declared law and practice."

On the other hand the two dissenting opinions lay stress upon the facts and the finding of the lower court. Maxey, C. J. observed:

"It was the conclusion of Judge Milholland that the will was forgery, and that no jury verdict sustaining it could be permitted to stand."

Further on, referring to the record comprising 3290 pages, the Chief Justice declared:

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[1]Where italics were used by the Court, the present writer has used underscoring for emphasis.

"I have carefully read the record in the case and I fail to see how any court could sustain a verdict in favor of this will (written on the face of a bank check), should a jury be misled into returning such a verdict."

Emphasis is laid upon "the true rule" that such a case should not go to the jury at all where the court in the exercise of a sound legal discretion would not sustain the verdict. This opinion closes with the following indictment:

"The paper offered by Lare as a will is an unmistakable counterfeit and the decree of the Orphans' court of Allegheny County saying so should be affirmed."

The opinion of Drew, J., likewise lays stress upon the facts as found by the lower court and designates the controlling issues and the chancellor's disposition of each issue, as follows:

First, Is the signature on the alleged will the handwriting of Mrs. Lare; and, if it is, did she sign the document before or after the typewriting was inscribed upon it?

Second, Was the typewriting on the alleged will the work of Mrs. Lare?

Third, Was the alleged will a forgery or was it genuine?

All these issues are then weighed in the light of the chancellor's findings with the conclusion by the learned justice that the chancellor's findings of fact in this case have the quality and weight of the verdict of a jury.

Drew, J. concludes his opinion thus:

"There is nothing in our cases which cast any doubt upon the two rules of law I have denied and illustrated; first, that a Chancellor is required to grant an issue d.v.n. *only* if after[2] a conscientious study of the evidence as a whole he is not certain of the truth of matters in controversy; and that he can and should refuse an issue and decide the case, if the evidence, considered as a whole, has convinced him that one side of the case is right and the other wrong; and, secondly, the rule that this Court will not, in such a case as this, overrule or reject any finding or conclusion of fact, or reverse any decree, which has been based by an Orphans' Court Judge upon a conscionable, lawful appraisal of the competent evidence.

"In this case, there is no substantial conflict or dispute about the evidence required to sustain Judge Milholland's essential findings that the signature on the alleged will was not written in January, 1942; that the typewriting cannot have been the work of Mrs. Lare; and that the physical characteristics of the paper and the other relevant circumstances, shown by the evidence, all indicate that the document is a forgery.

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[2]Emphasis supplide by the writer.

"Since such findings of fact will not be reviewed in this Court, and since in law they justify the refusal of an issue d.v.n. the decree of the Orphans' Court should be affirmed."

All the opinions contain copious citations of authorities in support of the respective positions. Stearne, J. on this matter makes the following observation:

"Because of the large number of reported will contests, it would be neither practical nor useful to attempt to collect and discuss or distinguish them. There has been expended much learning and effort upon this important branch of the law. Like all other matters of legal development, earlier views have been subjected to modification. This Court has not hesitated to declare, in at least one instance, that its earlier view was mistaken. See In re Cross' Estate, 278 Pa. 170, 180, 122 A. 267."

Over a generation ago a writer on Pennsylvania Practice[3] made this statement:

"The early practice in Pennsylvania shows to have accorded a liberal construction in favor of the right of heirs and parties interested to contest the validity of a will, just as our laws have always favored the freedom of the individual to make a will at any time and in his own manner. But the courts have drawn the rule tighter and tighter until the whole question now lies within a judicial nut-shell, to-wit: If in the opinion of the judge twelve men would not have sufficient reason to set the will aside, or if they did set it aside the judge would be constrained to set their sworn verdict aside, no issue should be awarded. This is a bald proposition, without bit or cinch. Let the authorities which follow modify it, if they can."

Many decisions have been handed down by our Supreme Court on this question since the above quotation was written and in fact practically all of the cases cited in the three opinions are since that time. Notable among them is Re Fleming's Estate[4] cited by Stearne, Jr., as containing much historical data.

LARE'S ESTATE, it is submitted, is the most important utterance by our Supreme Court upon the question of the scope of judicial function exercisable by the judge hearing preliminarily the question of the granting or not of an issue d.v.n. It is apparent that the views of the majority court expressed by Patterson, J. and particularly Stearne, J. and those of the Chief Justice and Drew, J., clash headon.

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[3]Johnson's Practice in Pennsylvania, O. C. Vol. 3 page 602 (1911); see also remarks of Hanna, P.J. in Estate of York, 185 Pa. 61 (1898) 39 A. 1119.

[4]265 Pa. 399, 409 et seq.. dissenting opinion by Simpson, J., (1919) 109 A. 265.

This difference of view has already been quoted from the opinion of Stearne, J. but it well bears repetition:

"The majority have decided that the exclusive function of such hearing judge is to determine *whether there exists a substantial dispute of fact.* The minority view is that the *hearing judge* may conclude, despite the testimony, that *he* would not support a verdict of a jury and therefore no substantial dispute exists."[5]

This is followed by an observation that the difficulty is in the determination of what is substantial.

This is the nub of the matter as readily appears in the evolution of the judicial function in will cases in the long line of cases in our reports.[6] The Orphans' Court Act of June 7, 1917, P. L. 363, Section 21(b) 20 PS section 2582 (reenacting section 41 of the Act of March 15, 1832, P. L. 135), provides: "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 of the county for the trial thereof."

It will be observed that the statute refers to "a dispute upon a matter of fact" as may arise and then requires that "the said Court shall at the request of either party direct a precept for an issue."

By judicial interpolation the statute is made to read, "Whenever a *substantial* dispute upon a *material* matter of fact arises" and the next step in development has been for the court to judicially determine what is substantial and what is material. The final step in this judicial process was the introduction of the rule characterized by Maxey, C. J. in his dissenting opinion as "the true rule," viz., that such a case should not go to the jury at all where the Court in the exercise of a sound legal discretion would not sustain the verdict.

The difficulty with this rule, apparently the result of a suggestion in De-Haven's Appeal,[7] is as pointed out by another writer,[8] that the lower courts by the rationale of "anticipative consequences," assumed to decide "what a jury might probably find and if they did so find what the court might do thereupon."

This devious process of reasoning has had two results, (a) an undue exaltation of the position of the hearing judge, and (b) a usurpation of the functions of

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[5]Emphasis by the learned Justice.

[6]For complete list of early cases, see 23 P & L Dig. Dec., col. 40275 and supplements. Also In re Estate of York, supra; and Hutton on Wills in Pennsylvania, 385 et seq.

[7]75 Pa. 337 (1874).

[8]Johnson's Pract. in Pa., O.C., Vol. 3 page 602 (1911).

the jury and the deprivation of parties to will contests to the right of trial by jury guaranteed under the provisions of our State Constitution:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate."[9]

In some of the early cases[10] the lower court has conceived its duty to be with or without a preliminary hearing, merely to determine whether there was a dispute and if so to grant the issue. As the granting of an issue is not appealable,[11] it would seem that so to grant is a time saver.[12]

A noted judge in reversing the decree refusing an issue made these pertinent remarks relative to the nature of the hearing judge's task and also as to the advantages of a jury trial as a fact finding tribunal:[13]

"In this review, I have touched the evidence lightly, and only the salient points. It is obviously undesirable, at this stage of the case, to indicate, or even to form an opinion as to which side has the weight of the evidence; and I have not done either. Nor have we considered at all the admissibility of any of the evidence referred to, if objected to. Such questions are left free to be determined when they arise.

"But, looking at the contestant's evidence separately, it seems to make a case for a jury; and, if no counter evidence were adduced, there would probably be no hesitation as to a verdict. So, on the other hand, it is equally clear that the proponent's evidence would not only support, but, uncontradicted, would command a verdict. Does it, however, so completely meet, answer, and overthrow the contestant's case as to leave but a one-sided issue? We cannot say so. Looking at the whole evidence as put before us in print, we do not think we can safely say that the balance is not doubtful. So much depends on the means of knowledge, the interest or bias, the manner, the character, and the personal weight which each witness carries as an individual among his neighbors and in the community, that a jury is the only appropriate tribunal, in such a case, to determine which way the balance inclines. Having the testimony present to their eyes as well as their ears, the truth may be made manifest beyond any substantial doubt; and the judge, who will have the same advantage, will still have the final result within his control. To decide it now, as presented, would be to decide it in the dusk, if not in the dark, when full daylight is at hand. For these reasons, we are of opinion that an issue should be awarded."

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[9]Constitution of Pennsylvania, P.S.

[10]Schwilee's Appeal, 100 Pa. 628 (1882). On petition and answer the court refusing to appoint a master.

[11]Supra, note 10.

[12]In instant case the record on preliminary hearing comprised 3290 pages, all to be gone over again.

[13]Sharpless's Est., 134 Pa. 250 (1890) 19 A. 631, per Mitchell, J.; also a forgery case.

When it is quite clear from the facts presented that there is no dispute, and by this is meant, that nothing has been alleged or presented that rebuts the presumptions of testamentary capacity, lack of undue influence and regularity, the petition for issue is properly refused,[14] but if otherwise then a dispute is present and the jury trial is a matter of right.[15] It would appear, therefore, that the instant case is based on sound principles clearly enunciated and that it marks the turning point in the higher Court's appraisal of the preliminary hearing in will cases, where in the past two decades it has seemed that jury trials were being gradually supplanted by judicial interposition.

A. J. WHITE HUTTON

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[14]Stewart's Estate, 149 Pa. 111 (1892) 24 A. 174; Douglas's Estate, 162 Pa. 567 (1894) 29 A. 715.

[15]Gardner's Estate, 164 Pa. 420 (1894) 30 A. 300.