

of different states; it is either this, or the last clause is without meaning, and we are not to presume that congress would put in a statute a clause without intending to mean something by it. The argument in the opinion of Judge SHIRAS, in the Iowa case, which reviews the decision in the California case, is so conclusive, to my mind, that suit may be brought in the district of the residence of either the plaintiff or defendant, when the jurisdiction is only founded upon the citizenship of parties to the action, that I do not believe it can be successfully controverted, and therefore feel constrained to adopt this construction of this provision of the act of 1887. The result is that the defendants' motion to dismiss the cause must be overruled.

EVERHART *et al.* v. EVERHART.

(Circuit Court, S. D. Mississippi, W. D. February 10, 1888.)

1. COURTS—FEDERAL JURISDICTION—ACTION TO ANNUL WILL.

A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity, and if by the law obtaining in the state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different states, and the amount in controversy is sufficient to give the circuit court of the United States jurisdiction.

2. SAME.

Jurisdiction as to wills, and their probate as such, is neither included nor excepted out of the grant of judicial powers to the courts of the United States. So far as it is *ex parte*, and merely administrative, it is not conferred, and it cannot be exercised by them at all, until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

3. WILLS—VALIDITY AND REQUISITES—MISSISSIPPI STATUTES.

By the statutes of the state of Mississippi, a will, to pass title to real estate to the devisee, must be made in writing, and signed by the testator or testatrix, or by some other person in his or her presence, and by his or her express direction, and, if not wholly written and subscribed by the testator or testatrix, it must be attested by two or more credible witnesses, in the presence of the testator or testatrix.

(Syllabus by the Court.)

In Equity. On demurrer to bill.

Frank Johnston and Yerger & Yerger, for complainants.

Calhoun & Green and McCabe & Anderson, for defendants.

HILL, J. The questions now presented for decision arise upon the demurrer of the defendant to complainants' bill, and, by request of both parties, upon the sufficiency of the proof to establish the will upon the *ex parte* evidence of the subscribing witnesses exhibited with the paper writing purporting to be the will of the decedent, exhibited with the bill. The bill in substance alleges that M. Everhart died in Issaquena county

in this state, possessed and seized of the real estate described in the bill; that he left surviving him no wife or children or descendants; that complainants are his brother and sisters, and heirs at law, and entitled to an undivided interest in the lands of which decedent died seized and possessed, and for the recovery of which they have brought their action of ejectment in this court, which is now pending, they being citizens of the state of Indiana and the defendant a citizen of this state and division of this district, and the value of the land in controversy, of a greater sum than \$2,000; that the defendant claims title to said lands under a pretended last will and testament of said M. Everhart, which paper writing claimed to be such last will was presented to the clerk of the chancery court of said county of Issaquena, and upon the *ex parte* sworn statements taken in writing and exhibited with this bill, was admitted to probate by said clerk in common form; that complainants had no notice actual or constructive, of said proceedings had before said clerk. The bill further alleges that said M. Everhart never did sign said paper writing, nor did any one else sign it in his presence, and at his special direction; and further, that he was not at the time said paper writing was prepared of sound and disposing mind and memory, and capable of making a last will and testament; and further avers that said paper writing is not the last will and testament of said M. Everhart, and prays that the same be so declared by the decree of this court, and that the defendant be enjoined from setting the same up as a muniment of title as against the just claims and rights of complainants to their undivided interest in the lands described in the bill. The defendant, who is the sole legatee and distributee under the will, except the nominal sum of one dollar given to each of the complainants, by his demurrer admits the facts stated in the bill as true, but insists that this court has no jurisdiction to grant the relief prayed for in the bill; that jurisdiction to determine whether the paper writing presented to the clerk of the chancery court of Issaquena county, and so admitted to probate by him in common form, is not the will of said M. Everhart, is alone vested in the said chancery court, with the right of appeal as in other cases. That the demurrer is not well taken, aside from the jurisdictional question thus raised, is admitted, consequently the only question that need be considered arising upon the demurrer is as to whether or not this court has jurisdiction to determine whether or not the paper writing so admitted to probate by the clerk of said chancery court is the last will and testament of said decedent, and conveys to the defendant the title to the lands described therein as against the title of complainants to an undivided interest in said lands as the heirs at law of decedent, and to enjoin defendant from setting up said paper writing as a muniment of title to said lands in said ejectment suit, and as against complainants' rights as heirs at law of said M. Everhart. The power in the owner of real or personal property to dispose of the same by last will and testament, and the mode in which the same may be done, and the proceedings for the establishment of such will, is derived wholly from the statutes of the state. It is well settled that the circuit courts of the United States have no power