

BEEBE ADM'R OF BURTON vs. LOCKERT.

Where a party prays an appeal from the judgment of a probate court, makes the affidavit required by statute, and the appeal is granted, but the judge fails to cause an entry to be made of record of the allowance of the appeal, *mandamus* will lie from the circuit court to compel him to cause the entry to be made.

Writ of error to the circuit court of Pulaski county.

Petition for mandamus, determined in the Pulaski circuit court, at the April term, 1845, before CLENDENIN, judge.

Lockert filed for allowance in the probate court of Pulaski county, an account against Beebe as administrator of Burton, the court allowed the claim, Beebe excepted, and prayed an appeal to the circuit court.

In the circuit court, Beebe filed a petition in substance as follows:

“The appellant, who was defendant in the court below, represents to the court here, that this cause comes up from said probate court on exceptions and appeal from the judgment of said probate court, upon a claim there presented against said estate by said Lockert, the papers of which have all been sent up to this court, are now on file, are here specially referred to, and consist, 1st, of the original claim of Lockert; 2d, the contestation thereof by the administrator; 3d, the bill of exceptions, and papers therein referred to; 4th, the motion and affidavit of said administrator for an appeal, and 5th, the transcript of the entries of record had in the cause in said probate court. Appellant further represents that said motion and affidavit for the appeal were presented to, and filed in said probate court on the 18th September, 1844, (the day after the judgment of the court was rendered) and the judge thereof did on that day in open court allow the petitioner an appeal to this court, as prayed for in said motion, but upon examination of the record of said probate court it does not appear that the judge thereof caused the

allowance of said appeal to be entered upon the record of his court, as by law he was bound to do."

Petitioner prayed for a rule upon Hon. A. Smith, judge of the probate court, to show cause why a mandamus should not issue against him, commanding him to cause to be entered of record in his court the granting or allowance of said appeal: the petition was verified by affidavit.

The counsel of Lockert moved the court to dismiss the case because it did not appear from the record that an appeal had been granted by the probate court. The court refused the rule upon the probate judge, and dismissed the case. Beebe excepted, and took a bill of exceptions, in which it was admitted by Lockert that the facts stated in Beebe's petition were true, and that the probate court was in session at the time the rule was refused.

Beebe brought error.

WATKINS & CURRAN, for the plaintiff.

A mandamus will lie to the judge of the probate court to compel him to grant an appeal after the expiration of the term at which the decision was made. *Webb & Estill ad. vs. Hanger & Winston*, 1 Ark. R. 121. A *fortiori* will it lie to supply an omission to make an entry upon the record of an appeal duly granted.

E. L. JOHNSON, contra.

OLDHAM J., delivered the opinion of the court.

The facts presented by this case are certainly as strong as in the case of *Webb & Estill vs. Hanger & Winston*, 1 Ark. R. 121, and equally entitle the appellant to the benefit of the writ of *Mandamus*. The party did every thing required by law to entitle him to an appeal, and the probate court has no more power to deprive him of that right by failing to cause the proper entries to be made on the records of the court than by an express refusal of the allowance of an appeal; in which latter case it has been the uniform practice of this court to award writs of mandamus at the instance

of the aggrieved party. *Levy vs. English*, 4 Ark. R. 65. *Martin Ex parte*, 5 Ark. R. 371.

The court therefore, improperly refused the rule upon the judge of the probate court of Pulaski county, to show cause why a peremptory mandamus should not issue: for which reason the judgment is reversed and the cause remanded to the circuit court with directions to grant a rule in accordance with the prayer of the petition.
