

RAGSDALE ET AL. vs. STUART ET AL.

To an averment in the bill charging fraud, and that improper allowances were made to administrators by the Court of Probate, an answer by the administrators denying fraud and averring that their acts were fair, is sufficient. Such denial and allegations are equivalent to an averment that the allowances were legal and proper.

If the court having probate jurisdiction, erred in making allowances to administrators, such error can be corrected only by appeal.

A judgment rendered against the administrators by the court having probate jurisdiction, loses the force of a judgment upon appeal taken and granted to the Circuit Court.

As soon as the appeal is granted the case passes out of the jurisdiction of the Court of Probate, and is not remitted to that court, though abated in the Circuit Court by the death of the appellee.

In such case there is no judgment, and the representative of the appellee or judgment creditor, is not entitled to be made a party to a bill by the heirs and distributees against the administrators, and have a decree for such former recovery.

Appeal from Hempstead Circuit Court, in Chancery.

This was a bill in chancery, filed in the Circuit Court of Hempstead county, by William B. Ragsdale and others, against Joseph Stuart and others, determined at the May term, A. D. 1846, before the Hon. JOHN O. HIGHTOWER, Special Judge.

The bill alleges, that the complainants are heirs at law of James Fowler, deceased, and that Joseph Stuart and Samuel Hopson administered upon his estate; that a large estate came to their hands, and that they proceeded to settle their accounts with the court having probate jurisdiction, and claimed several credits which were allowed by the court; that certain of the credits so allowed, specifying them, are false, fraudulent, and illegal, and were not proper and legal charges against the estate; and prayed that the administrators be compelled to answer and make a final settlement of their accounts; and for distribution.

The defendants, in their answer, admit the settlement of the estate as charged in the bill, and aver that they used no falsehood, made no misrepresentation, and practiced no falsehood, in the settlement of

their accounts, but that the same was made fairly and openly; that the credits were made with a full knowledge of the facts on the part of the court, and without falsehood or fraud on their part. They allege that at the October term, 1831, of the County Court, an allowance was made against them as administrators, and judgment rendered thereon in favor of John F. Keller, for \$294, with interest from 1st January, 1822; from which they appealed to the Circuit Court; that they prosecuted their appeal, but that the death of Keller was suggested in the Circuit Court, and the case abated, and that the judgment of the County Court remains unreversed, and constitutes a claim against the estate.

The complainants excepted to the answer because it did not admit or deny that the several allowances made to the administrators by the court in the settlement of their accounts, and charged in the bill to be improper, were a legal and proper charge against the estate: but the court overruled the exceptions.

John F. Keller, as one of the heirs at law of John F. Keller, deceased, and assignee of the other heirs, filed his petition, setting forth the judgment rendered against the administrators in favor of his deceased father, and praying to be admitted as a party defendant, with leave to file an answer and cross bill: which was granted by the court. He then filed an answer and cross bill, setting up the judgment rendered by the County Court in favor of his father, the appeal therefrom to the Circuit Court by the administrators, the suggestion of the death of Keller, and the abatement of the suit: and the assignment to him by the other heirs of said Keller, of their interest in the judgment, and praying that the court decree the payment of said judgment with interest to him by the administrators. The complainants demurred, but the court overruled their demurrer, and they elected to stand upon it.

The court then proceeded to render a final decree in favor of John F. Keller, for the amount of the judgment rendered in favor of his deceased father, against the administrators, and in favor of the complainants, for the residue of the estate. The complainants appealed to this court, and assigned for error the overruling their exceptions to

the answer of the administrators; the overruling their demurrer to the answer and cross bill of Keller; and the decree in favor of Keller.

S. H. HEMPSTEAD, for the appellants.

No Counsel, contra.

JOHNSON, C. J. The complainants excepted to the answer of the defendants, Stuart and Hopson, chiefly upon the ground that it did not expressly allege that the several sums allowed against the estate were legal and proper allowances. True it is, that they do not say in so many words that the allowances were legal and proper, yet the inference is clear and irresistible, as they expressly deny the charge of fraud and unfairness, and insist that every act on their part has been done fairly and openly, and with a view to the best interest of the estate. The complainants, upon the final hearing, offered no testimony in support of the fraud charged in the bill, and the exceptions, if true, could not do more than show error in the County Court in making the allowances. The answer admits that all the allowances charged in the bill were made, but denies most positively and unequivocally that they, or either of them, were made in fraud of the rights of the complainants; and the answer standing uncontradicted, must be presumed to be true in every particular. The County Court, doubtless, had jurisdiction of the whole subject matter at the time, and if error intervened, it could only be corrected by appeal. The Circuit Court ruled correctly, therefore, in overruling the exceptions to the answer of the administrators. The point next to be determined is, whether John F. Keller made such a showing in his petition as would entitle him to be made a defendant to this proceeding, and in case that he did, whether the decree in his favor was warranted by the principles of law. He states in his petition, that his father, in his life-time, at the October term of the County Court of the county of Hempstead, A. D. 1831, recovered against the administrators of Fowler, the sum of two hundred and ninety-five dollars, with

interest thereon at the rate of six per cent. per annum from the first day of January, 1822, and also that said judgment still remains in full force, unreversed, and unsatisfied. In his answer he sets up and claims the benefit of the same recovery, but admits that the administrators prayed and obtained an appeal from the decision of the County to the Circuit Court of Hempstead county, and that they prosecuted the same until at the November term of said court, A. D. 1834, the death of his father was suggested and admitted by the appellants, and that, by order of the court, said appeal abated. It is perfectly manifest from his own showing, that he has no right to the decree which the court below entered in his favor. It is not true that the judgment obtained by his father, against the administrators, is still in full force. The moment the appeal was granted, the case passed into another jurisdiction, and there to be tried *de novo* upon the merits. The force of the judgment in the County Court stood suspended by the appeal, and the appellee could not be said to have a judgment against the administrators until a trial in the Circuit Court, and a decision in his favor. The appeal has not been dismissed, neither has a decision been had in favor of the appellee. It is clear, therefore, that Keller was not entitled to a decree for the amount of his father's judgment in the County Court. The Circuit Court, therefore, erred in pronouncing the decree which it did, and for this cause it ought to be reversed. It is, therefore, ordered, adjudged, and decreed, that the decree herein rendered is reversed, annulled, and set aside; and it is further ordered, that it be remanded to the Hempstead Circuit Court, with instructions to proceed therein according to law, and not inconsistent with this opinion.