

WILLAMOUICZ vs. STRONG, AD'R.

Where a claim is presented to the Probate Court for allowance against an administrator, and the court, on hearing the evidence, rejects it, and overrules a motion for a new trial, the claimant may except, set out the evidence, and appeal to the Circuit Court.

It is the duty of the Circuit Court, in such case, to examine the transcript, and if the Probate Court erred, to try the case *de novo*, if not to affirm.

W. of the first part, S. as principal, and C. as his security, of the second part, entered into an agreement under seal, that W. should furnish S. with merchandize, S. should sell, account to W. for the proceeds, and W. was to allow him one-half of the profits for his services. C. died, and W. filed an account in the Probate Court for allowance against his administrator for a balance in the hands of S. under the above agreement.—HELD, that the claim was properly rejected by the Probate Court; and that W. must seek his remedy by suit upon the agreement.

Writ of Error to Johnson Circuit Court.

In July, 1846, Willamouicz presented to the Probate Court of Johnson county, for allowance, an account in his favor against John H. Strong, as administrator *de bonis non*, with the will annexed, of Lorenzo N. Clark, deceased, as follows:

“To this amount of balance unpaid arising out of sale of goods by M. F. Sadler, under agreement of 30th October, 1843, \$160,14.”

Which account had been duly probated, presented to Strong for approval and rejected. The court, after hearing the evidence, decided against the claim, and adjudged the costs against claimant. He moved for a new trial, on the grounds that the finding of the Court was contrary to law and evidence; the motion was overruled. he excepted, took a bill of exceptions setting out the evidence, and appealed to the Circuit Court. The evidence, in substance, as follows:

Willamouicz, to prove his account, introduced an agreement under seal, between himself of the first part, M. F. Sadler, as principal, and Lorenzo N. Clark, as security, of the second part, dated 30th October, 1843, whereby it was covenanted and agreed between the

parties that Willamouicz should furnish goods, wares and merchandize to Sadler, he should sell them, pay over the proceeds, and Willamouicz should allow him one-half of the profits for his services. Willamouicz then introduced an account of sales, and letters, furnished and written to him by Sadler, to show the balance in Sadler's hands, and due him, claimed in the above account.

The cause was tried in the Circuit Court, on appeal, at the March term, 1847, before SNEED, judge.

The record states—"On this day came the said parties, by their attorneys, and by consent this cause is submitted to the court, sitting as a jury, whereupon the court, sitting as a jury as aforesaid, doth find for the said appellee, and affirm the judgment of the court below. It is therefore considered," &c.—judgment against Willamouicz for costs.

Willamouicz moved for a new trial, on the ground that the court found contrary to law, the motion was overruled, he excepted and took a bill of exceptions. The bill of exceptions states—"Be it remembered that on the trial of this cause on the transcript of the record from the Probate Court, no evidence whatever was offered except such as contained in said transcript, and the court found that there was no error in the judgment of said Probate Court, and affirmed the same; and thereupon appellant filed his motion for a new trial," &c.

Willamouicz brought error.

WATKINS & CURRAN, for plaintiff.

PIKE & BALDWIN, contra.

OLDHAM, J. The appellee contends that an appeal will not lie from the decision of the Probate Court, upon a motion for a new trial. Whatever may be said upon the practice of this court of entertaining appeals from such decisions, it has become too well settled to be now questioned. Whatever reason applies in favor of the practice in this court, applies equally as strong in favor of it in appeals from the Probate to the Circuit Court. Besides, the Revised Statutes confers

the right of appeal from the Probate Court, on all demands against any estate, where the sum in controversy exceeds ten dollars, &c., *ch. 4, sec. 178*, and requires the Circuit Court to determine the points made to the decision of the court, to which exceptions have been filed, and if it should be of opinion that the Probate Court had erred in relation to any material question of *law* or *fact*, to try the matter *de novo*, &c.: *sec. 182*. We conceive that the authority thus conferred, may well be construed to extend to appeals from decisions upon motions for new trials.

When an appeal has been taken it is the duty of the Circuit Court, first, to determine whether the Probate Court erred in relation to any material question of law or fact, upon the points made, and exceptions taken to the decision, and if error exist, to try the cause *de novo*; if not, affirm the judgment.

The record states that in the Circuit Court the cause was submitted to the court sitting as a jury, and the court found for the appellee, and affirmed the judgment of the court below; but we conceive that the submission of the cause to the court was upon the exceptions taken to the decision of the Probate Court, because it does not appear that the court decided that error existed in the decision of the court below, and without such fact there was no authority for the trial *de novo*. The record substantially shows that the court decided that no error existed, and accordingly affirmed the judgment.

The account was properly rejected. The liability of Clark's administrator, if any existed, was upon the bond and not upon the account. If Sadler failed to comply with the conditions of the bond by refusing to pay over to Willamowicz his proportion of the profits arising from the sale of the goods, the remedy of the latter was upon the bond. The security of a sheriff could not be liable in assumpsit for money had and received, in case his principal had collected money under execution and failed to pay it over. That case is similar to the one before us. The Circuit Court correctly affirmed the judgment of the Court of Probate.

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