

No. 8596

Supreme Court of Illinois

W. W. Willard

vs.

James Bassett

71641  7

SUPREME COURT.

(ABSTRACT.)

W. W. WILLARD,

vs.

ESTATE OF N. C. MERRILL, DEC'D.

} APPEAL.

- Page 1st. Shows holding of County Court of Marion County, Illinois, and appeal from decision of County Court on 9th of February, 1861, by W. W. Willard, Defendant; and that proceedings of County Court was at Special Term, held on 18th day of January, 1861, by B. F. Marshall, County Judge, presiding
- Page 2nd. Order of County Court: And now at this day comes W. W. Willard and Minerva Merrill, Administrators of said Estate, and reports to the Court their actings and doings and filing of the Report, and order of the County Court in the following words: Ordered that said Administrators be allowed one hundred and fifty dollars for services rendered said estate; also certificates of County Clerk of said county in usual form, certifying the above orders to be true copies of proceedings had in said Court in said cause; also part of account of W. W. Willard against said Estate, for superintending and arranging and valuing property \$15,00.
- Page 3rd. Services rendered as Attorney in suits adjusting claims, making 27 suits and fees amounting on said pages to the sum of \$123,00.
- Page 4th. Account for attending 3 suits and supervision of property of estate, arranging accounts, and amounting to the sum of \$55; also filing account; also penal part of Appeal Bond in usual form. Amount of Bond \$100.
- Page 5th. Conditions of Bond in usual form; also approval of Bond by County Clerk, James S. Martin, and issuing of Summons by Circuit Clerk to James Bassett Administrator de bones non and Caption of Summons.
- Page 6th. Summons of Circuit Court returnable to 3d Monday of March, 1861, and acknowledgment of service by James Bassett Administrator de bones non return; that at the August Term of Marion Circuit Court, Judge H. K. S. O'Melveny presiding, ordered on 31st day of August, 1861, in said cause made as follows: W. W. Willard vs. N. C. Merrill Estate.
- Page 7th. Appeal from order of County Court in Probate matters.
The Cause being called for trial, Pl'ff. and Def't. present cause is submitted by consent to be tried by Judge H. K. S. O'Melveny. Decision of Court on facts agreed to, affirming the decision of County Court, and remanded the cause to County Court in order that the sum in said judgment mentioned to wit: \$150 be apportioned between said W. W. Willard and Minerva Merrill, Administrators, as to their respective services; whereupon the applicant, W. W. Willard, by his Attorney, moved the Court for new trial. Motion overruled, and thereupon an appeal is prayed which is granted on Bond in \$300 being filed with security in 30 days with Clerk of Circuit Court, and approved by said Clerk, and Pl'ff. filed Bond on the 27th day of September 1861.
- Page 8th. Copy of Appeal Bond, with Theodore Riley, which Bond is in the usual form.
- Page 9th. Shows approval of Bond by Clerk and filing of same, and statement of facts agreed to by parties; that N. C. Merrill died 11th April, 1859; that on 25th April, 1859, W. W. Willard and Minerva Merrill, decedents widow, obtained letters of Administrators and gave bond in \$10,000 with security; that they made settlement on 18th July, 1860, and again on 18th Jan., 1861, when they resigned and James Bassett was appointed Administrator de bones non and gave bond in \$5,000; that the inventories and reports are voluminous; that the whole estate was complicated and did require legal assistance, which was employed; that the amount inventoried was \$5,593,95.
- Page 10th. That credit side of 1st settlement was \$2,860,37. The Dr. side in payments was \$242,88, leaving balance of \$2,617,33; that credit side of 2nd settlement was \$158,80; that the Dr. side of 2nd settlement was \$1,042,14, leaving balance of \$1,734,05, which was reduced by returned note \$1,359,31; balance to Administrators de bonus non \$374,74; that amount of cash received and paid out by the Administrators was \$1,440,98; that the total amount which passed to the hands of Administrators de bonus non was \$1,850,91, and included said balance of \$374,74, and also notes returned \$1,358,31, and Book Accounts \$226,86, in all \$1,860,91; and that there was then pending as to them 19 suits before Justices of the Peace and in Probate Court; that the amount of claims on the estate is \$4,119,23, and that the Real Estate is small and the Estate is insolvent; that the Administrators de bonus non was the Attorney of the Administrators in the prosecution of the suits and in its general matters, and the Probate Court ordered payment to him and W. K. Parrish \$175; that W. W. Willard did render the services in his account, and that these services are for suits independent of the aforesaid suits; that the charges are reasonable for these services.
- Page 11th. That the County Court did not apportion between the Administrators the \$150 allowed, and that allowing 6 per cent. on the amount received and paid by Administrators \$1,440,91 would be \$86,54; that the amount allowed was \$150, which allowed the Administrators \$63,56 above said per cent. for trouble; that W. W. Willard's account is \$218, and his co-Administrators does not join in the appeal; that in view of all the above facts the question submitted to the Court is whether under Sec. 136 of the Statute of Wills an Administrator who is also an Attorney of this Court is entitled to charge his legal fees for services rendered by him as Attorney to the Estate in addition to per centage and reasonable allowance under the Statute of Wills. See 2d Purple Statute, Sec. 136, page 1219. Agreed on this 25th day of October, 1861.
- Page 12th. W. STOKER, Att'y for Pl'ff.
JAMES BASSETT, Att'y in Person.
Certificate of Clerk in usual form to this Record by J. O. CHANCE, Clerk.
- 1st. ERRORS ASSIGNED.
The Court erred in affirming the decision of County Court, and remanding the Cause back to County Court to amend order and judgments by apportioning the judgment between the Administrators.
- 2nd. The Court erred in refusing to allow W. W. Willard his fees as Attorney rendered said Estate, as Attorney in prosecuting and defending suits in favor of and against the estate.
- 3rd. And for this and many other errors apparent upon the record, this cause should be reversed.
W. STOKER, Att'y for Pl'ff.

William

vs

Bussell - Adm.

Abstract

Office

Filed Nov. 12, 1861 -

A. Johnston Clk

SUPREME COURT.

(ABSTRACT.)

W. W. WILLARD,

VALUER.

W W Belland

vs

James Bassett Adm^r of
the Estate of McNeill J^r

Mr Clark will please file Record
Abstract in this case

W Stokes atty for
JTB

36

Mr N Willard

vs

James Baper & Adms
of the Estate of N C
Willard

Filed Nov. 12. 1861.
A. Johnston Clk

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon ---- November Term, A. D., 1861.

W. W. WILLARD,

vs.

JAMES BASSETT,

Administrator of the Estate of N. C. Merrill, Dec'd.

BRIEF OF DEFENDANT. *RTf*

Willard on Executors, page 429. Allowance over and above expenses, all actual and necessary expenses as shall appear just and reasonable, and must be apportioned by surrogate or county court.

2. Williams on Executors, page 1578 and note W. The rule does not preclude an executor who acts as solicitor in a cause in which he is a party in his representative capacity, from being allowed, as against the estate, the amount which his agent would be entitled to receive.

3. Williams' Executor, page 1575, note 1st. Court may order the payment of such reasonable fees for copys and for all other charges, trouble and attendance, which may be necessary.

4. Henning & Mumford, page 57, note 4. Executors and administrators ought to be allowed in their accounts, reasonable charges and disbursements for the benefit of the estate, and reasonable compensation for personal trouble. *Also 9th Page Ref 462*

W. STOKER, For Appellant.

Handwritten notes in left margin:
W. W. Willard
James Bassett
N. C. Merrill
W. Stoker
W. W. Willard
James Bassett
N. C. Merrill
W. Stoker
W. W. Willard
James Bassett
N. C. Merrill
W. Stoker

W. W. Willard

James Bassett
Admin of the Estate
of A. C. Merrill Dec

Brief of P. W.

Protection for personal property. *Ward v. [unclear]*
and disbursements for the benefit of the estate and reasonable com-
pensation ought to be allowed in their accounts. *1852*
4. *Hornig & Munford*, page 97, note 4. *Executors*
fee, trouble & attendance, which may be necessary,
the payment of which reasonable fees for copies and for all
3. *Williams v. Executors*, page 137, note 1st. *Cont.*
to receive
against the estate, the amount which his agent would
he is a party in his representative capacity, from being
not precise, an executor who acts as collector in a case
3. *Williams v. Executors*, page 137, note 1st. *Cont.*
reasonable, and must be apportioned by surrogate or court
expenses of actual and necessary expenses shall appear just and
Willard on Executors, page 130. Allowance over and above

Filed Nov. 12. 1861.
A. Schuster Clk

BRIEF OF ~~DEFENDANT~~

Administrators of the Estate of A. C. Merrill Dec

JAMES BASSETT

vs
W. W. WILLARD

At Mount Vernon --- November Term, A. D., 1861

FIRST GRAND DIVISION

In the Supreme Court, State of Illinois.

Wm Willard

vs

Estate of A. C. Merrill

Defendants Brief

Points and Authorities

I

The 136th section of the statute of Wills, defines the powers and duties of Courts of Probate as to compensation to Executors and Administrators, and beyond its provisions they cannot go

Re S. 1845. p 564

II

The Probate Court having full cognizance and complete knowledge of the condition of the Estate, of Plaintiffs labor, and its value to the Estate, did exercise a sound discretion in its order. And the Court of appeal will not in view thereof and of Section 136 above cited disturb that order as to amount, allowed, by increase, it may to diminish perhaps.

Ray vs Dougherty, 4 Black 115

Allen vs Clark, 2 Black 343

Spowill vs Cannon, 2 Dev & Black 400

Wattson vs Avery, Do 405

Peyton vs Smith, Do 325

III

The Probate Court fully complied with said 136th section it allowed 6 percent on amount recd, and paid and reasonable additional allowance viz

6 per cent on \$1440

additional allowance

\$ 86.54

63.56

\$ 100.00

McC Whortan vs Benson 1 Hopkins 37

IV

The Probate Court allowed \$ 175. to the attorneys of the Adm^r. thereby protecting them from loss for their expenses incurred

Chaplin vs Moore 7 Monroe 106

V

The Probate Court exercised a liberal and sound discretion in its order, in view of the facts that the Estate was not finally closed, and that the bulk of the business devolved on the Adm^r de bonis non

VI

If the Probate erred in the amount allowed, it was in making too large an allowance. The 6 per cent allowed say \$ 86.54, ought not to have been yielded and this Court may disallow same, not to enlarge it. The rule is that Executors and administrators are not to make gain by their trust but are to be protected against loss in their trust.

Foller on Exors 495 Wrons Est Law 428

VII

Plaintiff's Bill of charges contains items to amt of \$ 85 which the Probate Court held to be his plain duty to do. His legal fees \$ 125 are the matter really in question and as to them the Court in view of their nature and the necessity of the Estate made a reasonable allowance under section 136 above cited.

Reasonable compensation is just, but no more

Carroll vs Bennett 2 J.J. March 205

Buler vs Hills 5 Dana 42

Carver vs Cutting 5 Monro 233

Putledge vs Wilkinson 1 Desosa 168 \$ 543 and note

Triplett vs Jameson 2 Monro 242

Webb vs Webb 6 Monroe 166

Jenkins vs Dondy 2 McCach 473

Jenkins vs Danahaw 1 Cheves 129 (2nd part)

V III

The Co Admt does not complain. It is true the Probate Court did not apportion the amount allowed that however is not material error and the Circuit Court ordered that error to be corrected.

Grant vs Pride 1 Dev Eq 269

Valentine vs Valentine 2 Barb ch Rep 435

X

The Circuit Court in view of all the points now cited, approved the order of the Probate Court with power to that Circuit to apportion the amount allowed. No Error is shown in that order.

X

On the whole, no special case is presented by the appellant, and the order is just in view

1. Section 136 Statute of Wills
2. The amount recd & paid out.

Valentine vs Valentine 2 Black ch Rep 435

3. The condition and Insolvency of the Estate
4. The amount of unfinished business
5. The liberality of the order of allowance
6. The words description used by the Court

See cases cited. Point II above

X II

As to the question of Law submitted. Should the Court affirm the principle, there is nothing in this cause to warrant that affirmance to favor the plaintiff, and deft pays judgment of this Court accordingly and submits Sect 136 concludes all questions on the point submitted in the negative. Should the Court affirm the point it is

suggested as essential, That the Executor or administrator who being one attorney of this Court, seeks compensation for his legal services, besides his per centage and reasonable allowance; should clearly show to the Probate Court ~~by or over~~ that the legal services rendered were either protective to, or were productive to the Estate, and were rendered in perfect good faith. And on all these the Probate Court should have ample proof.

There is plain danger in affirming such a principle without strict and abundant checks and in view of all these Sec 136 seems to be perfectly adequate.

Profit and gain is not the rule in Trusts, protection from loss in expenditure, and reasonable compensation is the rule.

Halley vs Ben Ambridge 6 Page 12

Vanderheyden vs Vanderheyden 2 Page 287

Thomas Coers vs Commonwealth & Genl Mumford 5-7

Carroll vs Corbett 2 Jf Moush 205

Jenkins vs Tickling 1 Decem 369

and case cited in Point V 11 above

Matter of Bank of Niagara 6 Page 213

Snow vs Buller 1 Decem 543

This appeal should be dismissed with costs.

Jenkins vs Hanahan 1 Chev 129, 2nd part

Valentine vs Valentine 2 Barb ch Rep 430

This appeal should be dismissed with costs

Wm H Hamilton

atly for Appeller

and see

1 Barb & Arr Digest 525
and case Carmichael vs
Wilson 4 Bligh MS 146
cited

Dayton on Surrogates 496.
and reference to Wms on
Easms 1575 not 1316

Will on Trustees 594
and cases cited.

³⁶⁻⁹
Supreme Court

W. W. Willard

vs
Est N. S. Merrill

Depts Brief

For the Court

Filed Nov. 12. 1861-

N. Johnston Clk

SUPREME COURT.

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W. STOKER, Att'y for Pl'ff.

JAMES BASSETT, Att'y in Person.

Page 12th.

Certificate of Clerk in usual form to this Record by J. O. CHANCE, Clerk.

ERRORS ASSIGNED.

1st.

The Court erred in affirming the decision of County Court, and remanding the Cause back to County Court to amend order and judgments by apportioning the judgment between the Administrators.

2nd.

The Court erred in refusing to allow W. W. Willard his fees as Attorney rendered said Estate, as Attorney in prosecuting and defending suits in favor of and against the estate.

3rd.

And for this and many other errors apparent upon the record, this cause should be reversed.

W. STOKER, Att'y for Pl'ff.

William

vs

Bassett - Adm'r

Abstract

Filed Nov-12-1861.
N. Johnston Clk

W. W. WILLARD, Plaintiff, vs. JAMES HARRIS, Defendant. The Court hereby certifies that the following is a true and correct copy of the original as filed in the Court's records. Witness my hand and the seal of the Court at St. Louis, Missouri, this 12th day of November, 1861.

SUPREME COURT.

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon ---- November Term, A. D., 1861.

W. W. WILLARD,

vs.

JAMES BASSETT,

Administrator of the Estate of N. C. Merrill, Dec'd.

BRIEF OF ~~DEFENDANT~~ *RTT*

Willard on Executors, page 429. Allowance over and above expenses, all actual and necessary expenses as shall appear just and reasonable, and must be apportioned by surrogate or county court.

2. Williams on Executors, page 1578 and note W. The rule does not preclude an executor who acts as solicitor in a cause in which he is a party in his representative capacity, from being allowed, as against the estate, the amount which his agent would be entitled to receive.

3. Williams' Executor, page 1575, note 1st. Court may order the payment of such reasonable fees for copys and for all other charges, trouble and attendance, which may be necessary.

4. Henning & Mumford, page 57, note 4. Executors and administrators ought to be allowed in their accounts, reasonable charges and disbursements for the benefit of the estate, and reasonable compensation for personal trouble. *Also 9th Page Ref 462*

W. STOKER, *For Appellant.*

Handwritten notes in the left margin, including a vertical list of names and dates, and a large signature.

Wm Willards

Defendants Brief

vs

Estate of A C Merrill

Points and Authorities

I

The 136 section of the statute of wills defines the powers and duties of Courts of Probate as to Compensation to Executors and Administrators and beyond its provisions they cannot go.

Re J. 1845 p 564.

II

The Probate Court having full cognizance and complete knowledge of the condition of the Estate, of Plaintiffs Cuba, and its value to the Estate, did exercise a sound discretion in its order. And the Court of appeal will not in view thereof and of Section 136 above cited disturb that order as to amount, allowed, by increase, it may ^{to} diminish perhaps.

Roy vs Dougherty, 4 Black 115

Allen vs Clark 2 Black 343

Sprille vs Cannon 2 Dev & Black

Walton vs Avery Do $\frac{200}{205}$

Peyton vs Smith Do 325

III

The Probate Court fully complied with said 136 section, it allowed 6 per cent on amount received and paid and reasonable additional allowance was

6 per cent on \$ 1440

\$ 86.54

additional allowance

63 56

$\frac{150.10}{100.00}$

See Whorton vs Benson 1 Hopkins 37

IV

The Probate Court allowed \$175. to the attorneys of the Admrs, thereby protecting them from loss for their expenses incurred

Chaplin vs Moore 7 Monroe 106.

V

The Probate Court exercised a liberal and sound discretion in its order, in view of the facts that the Estate was not finally closed, and that the bulk of the business devolved on the Admrs de bonis non.

VI

If the Probate erred in the amount allowed, it was in making too large an allowance. The 6 per cent allowed pay \$86.54. ought not to have been exceeded, and that Court may diminish same, not to enlarge it. The rule is that Executors and Administrators are not to make gain by their trust, but are to be protected against loss in their trust.

Foller on Exors 495 - Drown Eccl Law 428.

VII

Plaintiff's Bill of Charges contains items to a amt \$85 which the Probate Court held to be his plain duty to do -

His legal fees \$123 are the matter really in question and as to them the Court in view of their nature and the insolvency of the Estate made a reasonable allowance under Section 136 above cited

Reasonable compensation is just, but no more

Carroll vs Bonnet 2 J J March 205

Buler vs Hills 5 Dana 102

Baxter vs Baiting 5 Mump 233

Rutledge vs Williamson 1 Deser 160 8543 and note

Liplett vs Garrison 2 Mump 242

Webb vs Webb 6 Monroe 166

Jerguson vs Denby 2 Mc Cord ch 473

Jenkins vs Hanahan 1 Cheves 129 (2nd part)

VIII

The Co Adm^r does not complain. It is true the Probate Court did not apportion the amount allowed that however is not material error, and the Circuit Court ordered that error to be corrected

Grant vs Price 1 Dev Eq 269

Valentine vs Valentine 2 Barb ch Rep 435

IX

The Circuit Court in view of all the points now cited, approved the order of the Probate Court, with power to that Circuit to apportion the amount allowed. No error is shown in that order

X

On the whole, no special case is presented by the appellant, and the order is just in view

1. Section 136 Statute of Wills

2. The amount paid & paid out

Valentine vs Valentine 2 Black ch Rep 435

3. The condition and Insolvency of the Estate

4. The amount of unfurnished business

5. The liberality of the order of allowance

6. The sound discretion used by the Court

see cases cited, Point II above

XI

As ~~to~~ the question of Law submitted, should the Court affirm the principle there is nothing in this cause to warrant the affirmance to favor the plaintiffs, and Dept pres judgment of this Court accordingly and submits Sect 136 concludes all question on the point submitted in the negative. Should the Court affirm the point

It is suggested as essential, That the Executors or Administrators, who being an attorney of this Court seeks compensation for his legal services, besides his percentage and reasonable allowance; should clearly show to the Probate Court that the legal services rendered were either protective to or were productive to the Estate, and were rendered in perfect good faith. And on all these the Probate Court should have ample proof

There is plain danger in affirming such a principle without strict and abundant checks and in view of all these Sec 136 seems to be perfectly adequate

Profit and gain is not the rule in Trusts protection from loss, in expenditure and reasonable compensation is the rule.

Halsey vs Van ~~Orange~~ 6 Page 12
Vanderhyden vs Vanderhyden 2 Page 287
Kinios Ex^r vs Commonwealth 4 Hen & Monmouth 57
Carroll vs Commt. 2 JF March 205
Jenkins vs ~~Stacking~~ ^{Stacking} & Desau 369
and cases cited in Point & Malone
Matter of Bank of Niagara 6 Page 213
Snow vs Callum 1 Decree 543
Jenkins vs Hanahan 1 Chene 129 2nd part
Valentine vs Valentine 2 Barb ch Ref 430

and see
as follows - This appeal should be dismissed with costs
1 Barb & Harrington Digest 325
and case cited - Carmichael v. M'com
4 Bligh 1146
Bapett & Hamilton
att'y for appellee
Doughton on Surrogates 496
and its reference to Wm in Exors 1595 vol 1316
Bill in Trustees 574 & cases cited

36
Supreme Court
vs
Wm W Willard
vs
Est A C Merrill
Dist Court

For the Court

Filed Nov. 12. 1861 -
Prothonotary City

36 - 9

Millard

my

Bassett Adams

1861

8596

New Term 1861

See Bill on Page 485-

Copy of final order &
Opinion to Bassett
7th March 62 - He to
court for pt-60. therefore