Zumwalt, John; Zumwalt, George; v. Zumwalt, Jacob
admin'rs of Zumwalt, John

Nov. 1833 | 2nd Cir. | St. Charles | 146/13

37 Estate settlement: Aff'd; Since GZ's interest made doubtful, ct decided vs. him

Estate; Inheritance

$839

Spanish Land Grant

State of Missouri
County of St Charles } ss Pleas in the Circuit Court began and held at the Court house in the Town of Saint Charles within and for the County of St Charles, on the ninth day of January it being the second monday of said month in the year of our Lord one thousand eight hundred and thirty two, before the

Honorable
Priestley H. McBride
Judge of Said Court -

Be it remembered that heretofore to wit: on the third day of October in the year of our Lord one thousand eight hundred and twenty nine was filed in the office of the Clerk Circuit Court of Saint Charles County in the second judicial Circuit of of the State of Missouri a transcript of the Record and and proceedings in the matter of the final settlement, and destribution of the Estate of John Zumwalt deceased, sent hither from the County Court of Saint Charles County on an appeal prayed for and granted at the August Term of Said Court in the year one thousand eight hundred and ~~thirty~~ twenty nine - Which said transcript is in the words and figures following - to wit

State of Missouri, County of Saint Charles ss. Be it remembered that at a County Court began and held at the Court house in the Town of Saint Charles within and for the County of St Charles on the fourth monday in August it being the 24th day of said month and in the year of our Lord 1829, and on the fourth day of said Term of said Court, it being the 27th day of said month in the year last aforesaid. Present, The worshipful William G. Pettus presiding justice & Micajah McClenny & Daniel Griffeth Esqrs justices of said Court - During the session of the said Court, and on the day and year last aforesaid Henry Zumwalt and Jacob Zumwalt by Ezra Hunt their Attorney filed a petition of which the following is a copy to wit .....

To

To the Honorable the county court within and for the County of St. Charles now in session, and upon the final settlement and destribution of the estate of John Zumwalt late of said County deceased, Your petitioners Henry Zumwalt and Jacob Zumwalt, two of the sons and heirs of the said John, respectfully suggest and state that some time in the latter part of the year of our Lord 1819 and the forepart of 1820, in the lifetime of the said John, he the said John destributed and gave by way of advancement to eight of his children, towit, George Zumwalt, John Zumwalt Jr., Adam Zumwalt, Andrew Zumwalt William Zumwalt, Alexander Murdoch and Mary his wife daughter of said John, Henry Steel and Barbary his wife daughter of said John, and to William Cashow and Eligabeth his wife daughter of said John, in real and personal estate to a large amount in value towit, to the value of eleven hundred and fifty dollars each, which was then received by them respectively at the county of Saint Charles, the said John also at the same time gave to his son Henry one of your petitioners about five hundred and sixty one dollars and fifteen cents in personal estate, and in land of a doubtful title, in value if the title had been good of about five hundred and eighty dollars, the said Land was held by the said John by virtue of a Spannish Grant which had never been confirmed, nor has it since been confirmed, although the Administrators of said estate has incurred great expense in attempting to get it confirmed without success, nor is there any probability that the same will be ever confirmed under any of the extisting laws of Congress: Wherefore as all the title papers are, or are supposed to be in possession of the Administrator of said Estate the said Henry is now here ready and appers to execute any release or acquitance to the said tract of Land, or to bring its real value and that of the personal estate aforesaid into an equal partition or "hotch pot" - And your petitioner

further state that our other ~~petit~~ petitioner Jacob Zumwalt did not receive any thing of his said father in his lifetime by way of advancement, and that the above named ten children, are all the heirs of the estate of the said John Zumwalt as far as your petitioners are informed and believe, all of which they are now here ready to prove as this Court shall direct, wherefore they pray that the rest and residue of the estate, found in the hands of the Administrators unadministered after the payment of all debts may be so divided as to make the said Jacob equal with what the said Henry has received as aforesaid, and then that they may receive of the balance, if any, equally till they shall be made equal to the others, and that the Court will now hear the evidence to prove the said several Advancements as above alledged and proceed to make the destribution of said residue, according to the facts, and the provisions of the Statute in such case made and provided, and to do whatever else as shall seem meet and proper in the premises as in duty bound &c (Signed) Henry Zumwalt, Jacob Zumwalt by Ezra Hunt their Attorney"

And afterwards, towit, on the same day and year last aforesaid, the said Administrators of the said John Zumwalt deceased came into Court and filed their settlement of which the following is a copy towit: John & Adam Zumwalt Adm^rs" of John Zumwalt Deceased, having given notice agreeably to law for a final settlement of their Administration & destribution of said Estate, came into Court, and represented that they had not administered any thing since their final settlement on the 12th of December 1825, by which it then appeared there remained in their hands to be destributed the sum of eight hundred and fifty nine dollars, and seventy and one fourth cents, And thereupon Jacob Zumwalt filed his "obligations" in writing to any said sum being

Adm: final settlement & destribution

distributed to the other heirs untill he should be made equal to them in consequence of Advancements, to them by the intestate in his lifetime; and Henry Gumwalt also filed objections, and proposed to bring into hotch pot, such advancements as had been made to him by the intestate in his lifetime: The Court upon a full examination of the whole matter, with evidence of witnesses and arguments of Counsel, are of opinion that John Gumwalt deceased in his lifetime made advancements to each and every of his Children, except Jacob, in lands to the amount of Five hundred Dollars, and personal estate to the amount of five hundred ~~dollars~~ and sixty one dollars and sixteen and two third cents, in all one thousand and sixty one dollars and sixteen and two third cents, They therefore order that the Administrators pay to Jacob Gumwalt the sum of eight hundred and fifty nine dollars, and seventy and one fourth cents, the balance found due by them on said final settlement in 1825. It also appearing to the Court that there is a slave belonging to the Estate undisposed of, the further settlement and distribution as to that part of the Estate is continued

Bill of exceptions by Jno & Geo Gumwalt

And afterwards, towit on the same day and year last aforesaid, John Gumwalt & George Gumwalt filed their bill of exceptions to the order of distribution &c. made by the Court aforesaid, a which the following is a copy towit

St Charles County Court August Term 1829 August 27th 1829. Whereas an application for a final settlement of the Estate of John Gumwalt, late of the County of Saint Charles by the Administrator of said Estate, Jacob Gumwalt, one of the heirs of said John, came into court and stated that in the lifetime of the said John his father, towit in the latter part of the year of our Lord 1819 or the forepart of the year 1820, he the said John, his father, distributed and gave by way of Advancement to eight of his other Children (then and there named) in real and personal Estate to a large

amount towit to the value of eleven hundred and fifty dollars each, which was then received by them Respectively at the county of St. Charles: and he further States that he the said Jacob Zumwalt did not receive any thing of his father by way of advancement, whereupon he prayed that the court would order that he the said Jacob might receive of the remaining property of his fathers Estate in the hands of the Administrator (of which his said father died intestate) so much as would be equal to the amount received by the other heirs of his said Fathers Estate in his fathers lifetime, and thereupon the Court order that the destribution should be made in such manner as he the said Jacob had prayed, by which order of the said County Court: John Zumwalt & George Zumwalt feel themselves aggrieved in that, they believe that the evidence then and there given was sufficient clearly to prove that the amounts which they received in the lifetime of the said John as stated by the said Jacob Zumwalt to the Court was not given by way of Advancement as decided by the Court: and thereupon they except to the decision of the said Court upon said point and pray an appeal to the next Circuit Court of the County of St. Charles on the first monday of October next, and also that this their bill of Exceptions and Statement may be Signed and sealed by the Court which is accordingly done (Signed) Wm. G. Pettus (Seal) Daniel Griffeth (Seal) Micajah McClenny (Seal) - .....

Affidavit And afterwards towit, on the same day and year last aforesaid towit, on the 27th day of August 1829. the said John Zumwalt and George Zumwalt, came into Court and filed their affidavit for an appeal in the words and figures following, towit: In the County Court Saint Charles County August Term 1829, On an order for destribution of the Estate of John Zumwalt deceased, John Zumwalt & George Zumwalt feeling themselves aggrieved by the decission of the Court pray an appeal to the Circuit Court and swear that they do not appeal for the purpose of vexation

or delay, but verily and truly because they feel themselves aggrieved by the decision of the Court (signed) John Zumwalt, George Zumwalt subscribed and sworn to in open Court this twenty seventh day of August 1829 (signed) Wm Christy Jr. ..... And afterwards to wit on the aforesaid 27th day of August, and whilst said County Court was in Session, came John Zumwalt & George Zumwalt and prayed an appeal and filed their affidavit therefor from the decision of the Court, on an order for distribution of the Estate of John Zumwalt deceased to the Circuit Court of St Charles County - whereupon an appeal is granted them - State of Missouri County of St Charles ss I William Christy Jr. Clerk of the County Court within and for the County of St Charles, certify that the above and foregoing is a complete transcript of the record and proceedings in the matter of final settlement and distribution in the Estate of John Zumwalt deceased, In testimony whereof I have hereunto set my hand and affixed the seal of said Court this third day of October AD 1829 Signed Wm Christy Jr.

order granting appeal

Seal

And afterwards to wit at a circuit Court began and held at the Court house in the Town of Saint Charles, within and for the County of Saint Charles, on the first monday in October it being the fifth day of said month and in the year of our Lord one thousand eight hundred and twenty nine, and on the sixth day of said month it being the second day of said Term is the following to wit

Henry Zumwalt & Jacob Zumwalt appellees
vs
George Zumwalt & other heirs & Admrs. of John Zumwalt decd. appellants
motion of Mr. Gamble —

} Appeal certified from St Charles County Court continued on

And afterwards to wit At a circuit court began and held at the Court house in the Town of Saint Charles within and for the County of Saint Charles on the

first Monday in February. it being the first day of said month in the year of our Lord one thousand eight hundred & thirty and on the third day of said month it being the third day of said Term of said Court in the year aforesaid is the following towit —

George Gumwalt & the other heirs & Admenistrators of John Gumwalt decd. vs Henry Gumwalt & Jacob Gumwalt } Appeal certified from the County Court of St Charles County

And now at this day came the parties by their Attornies, whereupon all and singular the premisies being seen & heard, and by the court fully understood, and mature deliberation being therenpon had: It is considered by the court that the decission of the County Court is erroneous, and that the same be reversed, and that a new trial be granted in this case and that the same be continued untill the next Term of this Court. And afterwards towit at the June Term of said Court no judge appearing the first day to open the said Court, It was adjourned from day to day untill the evening of the ninth day of June it being the third day of said Term: and no judge still appearing to open said Court, the said Court and all the business therein was adjourned untill the next regular Term thereof in pursuant to the statute in such cases made and provided

October Term 1836

And at a nother term towit, at a circuit Court began and held at the Court house in the Town of Saint Charles within and for the County of St Charles on the first monday in October it being the fourth day of said month, and in the year of our Lord one thousand eight hundred & thirty, and on the 5th day of said month it being the second day of said Term is the following Court

Henry Gumwalt & Jacob Gumwalt vs George Gumwalt & the other heirs & the Adm.rs of John Gumwalt decd. } Jacob Gumwalt by

Bates and Hunt his Attornies, moves the court here to set aside the decision and judgment rendered in this case at the last February Term and files his reasons which are taken under advisement by the Court, which said reasons are in the words and figures following viz

reasons filed to set aside judgment by Jacob

Jacob Gumwalt moves the court here to set a side the decision and judgment of this Court, rendered in this cause at the last February Term of the Court (being the last actual session of the Court) .. 1 .. Because the said decision and judgment purports to reverse the judgment of the County Court of Saint Charles County, without any question being saved on the record, sufficient to give to this court jurisdiction & control over the said judgment of the County Court .... 2 .... Because the bill of exceptions does not set forth the points decided by the County Court nor the opinion of said Court - nor the exception (if any) taken to that opinion .... 3 .... Because, although it appears on the Record that the County Court decided the question presented "upon full examination of the whole matter with evidence of witnesses and arguments of Counsel", The evidence is not preserved in the bill of exceptions, nor otherwise on the record .... And therefore the said Jacob insists that the said judgment of this court is irregular and void and he prays that the same may be set aside

signed Hunt & Bates

And thereupon this cause was continued until next Term - And afterwards to wit At a Circuit Court begun and held at the Court house in the Town and County aforesaid on the second Monday in may it being the ninth day of said month in the year one thousand eight hundred and thirty one and at said Term this cause was continued under Advisement -

May Term 1831.

continued

Sept. Term 1831

And at an other term to wit: At a Term of the Circuit Court began and held at the Court house of the Town and County of Saint Charles aforesaid on the second Monday of September and the twelfth day of said month and in the year of our Lord one thousand eight hundred and thirty one, and on the 4th day of said term it being the 15th day of said month of September in the year last aforesaid is the following proceedings Towit

George Zumwalt & the other heirs & Administrators of John Zumwalt decd
vs
Henry Zumwalt & Jacob Zumwalt

Appeal certified from St. Charles County Court

motion overruled

And now at this day came the parties by their Attornies & and the said Jacob Zumwalt having filed his reason & motion now here moves the Court to set aside the decision and Judgment of this Court rendered in this case at the February Term of this Court in the year 1830. and the said motion having been maturely considered by the Court is over ruled, and thereupon the said Jacob Zumwalt excepts to the opinion and decision of this Court and tenders his bill of exceptions which is signed & sealed & ordered to be filed as part of the record in the above cause & cause Continued: And on motion, It is ordered that subpoenas duces tecum - be issued to such of the heirs in the above estate as the said Jacob shall direct - Which said bile of Exception above mentioned were on the said 15th day of September 1831 filed, and are in the words and figures following Towit

Bill of exceptions filed by Jacob

Jacob Zumwalt appellee
vs
George & John Zumwalt appellants

September Term 1831
Circuit Court

Be it remembered, that at the October Term of the Circuit Court in and for the County of St. Charles in the year 1830 said Jacob by his Attorney filed & made a motion in writing, to set aside a judgment previously given by said court in the above cause, and to dismiss said case from the Docket for reasons therein stated which said writing is praied to be taken & made a part of this Bill of Exceptions: And now at this Term

of said Court said motion having been continued from term to term under advisment.- The Court over rule said Motion and refuse to set aside said judgment or to dismiss said cause from the Docket, to which opinion, refusal and decision said Jacob by his Attorney excepts and tenders this bill of exceptions and prays that the same may be signed by the Court & allowed & made a part of the record in the above cause: Which is so ordered by the Court and done accordingly. Given under my hand this 15th day of September A.D. 1831 (signed) P. A. McBride (Seal)

And at another term to wit:- At a County Court began and held at the Court house in the Town and County aforesaid on the second Monday in January it being the ninth day of said month and in the year of our Lord one thousand eight hundred and thirty two, and on the third day of said Term it being the 11th day of said month, is the following motion, Reasons &c viz

Henry & Jacob Zumwalt
vs
George Zumwalt & other heirs & Administrators of John Zumwalt dec'd

} The said Jacob Zumwalt moves the Court to dismiss the appeal of the said John & George Zumwalt and files his reasons therefor - which are in the words & figures following to wit

Jacob Zumwalt adm: John Zumwalt & George Zumwalt, The said Jacob moves the Court to dismiss the appeal of the said John & George Zumwalt, because - 1 - The decree of the County Court is against the Administrators of John Zumwalt dec'd, in favor of Jacob Zumwalt, and the Administrators (John and Adam) have not appealed ... 2 ... On the case as it stands in this Court no judgment can be rendered for or against the Administrators, for they are not here in Court ... 3 .... George Zumwalt, one of the appellants is no party to the decree & therefore cannot appeal ..... 4 .... The parties to the case as it stands in this Court are other and different from the parties in the cause below .... 5 .... no facts or objections are preserved on the record so as to give this Court appelate jurisdiction under the Statute (signed Hunt & Bates

Attached to the above ~~objections~~ reasons is the fol-

= lowing towit Lumvalt vs Lumvalt - In this case Jacob Lumvalt moves to dismiss the appeal because the Administrator did not appeal .... The case has not the same parties .... and for want of a sufficient bill of exceptions ..... 1 .... I say if it be necessary that an Administrator should appeal, one has appealed if the order is against him John as Administrator, and he appeals from that order, it is clear that the court will so construe the whole record as to give effect to the appeal - and the coupling of an other name will not vitiate what is otherwise good ..... 2 ..... By the 77 sec. Adm.r law it is clear that the cases in which appeals are allowed, are not cases in which there are regularly any parties as such and by name before the Court but the appeal may be taken by any person whose interest on the whole record appears to be effected by the decission ... I say then that the appeal may be by destributees. But if it must be by an Administrator, then it is so taken here, so that in either view the appeal is right, One Admenistrator may appeal and there is no summons and severance in such case .... 3 ... The effect of the appeal is to bring here all the parties interested in that decission, whether they acquiesced in it or not, and the Record to be made here is to be just such record as ought to have been made in the County Court, there is no difficulty whatever in making a proper order, whatever may be the judgment of the Court ..... 4th .... The objections about the bill of exceptions is certainly, that before decided twice in this Court and there can be no necessity for again arguing it - But if there was or if the case ever should go to the Supreme Court, I am perfectly confident of maintaining the judgment of Reversal -

It is said I am not willing to have the appeal dismissed - Granted - for the Court can now only dismiss the appeal because of irregularities but if the Gentleman wish to dismiss their suit, I consent freely to that, or I am ready to try it on the merits

Signed A. R. Gamble -

And afterwards towit on the 13th day of January 1832 it being the 5th day of the said January Term of the said Court aforesaid in the said year one thousand eight hundred and thirty two - is the following

towit

Jacob Zumwalt
vs
John Zumwalt &
George Zumwalt

Appeal from the County Court

The said Jacob Zumwalt moves the court to dismiss the appeal of the said John & George Zumwalt, and assigns in writing the following reasons, to wit ... 1 ... The decree of the County court is against the Administrators of John Zumwalt deceased, in favor of Jacob Zumwalt, and the Administrators (John & Adam) have not appealed ... 2 ... On the cause as it stands in this court no judgment can be rendered for or against the Administrators for they are not here in Court ..... 3 .... George Zumwalt one of the appellants is no party to the decree and therefore cannot ap- appeal .... 4 .... The parties to the cause at it stands in this Court are other and different from the parties in the cause below ... 5 ... No facts or objections are presented on the record so as to give this court appellate jurisdiction under the Statute. And thereupon after hearing the arguments of Counsel, on both sides & mature deliberation being thereupon had the Court is of opinion that the said appeal ought to be dismissed: And accordingly it is ordered & adjudged that the said appeal be dismissed And thereupon came the said John Zumwalt and George Zumwalt by their Attorney and pray an appeal to the Supreme Court from the judgment of this court dismissing their said appeal and file here in Court the affidavit of William Cashow their agent in conformity to law, whereupon said appeal is allowed and the said William Cashow as principle and Isaac Fulkerson and William Dodson as securities being here in Court acknowledge themselves indebted to the said Jacob Zumwalt in the sum of one hundred dollars to be levied of their respective goods and chattels lands and tenements upon condition that if the said John Zumwalt & George Zumwalt shall prosecute their said appeal with effect, and shall pay and satisfy the condemnation money and all costs, or otherwise abide the judgment of the said Supreme Court in such appeal then the above recognizance to be void otherwise to remain in full force which said Recognizance is here approved by the Court

And the affidavit of the said John Zumwalt and George Zumwalt above mentioned is in the words & figures following

Jacob Zumwalt
" } William Cashon agent of John Zumwalt
John & George Zumwalt } and George Zumwalt being duly sworn upon his oath saith that the application of the said John Zumwalt and George Zumwalt for an appeal to the Supreme Court from the judgment, order and decission of this court dismissing the appeal of the said John Zumwalt and George Zumwalt (which was taken from the order of the County Court of St Charles County directing the Administrators of John Zumwalt deceased to make destribution in such order specified of the assets in their hands) is not made for the purpose of vexation or delay, but because this affiant verily believes the said John Zumwalt, and George Zumwalt aggrieved by the said Judgment, order and decission of this court dismissing said appeal (signed) William Cashon

sworn to and subscribed in open Court this 13th of January 1832 — signed William Christy Jr
C. C. C.

State of Missouri
County of Saint Charles } I William Christy Jr Clerk of the Circuit Court within and for the County of St Charles aforesaid certify that the above and foregoing is a copy of the Record and proceeding of our said Court in the case of Henry Zumwalt & Jacob Zumwalt appelles verses, George Zumwalt & other heirs & administrators of John Zumwalt deceased appellants sent hither from the County ~~of~~ Court of St Charles County on an appeal from the matter of final settlemen & destribution in the Estate of John Zumwalt deceased and lately pending in our said Court —

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this twenty first day of April A.D. 1832 —

Wm Christy Jr

Fees in the Circuit Court of St Charles County for which Henry & Jacob Zumwalt are liable being the fees accrued on their behalf viz

Clerks fees St Charles Circuit Court	$7.16
Jonathan Bryan Witness	12.00
A McKinney witness	20.40
Wm Cashon do	4.50
Mary Murdoch do	5.00
Wm N Fulkerson Sheriff	10.65
	$59.71

Fees for which George & Jno Zumwalt &c are liable having accrued in their behalf

A McKinney a Witness	$10.00
Clerks fees St Charles	5.97½
Sheriff St Charles	3.30
	$19.27½

This Transcript not included

No 8 April 1832 (37)

519

Henry & Jacob Zumwalt

vs Ex Transcript

George & John Zumwalt &c

519

Clerks fees St Charles County viz

Transcript	$4.32¼
Certificate	" 50
Tax on seal	" 62½
due by Mr Gamble	$5.44¾

Filed 23rd April 1832

Jos. C Brown clk

Judgment affirmed Book 4 page –

S –

Fa bill 36 –

Henry & Jacob Zimmwalt
vs
George & John Zimmwalt &c

On appeal

And the said appellants come and say that in the record & proceedings & judgment aforesaid there is error in this that the Circuit Court dismissed the appeal from the County Court against law

There is error in this that the said Circuit Court should have given judgment for the appellants and not against them

Wherefore they pray that the judgment aforesaid be reversed annulled &c

W R Gamble
Atty for Appts

There is no Error

Edwd Bates

9.

Zumwalt
v
Zumwalt

assignment & joinder

filed 25th Apl. 1832
J. C. Brown Clk

John and George Zumwalt
appellants
vs
Jacob Zumwal
appellee

This case originated in the County Court of St Charles and its history is in breif, as follows — Henry and Jacob, two sons and co: heirs of John Zumwalt dec.d by petition, stated to the county Court, that the other children and co: heirs had rec.d from the father, by way of advancement, property to the amt of $ 1150 each. That Henry had recd: say $ 600 worth of personal property and land estimated at $ 500, but the title to which was bad, and therefore of no value — That Jacob had recieved nothing — Henry offered to bring his advancement into hotchpot —

There was in the hands of the admrs of the dec.d John Zumwalt — ie John and Adam Zumwalt; to be distributed $ 859.71. which Jacob prayed might be paid to him until he should be made equal to his brethren.

The County Court took no order upon the offer Henry to bring his advance into hotch pot, but decided that the bal: in hands of the admrs ($859.71.) be paid to Jacob Zumwalt the petioner and present appellee.

John and George Zumwalt (which George was not one of the admrs, nor a party to the record tendered a bill of Exceptions (which see) and took the case to the Circuit Court by appeal. And the Circuit Court, on motion of the appellants reversed the judgment of the County Court and awarded a new trial.

Afterwards at the next term, Jacob Zumwalt moved the Court to set aside that judgment of reversal, for irregularity - and filed reasons which will be seen in the transcript - The Court, after advising upon it, overruled the motion - And then Jacob Zumwalt moved the court to dismiss the appeal, which ~~motion~~ was granted - and thereupon John and George Zumwalt appealed to the supreme Court.

Jacob Zumwalt the appellee rests his case upon the following views.

1. The Circuit Court erred in reversing the decision of the County Court, ordering the payment to Jacob Zumwalt of the balance in the hands of the admrs of John Zumwalt.

2. And in refusing to set aside that judgment for irregularity.

3 And the motion to dismiss the appeal was well sustained.

And in referance to these points, I submit the following observations.

The Circuit Court never had jurisdic=tion of the cause, because the appeal from County Court was illegally and irregularly taken. Under our statute the case at large is not taken up subject to be reversed for any error that may be found in the record, but the points decided by the Court below must be set forth in a bill of exceptions, stating the opin=ion of the court and the exceptions thereto. Digest p. 123-4-§§77 to §§80. And when the case comes into the Circuit Court it is not taken up broadly up=on its general legal merits, but by the express requirement of the statute - "the Circuit Court shall first hear and determine the points or decisions ex=cepted to" and if the Court below erred on any material question, shall reverse the decision and grant a new trial.

It is clear that the case is to be stated in the bill of exceptions, and that unless sufficient matter appear there, the Circuit Court has no right to hear the ~~appeal~~ case at all upon ap=peal.

The statute expressly requries that the bill of exceptions shall set forth the opinion of the Court and the exceptions thereto - But here neither the opinion nor the exception is set forth - John and George only say in the bill of exceptions, that they believe that the eve=dence was sufficient to prove that what they recieved from their Father in his life time was not by way of advancement. But they

state no part of the evedance nor any opinion of the Court there upon — and it is impossible for the Circuit Court, or this Court to judge whether they believed right or wrong. Besides, their belief is wholly immaterial to the law of the case —

It is plain that the Circuit Court could take jurisdiction, on this appeal, of nothing but what is set forth in the bill of exceptions. and as this bill contains nothing on which to found a judgment it follows of necessity, that the Circuit Court had no authority over the subject matter and so its judgment reversing the decision of the County Court was irregular and void — and for the same reason its judgment dismissing the appeal was right.

Again — the case was not lawfully in the Circuit Court, because there was no appeal taken, nor bill of exceptions filed by the proper parties. This Court has decided the principle in the case — Thompsons adm^rs: vs Northcott 1 vol: Md decisions p. 224.

The record shews that the order to pay over the money to Jacob was made upon John and Adam as administrators of John Zumwalt dec^d. But they took no appeal. The bill of Exceptions the affidavit and the appeal are all in the name of John and George in their right.

No person can appeal, but a party to the proceeding (which George was not at all, and John was not individually) either an original party or a party by legal interpleader, which any one may become by taking the proper steps in the Court below.

It is no answer to say that the statute gives the appeal to "any person" who may feel aggreaved. It will prove too much, for the same phrase is used in the general law regulating ap=peals from the Circuit Court to this Court. The statute means any person entitled to appeal. If a stranger to the record can appeal, he may keep a cause in Court in spite of all the parties, and perhaps reverse a judgment which all the parties wish to uphold.

Dig: p.632 §43

And the appeal from the Circuit Court to this Court is irregular and illegal, for the statute (p632. §-43.) allows appeals only in cases originating in the Circuit Court: leaving the par=ties to the general remedy of writ of error, to correct mistakes commited in causes brought up from the inferior tribunal —

Innewalt
v
Innewalt

Appellee's brief

June 1833.

Edw Paty

John & George Zumwalt Appellants

vs

Jacob Zumwalt Appellee

This is an appeal from the Circuit Court of St Charles County. The case presented by the record commenced in the County Court of St Charles County upon the final settlement of the estate of John Zumwalt deceased.

John & Adam Zumwalt were the administrators of the estate of their father and at the August Term of the County Court in the year 1829 they appeared before that Court to make a final settlement of their administration. At the same time Jacob Zumwalt the Appellee and his brother Henry presented to the Court their petition in which they represented that their father in his life time had advanced each of his other children to the amount of $1150. and had at the same time given to the petitioner Henry personal property to the value of $561.15 and ~~in~~ land if the title to it had been good to the value of about $580 that the land was held by an unconfirmed Spanish grant and the petitioner Henry offered to bring what he had received into Hotch-pot. The petition further stated that Jacob had never received any thing from his father as an advancement. The petitioners then prayed that the funds remaining in the hands of the administrators might be distributed by first giving to Jacob the amount necessary to make

him equal to what Henry had received and that the remainder if any might be divided between them until they were made equal to the other heirs.

On the final settlement by the administrators it was found that they had in their hands $859 20¼/100 unadministered and to be distributed - The record says that Jacob filed his "obligations" in writing to said sum being distributed to the other heirs until he should be made equal to them and Henry filed his objections and offered to bring into Hotchpot all that he had received as advancement. whereupon the Court after a full examination of the case pronounce the opinion that the intestate in his life time made advances to each and every of his children except Jacob in lands to the amount of $500 and personal estate to the amount of $561.16⅔ in all $1061.16⅔ and therefore they ordered the administrators to pay to Jacob the sum of $859 20¼/100 being the balance in their hands and the further settlement of the estate in relation to a slave appearing to be unsold was continued

To this conclusion and judgment of the Court John Zimmwalt one of the administrators and George Zimmwalt one of the other distributees filed their exceptions and prayed an appeal to the Circuit Court

The Bill of exceptions as might be supposed does not in itself very clearly state the points of law decided by the County Court nor can it be expected that in Courts where the parties are not

represented by lawyers there will be found a technical accuracy in drawing papers like bills of exception - The exception taken is that on the settlement of the estate Jacob one of the heirs came into Court and stated that the estate had in his life time given by way of advancement to eight of his other children in real and personal estate to the value of $1150 each and that he (Jacob) had never received any thing as advancement and he prayed that he might receive of the assets remaining in the hands of the Administrators an amount equal to that received by the other heirs and "thereupon the Court ordered that distribution should be made in such manner as he the said Jacob had prayed" by which order the said John & George J feel themselves aggrieved in that they believe that the evidence then and there given was sufficient clearly to prove that the amounts which they had received in their fathers life time as stated by said Jacob Zimmwalt to the Court was not given by way of advancement as decided by the Court and thereupon they except to the decision of the Court and pray an appeal and that the exception may be signed and sealed

The appeal being regularly taken to the Circuit Court was docketed at the Octr Term 1829 and was continued at the Febry Term 1830 The Circuit Court reversed the judgment of the County Court and awarded a new trial -

At the Octr Term 1830 Jacob Zimmwalt appeared and moved the Court to set aside the judgment of the Circuit Court reversing the judgment of the County Court for the following reasons

1st Because the said decision and judgment

purports to reverse the judgment of the County Court of St Charles County without any question being saved on the record sufficient to give the Circuit Court jurisdiction and control over the judgment of the County Court. 2d Because the bill of exceptions does not set forth the points decided by the County Court nor the opinion of said Court nor the exceptions if any taken to that opinion. 3d because the evidence is not preserved; And therefore the said Jacob insisted that the said judgment of the Court was irregular and void — This motion was continued from Term to Term until the Sept Term 1831 when it was overruled and upon overruling of the motion Jacob Zumwalt asked for subpoenas duces tecum and both parties prepared for trial. At the next term when the case was to be tried Jacob comes again and moves the Court to dismiss the appeal for the following reasons

1st Because the decree of the County Court is against the Admrs of John Zumwalt in favor of Jacob and the Admrs (John & Adam) have not appealed

2d On the case as it stands in the Circt Court no judgment can be rendered for or against the admrs for they are not in Court

3d George Zumwalt one of the Appellants is no party to the decree and therefore cannot appeal

4th The parties to the cause as it stands in the Circt Court are other and different from the parties in the cause below

5th No facts or objections are preserved on the Record so as to give the Circt Court Appellate jurisdiction under the Statute

The cause was upon this motion again continued until the Jan Term 1832 when strange to tele the motion was sustained and the appeal was dismissed

From this judgment of the Circuit Court an appeal was taken to this Court

The Errors assigned principally relate to the dismissal of the appeal.

The questions to be determined are 1st Whether the cause was in a situation in which the appeal could be dismissed & 2d Whether if such order could then be made it was properly made.

The 1st point I make is that the parties only appealed were interested in the order made by the County Court and as such were entitled to appeal

2d That the order for a distribution is an action of the Court upon a specific fund and that any distributee may appeal from such order whether the administrator will appeal or not.

3d That the appeal in this case was taken according to the forms of law and was therefore not irregular

4th That the Circuit Court having reversed the judgment of the County Court and awarded a new trial, the case then stood ready for a trial upon the merits and the bill of exceptions had discharged its office and the Court could take no other course than to proceed to trial.

If these positions be correct there will be no necessity for considering the propriety of the judgment

of the Circuit Court reversing the judgment of the County Court but if that question is to be determined then I say that the judgment was erroneous –

1st In this that the judgment was founded on the mere statements of Jacob Zumwalt –

2d That the Court in effect refused to allow Henry Zumwalt (who petitioned with Jacob) to bring what he had received into Hotchpot –

3d That ~~it does not appear~~ that the intestate had given any thing by way of advancement to any of his children

1st Point The appeal is by two distributees one of them an admr – The 77 sec of Admr law gives the privilege of appeal to any person who shall feel himself aggrieved "by the decision of the Court of probate by any order directing an admr to make distribution" See Revised Laws 123. An order for distribution may be made after any annual settlement §§64 but on final settlement the admr is to notify all persons interested in the estate that he intends to make such final settlement and when such settlement is made the Court of course order distribution §§69.

At a final settlement the distributees are ~~those~~ the persons interested in the estate after payment of the debts and there can be no other person interested – Who then is to appeal from an order directing distribution to be made in a particular manner? Certainly the distributees or as many of them as

feel themselves aggrieved.

2d Point the appeal need not be taken by the administrator - Although the order is made upon the administrator to pay over money yet they are not the persons really interested in the fund or the disposition made of the fund. It would therefore confine the right of appeal to persons who could no interest in the order appealed from if it were held that the Admrs could only appeal

3d The appeal in this case was taken according to the forms of law - The affidavit is in the words of the law. A Bill of exceptions or statement in the nature of a bill of exceptions has been signed and sealed by the justices of the County Court. Whether that bill, contains a statement of erroneous decisions by the County Court or not, is a question to be determined by the Circuit Court exercising its appellate jurisdiction and is not a question affecting the regularity of the appeal. If the bill did not shew sufficient error to authorise the reversal of the judgment of the County Court the Circuit ought not to dismiss the appeal but ought to affirm the judgment. Unquestionably there was nothing in the proceeding that could be termed irregularity See Tidds practice 434

4th That the Court having reversed the judgment of the County Court and awarded a new trial upon the merits no further objection could be taken to the substance of the bill of exceptions.

It is altogether manifest that the proceeding in dismissing the appeal is a revision by Judge McBride

of the judgment of his predecessor and must be upon the very points upon which his predecessor adjudicated when he reversed the judgment.

The bill of exceptions in such cases is intended only to form the basis of a new trial if any erroneous judgment has been given see § 82 Revised Laws 124. and this is not confined to mere questions of law but also to the finding of facts. When the Circuit Court has awarded a new trial the parties stand precisely in the condition in which they were when before the County Court and this order of the Circuit Court granting a new trial is much of the same character with the granting a new trial in a case in the Circuit Court, an error in which, cannot be corrected in that or any other court but the party is provided with an abundant remedy if upon the new trial there should be any error of the Court against him. That this is the character of the award of a new trial in such case is the more apparent from the fact that it may be awarded when the Circuit Court differs from the County Court in opinion as to the facts of the case. It is, as it was intended to be, a mere motion for a new trial in another Court and when granted by such Court the parties must proceed upon the merits.

If I be correct in these positions the reversal of the judgment of the Circuit Court must follow and it is no answer to say that the Circuit Court erred in reversing the judgment of the County Court

But the Circuit Court did not err in reversing the judgment of the County Court.

Two grounds were assumed for reversing that judgment or rather the Court acted upon two views of the

case 1st as the case was presented on the bill of exceptions and 2d as to the propriety of the judgment itself.

The bill of exceptions states that the order of distribution was made on the representations of Jacob Zimmwalt one of the petitioners. And the only evidence hinted at as having been given in the cause was evidence to contradict his statements

As to the judgment itself it is not upon the finding of the fact that John Zimmwalt deceased had given any thing to his children by way of advancement

2d It is not a conclusion of law that upon the finding of the fact that ~~property has been given by way of advancement~~ that the property remaining shall be given to the Child not advanced

3a Here Henry joins in the petition and offers to bring into Hotchpot what he had received, and unquestionably he had a right to claim that distribution should be made as well of what remained as of what he had received and it was the right of all the other distributees to claim that distribution should be so made. Suppose a court after a dispute among distributees whether any thing had been given by way of advancement should find that a child has been advanced what is the right of that child? Certainly it would be his right to bring the property received into Hotchpot and any other child who had also received property would be interested in the ~~bringing~~ first one bringing his property into Hotchpot. In this case the illustration

of this position is simple - Admit that property had been given by way of advancement to all the children but Jacob, and that a part of the property given to Henry was an unconfirmed Spanish claim, which at the time of this order of distribution, was considered of but little value but now by the increased probability of a confirmation is reckoned of great value - A dispute arises whether the other children had received any property as an advancement and suppose the Court find the fact that the property was so received - The order then instead of holding Henry to keep his unconfirmed title should have been to permit him to bring his advancement into Hotchpot, and then if the others refused to bring in the advancement they received; the distribution would have been between Henry and Jacob as if there never had been any other heirs, If Henry had been permitted to bring in his property as he offered, the other distributees by bringing in their advancements would have been entitled to their share in the property brought in by Henry and that, is most probably at this time, of more value than his estimated share in the estate of his father - The others, then, were interested in his being permitted to bring in what he had received, and the Court in their order of distribution having refused such permission any distributee (even Jacob) had a right to complain of that order because it was not in conformity to the law and might injure the distributees -

I conclude that the judgment of the Circuit Court ~~ought to be reversed~~ dismissing the appeal ought to be reversed and

H N Gamble atto
for Appellants

Mr Bates says that the right of appeal is a right granted by the stat-
-ute and to be exercised in manner & form as the statute points
out - I deny it - the constitution gives the right -

Irregularity in this Court trying a man for larceny

new trial - not a good rule that won't work both ways

John & George Zimmwalt

vs

Jacob Zimmwalt

Appellants Brief

John George Zumwalt
vs
Jacob Zumwalt } Appeal from the Circuit Court of St Charles County

John & Adam Zumwalt were administrators of the effects & c of their father and a final settlement before the county court of St Charles County Jacob Zumwalt presented his petition to the Court alleging that he had received no advancement in the lifetime of his father and that the other children of the deceased had been advanced to about the amount of $1000 & praying that the remaining funds in the hands of the administrators might be paid over to him which would still leave him with a less portion than the other children had received The Court heard the testimony and ordered that the administrators pay the balance in their hands to Jacob. a bill of exceptions was taken to the opinion of the Court Thereupon John one of the administrators and one George Zumwalt appealed to the circuit Court When the cause came there various proceedings were had in regard to said appeal among other things, Jacob Zumwalt moved the Court to dismiss the appeal because both the administrators did not appeal & Secondly because George Zumwalt who is one of the appellants does not appear by the record to have any interest in the judgment or decree of the Court — The Circuit Court dismissed the appeal from which dismissal the cause is brought here by appeal The only point necessary to be considered is whether the Circuit Court did right in dismissing the appeal

The only evidence on the record conducing to show that George Zumwalt was in any wise interested in the matter is that Jacob Zumwalt sets forth in his petition the names of the children of the intestate and among them George is named

taking it to be true that there is a distributee named George Zumwalt yet the man appealing may or may not be that man the record should shew that George the appellant had an interest in the thing litigated this could be done by his petition or motion to the Court stating & shewing his interest by proof if denied or required then this being entered of record his right to appeal would be clear

The law is that any person who has an interest in the matter and feeling himself aggrieved may appeal the fact that an appellant is interested if he is not a direct party must be made apparent on the record and if he does not make it clear that he is interested but leaves the matter doubtful the court must decide against him for the rule is that if he whose duty it is to make a matter clear leaves it doubtful the Court will solve that doubt against him

The Judgment of the Circuit Court is affirmed with costs —

M. M. Gish
George Lompkins
N Wash

John & George Lunnwalt
vs opinion
~~George~~ Jacob Lunnwalt

12

(472 words counted)

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M'Girk

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