PICOT, LOUIS G, ADM'R WITH THE WILL ANNEXED OF DILLON, ANN E * V BATES, BARTON, TRUSTEE OCTOBER 1866 ST. LOUIS COUNTY 570/1

OLD 654/8 REVERSED AND REMANDED

INVOLVED:

ESTATE SETTLEMENT

FRAUD

* Indexed under DILLON in Vol. 39 Reports

State of Missouri }
County of St Louis } Be it Remembered that heretofore to wit: On the Twelfth day of August in the year of our Lord One thousand eight hundred and fifty eight, there was filed in the Office of the Clerk of the St Louis Circuit Court a petition in the words and figures following to wit:

Petition

St Louis Circuit Court.
October Term 1858.

St Louis County Set:
Lewis G. Picot Administrator }
with the Will annexed of
Ann E. Dillon deceased. } Plaintiff Comes and
" } filing his petition
Barton Bates } in equity Says:

That Ann T. Dillon died in the year eighteen hundred and thirty seven leaving three children as her sole heirs and distributees to wit: Ann E. Dillon, the plaintiffs testator, Martha A Dillon and Susan Dillon, That after the death of the said Ann T. Dillon letters of administration upon her estate were duly granted to her husband Patrick M. Dillon by the St Louis County Court,

That the said Patrick M. Dillon after the death of said Ann T. Dillon and as administrator collected and received on account of the

cp 1.

2. Estate the Sum of Two Thousand Seven hundred and Sixty eight 49/100 dollars paid by the estate of John T. Nash to Said P M Dillon as Said Administrator of Ann T. Dillon in the year eighteen hundred and forty five as appears by the Settlements of said Patrick made in the St Louis Probate Court at the December Term 1845 of said Court, at which time Said Patrick made final Settlement of said Estate, but this plaintiff Says that Said Settlement was erroneous & fraudulent in this that Said Patrick wrongly credited himself with the Sum of Two thousand three hundred and one 22/100 dollars principal of a demand of the Said Patrick against the Estate of John T. Nash which was the Same item with which he charged himself as administrator as of the effects of the Said Ann T. Dillon, and Said Patrick also erroneously and fraudulently credited himself with the Sum of Eleven hundred and Sixteen 7/100 dollars as interest upon Said principal, both of which items of credit, principal & interest were erroneous and fraudulent, as the Said Patrick had no Such claim for which his wife's estate was liable for him, and no Such claim was ever allowed against the Estate of said Ann T. Dillon by the Probate or County Court of said County, Said Settlement was further fraudulent in this, that Said Patrick both credited for

Commissions at the rate of four per Cent on the Sum of $3.491.56 as received and paid out, amounting to $138.66. whereas the said Patrick received the Sum of $2.768.49 the Commissions on which at four per cent, are $110.74, And plaintiff says that at said Settlement said Dillon was entitled only to a credit for the Sum of $116.33 including Commissions, and that all the remaining items of said credit in said Settlement were fraudulently obtained, and were enormous and Contrary to the duty of said Patrick to make just and true Settlement, as Administrator as he charges and Credits himself with the same item, Plaintiff files herewith a certified copy of the record of the St Louis Probate Court showing the Administration of said Estate of said Ann T. Dillon, and the final Settlement of the same,

Plaintiff further States that his testatrix died on the 30' October 1842 having made her will which was duly probated July 24. 1854 but no letters testamentary were issued until the 28' July 1856. when letters of administration with the Will annexed were duly granted by the St Louis Probate Court to the plaintiff which letters are herewith filed. That said Patrick Mc Dillon died having made his will and a Codicil thereto which were duly admitted to Probate on the 28th

3.

4. January 1851 by the St Louis Probate Court, by which Said Will Said Dillon devised his estate Real and personal to Barton Bates & Ferdinand Provenchere as Trustees in joint tenancy, which Said devise Said Said Provenchere duly renounced and Said Barton Bates became Sole trustee and devisee under Said Will, as trustee for the benefit of the Children of Said P. M. Dillon, as declared by Said Will, a copy of which is herewith filed. By Said Will Said Dillon Constituted Edward Bates, and Edward Walsh as Executors who having duly qualified transferred the management of Said Estate to Said Barton Bates having made final Settlement of their accounts,

That the Said Martha M. Dillon died before her father Patrick M. Dillon leaving issue who took under the will of Said P. M. Dillon a use in the property devised to Said Barton Bates, And that Said Susan F Dillon Survived her father and took an use under Said will, by reason whereof the issue of Said Martha and the Said Susan F Dillon who married Charles W Stevens are represented by Said Barton Bates and are not made parties to this Suit,

In Consideration of the premises plaintiff prays, that the Settlement made by the Said P. M. Dillon as Administrator of Ann F. Dillon at the December Term 1845 of the St Louis Probate

Court be set aside as fraudulent as far as this plaintiff is concerned, and that the said settlement be corrected as to the two items of credit, in said settlement above referred to of $2.301.22 and $1116.07 and to avoid circuity of action plaintiff may have judgment for one third of such amount as may ~~have~~ be found to have been justly due by said P. McDillon as administrator aforesaid Ann T. Dillon upon a just and fair settlement of the accounts of said P. McDillon as administrator of said Ann, And that the defendant be adjudged out of the estate real & personal devised to him as trustee to pay such sum as may be found due the plaintiff as administrator with the will annexed of the said Ann E. Dillon, with interest upon said sum from the date of said final settlement, and that plaintiff may have such other and further relief as to the Court may seem meet.

Whittesey Atty for P.

State of Missouri }
County of St Louis } L. G. Picot plaintiff makes oath and says that he believes the foregoing petition and the matters and things therein as stated are true

L. G. Picot

Subscribed and sworn to before me this 12th August 1858.

T. Rice Clk.

6. And thereupon on the day of the filing of said petition a Summons issued from the Office of the Clerk of the St Louis Circuit Court aforesaid in tenor and form following, to wit:

Summons. The State of Missouri, County of St Louis &c.

To the Sheriff of St Louis County Greeting We Command you to Summon Burton Bates to appear before the Judge of our Circuit Court on the first day of the next Term thereof to be held in the City of St Louis within and for the County of St Louis on the first Monday of October Next, then and there to answer the Complaint of Louis G. Picot Admr with the Will annexed of Ann E. Dillon deceased, as set forth in the annexed petition, And have you then there this writ. (Seal) Witness Stephen Rice Clerk of our said Court with the Seal thereof hereto affixed at Office in the City of St Louis this 12 day of August in the year of Our Lord eighteen hundred and fifty eight,

S. Rice Clerk.

On Which Summons the Sheriff made return as follows.

Shffs Return "Burton Bates Not found in my County Sept 27. 1858

M. S. Cerre Shff

By Geo A. Stevens Deptg

And thereupon & in pursuance of An

Order of said Circuit Court an Alias Summons issued from the Office of said Court in terms and form following to wit:

Als Sum.

The State of Missouri, County of St Louis ss.

To the Sheriff of St Louis County Greeting

We Command you to Summon Barton Bates to appear before the Judge of our Circuit Court on the first day of the next Term thereof to be ~~begun~~ held in the City of St Louis within for the County of St Louis on the fourth Monday of February next then and there to answer the Complaint of Louis G. Picot administrator de bonis non of Ann E. Dillon deceased, as set forth in the amended petition, And have you then there this writ. Seal Witness Stephen Rice Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St Louis, this 18 day of November in the year of our Lord eighteen hundred and fifty eight

Stephen Rice Clk.

On which Summons the Sheriff made return as follows to wit:

Shff's Return.

"The within named defendant not found in my County, Feby 23 1859

Michael J. Lane Shff

And thereupon and in pursuance of an order of said Circuit Court, a pluries Summons issued from the Office of the Clerk of said Court

7.

8. interior & form following to wit:

The State of Missouri County of St Louis ss.

Pluries Sum.

To the Sheriff of St Louis County Greeting.

We again Command you to Summon Barton Bates to appear before the Judge of our Circuit Court on the first day of the next Term thereof to be held in the City of St Louis within and for the County of St Louis on the Last Monday of September next then and there to answer the Complaint of Louis G. Picot administrator with the will annexed of Ann E. Dillon deceased, as Set forth in the annexed petition, and have you then and there this writ, Seal Witness Stephen Rice Clerk of our said Court with the Seal thereof hereto affixed at Office in the City of St Louis this 24 day of January in the year of our Lord eighteen hundred and Sixty.

Stephen Rice Clk.

Upon which Summons the Sheriff made return as follows.

Shff's Return

"Executed this within the County of St Louis on the 25th day of January 1860 by delivering a Copy thereof, with a Copy of the petition as furnished by the Clerk to Barton Bates.

Thos E. Courtney Shff

By W W Winner Dfty"

At which said September Term of said Court for the year eighteen hundred and Sixty to wit: On the Third day of October AD 1860 the defendant

filed his demurrer to the petition aforesaid in the Words & figures following to wit:

Demurrer. Louis G. Picot Admr. with the Will Annexed of Ann E. Dillon deceased. } In St Louis Circuit Court September Term 1860.

" Barton Bates } Barton Bates defendant

in the above entitled action by his Attorney Comes and demurs to the petition of plaintiff and shows these two Causes of demurer,

1st. That the petition does not State facts Sufficient to Constitute a cause of action

2nd. That the facts as Stated in the petition if they be true, do not give to the plaintiff a Sufficient ground of action against this plaintiff defendant; for that an Action founded on these facts should be brought against the personal representatives of Patrick M. Dillon against whom the petition alleges fraud.

Woodson & Bates Attys for Defendant.

And afterwards to wit: At the Said September Term of said Court for the year of Lien hundred and Sixty, the following proceedings were had in said Cause to wit:

Demurrer Overruled Ann E. Dillon's Admr. } November 21. 1860

" Barton Bates. } The demurrer to the petition herein being heard and fully considered by the Court

is Overruled. Ten days are given the defendant to plead.

And thereupon said Cause was Continued.

And afterwards At the February Term aforesaid Court for the year eighteen hundred & Sixty one said Cause was continued

And afterwards to wit: At the February Term aforesaid Court for the year eighteen hundred & sixty two said Cause was continued

And at the September Term aforesaid Court for the year eighteen hundred and sixty two said Cause was continued

And afterwards to wit At the February Term aforesaid Court for the year eighteen hundred and Sixty three, to wit: On the Second day of February 1863. the defendant filed his answer to the plaintiffs petition in the words & figures following to wit:

Answer

Louis G. Picot admr
of Ann E. Dillon dec'd
vs Plaintiff
Barton Bates
Defendant

St Louis Circuit Court

And now Comes the said defendant by his Attorney and in answer to the said plaintiffs petition says, That being a mere Trustee under the will of Robert M. Dillon he has no Knowledge or information sufficient to form a belief as to whether Ann T.

Dillon died in the year 1837 or left three children as her sole heirs and distributees to wit: Ann E. Dillon, Martha A. Dillon & Susan Dillon, or whether after the death of said Ann T. Dillon letters of administration were duly granted to her husband Patrick M. Dillon by the St Louis County Court, or whether after the death of said Ann T. Dillon the said Patrick M. Dillon as her Administrator collected and received on account of her estate the sum of $2768 42 paid by the estate of John T. Nash to said Patrick M. Dillon as Administrator of Ann T. Dillon in the year 1845 or any other sum, or whether the same appears by the settlements of the said Patrick M. Dillon made in the St Louis Probate Court at the December Term 1845 or at any other time, or whether said Patrick M. Dillon made final settlement of said Estate at that time. Or whether said settlement was erroneous or fraudulent in any respect. Or whether said Patrick M. Dillon wrongfully credited himself with the sum of $2.301.22/100 in said settlement or whether the same was principal of a demand of the said Patrick M. Dillon against the estate of John T. Nash or any other estate or person, Or whether in said final settlement the said Patrick M. Dillon as Administrator charged himself with this same sum

11.

or any other sum. Or whether said Patrick M. Dillon erroneously or fraudulently credited himself with the sum of $1116 as interest upon said principal two, Or whether this or any other item of credit in said final settlement was erroneous or fraudulent, Or whether said Patrick M. Dillon had no such claim for which his wife's estate was liable for him, Or whether no such claim was ever allowed against the estate of the said Ann T. Dillon by the Probate Court or County Court of St Louis County, Or whether said settlement was further fraudulent in any respect whatever. Or whether said Patrick M. Dillon in said settlement took credit for commissions at the rate of four per cent on the sum of $3.491.56 dolls. as received and paid out amounting to $138.66 or any other sum. Or whether said Patrick M. Dillon received the sum of $2768.49 or whether his legal commissions were only $110.74, Or whether said Patrick M. Dillon at said settlement was entitled only to a credit of for the sum of $116.33 dolls. including commissions, Or whether all the remaining items of said credit in said settlement were fraudulently obtained or whether they were erroneous or contrary to the duty of said Patrick M. Dillon to make

just and true Settlement as Administrator or whether Said Patrick McDillon in Said Settlement charged and Credits himself with the Same item

And as to the paper alleged to be a Certified copy of the record of the St Louis Probate Court showing the Administrator of the estate of said Ann T Biddle and the final Settlement of the Same, this defendant Answers as follows, That said Certified Copy is not a part of the said plaintiff's petition, That he has not examined the Same and Knows not whether the Same is a true Copy of the said record, and has not Knowledge or information Sufficient to form a belief as to whether the items & facts Set forth in the said Copy are true, And the defendant further Says that he has no Knowledge or information Sufficient to form a belief whether the Testatrix of the plaintiff died on the 30th Oct 1842 or whether the Madeaux will or whether any will of hers or purporting to be hers was duly probated July 24. 1854, Or whether no letters Testamentary were issued until July 28. 1856, Or whether letters of Administration with the Will annexed were then duly granted by the St Louis Probate Court to the plaintiff, And this defendant denies the

13.

right of the plaintiff to charge him with the Contents any such letters by filing them in the case

And this defendant further says that he has no knowledge nor information sufficient to form a belief whether Martha M. Dillon died before her father Patrick M. Dillon or whether she left issue who took under the will aforesaid Patrick M. Dillon in the property devised to this defendant. Or whether said Susan F. Dillon survived her father or took an use in and under said will, Or whether by reason thereof the issue aforesaid Martha and the said Susan F. Dillon are represented by this defendant in this suit,

And therefore defendant denies that the plaintiff is entitled to the relief sought in his petition or to any relief whatever.

And for a further answer this defendant says that said supposed cause or causes of action mentioned in said plaintiff's petition did not accrue at any time within five years next before the Commencement of this suit,

And for a further answer he says that said supposed cause or causes of action did not accrue at any time within ten years next before the Commencement of this suit, which facts he

now plead as a bar to the said plaintiffs alleged causes of action.

And for a further answer he says that the said Patrick M. Dillon died on or about the _ day of 1851, that letters of Administration were granted upon his estate to Edward Bates and Edward Walsh who duly qualified as Executors of the Last Will and testament of said Patrick M. Dillon deceased on or about the _ day of 1851; That within thirty days after the granting of said letters of Administration the said Edward Bates and Edward Walsh Executors as aforesaid published in a Newspaper in this State for three weeks a Notice that letters testamentary had been granted to them stating the date and requiring all persons having claims against the estate of said Patrick M. Dillon to exhibit them for allowance to them the said Executors within one year after the date of said letters testamentary, or they may be precluded from any benefit of said Estate, and that if such claims be not exhibited within three years from the date of said letters they shall be forever barred,

And the defendant says that the plaintiffs said supposed causes of or causes of action mentioned in his petition constituting

15.

16. his claim or claims against the estate of the said Patrick M. Dillon were not exhibited to the said Executors for allowance within three years from the date of their said letters testamentary by this plaintiff or by any one else and that said claim or claims were not exhibited in any manner for allowance within the said three years, which fact this defendant now pleads in bar of the plaintiff's claim or claims against the estate of Patrick M. Dillon,

And having answered fully he asks to be discharged hence with his costs.

Martin & Bell for Deft.

Verification of the foregoing Answer was sworn to by Wm. Whitney

Ary W Alexander.

And thereupon At the said February Term of said Court for the year eighteen hundred sixty three said Cause was by Consent continued

And afterwards to wit: At the September Term of said Court for the year eighteen hundred and sixty three the following proceedings were had in said Cause, to wit:

January 28th 1864

Indpte. Louis G. Picot Administrator
with the Will annexed of
Ann E. Dillon deceased } Petition

Barton " Bates

Now Come the parties by their respective Attorneys, and Submit this Cause to the Court upon the pleadings and proofs and the Court having duly heard and Considered the Same finds the issues herein joined in favor of the plaintiff, That the Credits taken by said P.M. Dillon of Two Thousand Three hundred and one dollars and twenty two Cents and of seven hundred and Sixteen dollars and Seven Cents in his Settlement of the estate of Ann T. Dillon were fraudulently obtained as Set forth in the petition And that he fraudulently obtained Commissions amounting to One hundred and thirty eight dollars and Sixty Six cents, but was entitled to only One hundred and ten dollars and Seventy four cents And that there was a balance against said P.M. Dillon as Administrator of Ann T. Dillon of Two Thousand five hundred and fifty three dollars and thirty eight cents, One third of which with interest from the Commencement of this Suit, the plaintiffs is entitled to recover of the defendants. And the Court assesses the damages at the Sum of Eleven hundred and thirty four dollars and thirty three Cents

It is therefore Considered by the Court that the plaintiffs recover of the defendants the damages aforesaid as assessed, and his Costs & Charge

17.

18. in this behalf expended. And have execution thereof to be levied out of the goods and chattels Lands and tenements held by the defendant in trust for the devisees and legatees of Patrick M. Dillon

January 30. 1864

Mo for New Trial Cont. Ann E. Dillon's admr. } Motion for a New Trial Continued.
" Barton Bates

And Afterwards to wit: At the February Term of said Court for the year eighteen hundred and sixty four the following further proceedings were had in said Cause to wit:

February 22. 1864

Motion for New Trial Av.d Louis G. Picot Administrator with the will Annexed of Ann E. Dillon dec.d } The defendants Motion for a New Trial being heard and fully Considered
" Barton Bates

by the Court, It is Ordered that the Same be Overruled. Motion in Arrest filed

March 22nd 1864

Mo in Arrest Stricken out. Ann E. Dillon's admr. } The Motion in Arrest of judgment Not having
" Barton Bates

been filed in time required by law, It is Ordered that the Same be Stricken out.

April 15. 1864

Lewis G. Scott administrator
with the Will annexed of
Ann E. Dillon decd } The defendant
" } files an affidavit
Barton Bates } for an appeal

Aff't for appeal filed
Appeal all'd
Bond Waived

And on his Motion by Attorney an appeal is allowed him to the Supreme Court from the judgment herein rendered, and the plaintiff waives any appeal bond herein, and it is Ordered by the Court that Execution herein be Stayed until the further Order of the Court.

Which said Affidavit for an appeal is in the Words and figures following to wit:

Aff't for appeal

"Barton Bates defendant in the above cause being duly Sworn on his oath Says, the Appeal from the judgment of this Court in this Case is not made for vexation or delay but the cause the Affiant believes that the appellant is aggrieved by the judgment and decision of the Court.

Barton Bates

Sworn to and Subscribed before me this 15th day of April 1864.

J. Rice C.C.

On the 5th day of April eighteen hundred and sixty four a Bill of Exceptions was filed in the said cause in the words and

20.

Bill of Exceptions

St Louis Circuit Court, September Term

Louis G. Picot Administrator with the Will annexed of Ann E. Dillon deceased } Bill of Exceptions

vs

Barton Bates

Be it Remembered that on the trial of this Cause by the Court without a jury, the following proceedings were had

Defendant admitted that Ann T. Dillon died in 1837 leaving three children of whom Ann E. Dillon was one, That Ann E. Dillon died Oct 30. 1842.

Plaintiff read in evidence a Certified Copy of letters of Administration with Will annexed of Ann E. Dillon as follows.

Letters of Adm. of Est of Ann E. Dillon

County of St Louis }
The State of Missouri }

To All persons to whom these presents shall Come. Greeting.

Know Ye That the last Will of Ann E. Dillon deceased hath in due form of law been exhibited proved and recorded in the Office of the Judge of the Probate Court for St Louis County a copy of which is hereto annexed, And inasmuch as it appears that Napoleon has been appointed Executor in & by the said last will to execute the same, Therefore

These Letters of Administration with the Will annexed on the estate of said Ann E. Dillon are granted to Louis G. Picot, And to the end that the property of the Testatrix may be preserved for those who shall appear to have a legal right or interest therein, And that the said Last Will may be executed according to the request of the Testatrix we do hereby authorize him the said Louis G. Picot as such Administrator to collect and secure all and singular the goods and chattels rights and credits which were of the said Ann E. Dillon at the time of her death in whosoever possession the same may be found, And to perform and fulfil all such duties as may be enjoined on him by said Will, so far as there shall be property and the law charge him and in general to do and perform all other things which now are or hereafter may be required of him by law. Seal In Testimony Whereof I Peter Ferguson Judge of the Probate Court in and for the County of St Louis hereto sign my name and affix the seal of said Court at Office this Twenty eighth day of July A.D. 1856.

Peter Ferguson
Judge of Probate.

21.

22. I. Peter Ferguson Judge of the Probate Court for the County of St Louis Certify that the foregoing Letters of Administration with the Will annexed of Am on the estate of Ann E. Dillon deceased are duly recorded in my Office this 28th day of July 1856.

Peter Ferguson
Judge of Probate.

Will of Ann E. Dillon

In the Name of God Amen.

I. Ann Eliza Dillon of the County of St Louis and State of Missouri being Mindful of my Mortality do this twenty-fourth day of October in the year of our Lord eighteen hundred and forty two make and publish this my last will and testament in manner following.

First, I desire to be decently buried in the Catholic Church Yard at Carondelet, without any funeral pomp

Second. It is my will that my funeral expenses and all my just debts be fully paid.

Thirdly. I give unto Marie Pommerel all the rest of my property Real or personal Whatsoever, and wheresoever of what nature Kind and quality the Same may be and not here particularly mentioned or described And as well in possession as in expectancy in

nto any land or lands unto which I have any claim or claims, Finally I pronounce the Said Aline Pommerol my only heir

In Witness Whereof I have hereunto setting hand and Seal the day and year before written

Ann E. Dillon (Seal)

Signed, Sealed published and declared by the Said Ann Eliza Dillon as and for her last Will and Testament in presence of us, who at her request, And in her presence And in the presence of each other have Signed as Witnesses to the Same

Joseph Le Blond
James Byrne,
Amable Chatron.

State of Missouri
County of Saint Louis } Be it Remembered that on this Twenty fourth day of July in the year of Our Lord One thousand eight hundred and fifty four before me Peter Stapleton Judge of Probate of the County of St Louis personally appeared Amable Chatron and who being by me duly Sworn on his oath Says, I was present being called into the Convent while I was at work there and saw the deceased as I suppose who was called Josephine tuttle this paper, when She lay in bed and appeared

24. to write, I Subscribed my name as a Witness in the Same room with said person called Josephine, who could have Seen me if She had looked, Joseph LeBlanc & John Byrne were both present at that time but I do not recollect to have Seen them write, the said Josephine who was called Alse Dillon, So far as I recollect did not speak to me at that time.

Amable Chenier

Sworn to and Subscribed before me this 24th July 1854.

Peter Ferguson Judge of Probate.

And on this Twenty fourth day of July in the year aforesaid also appeared Charles B. Lord, who being by me duly Sworn on his oath Saith that he Knew Joseph LeBlanc whose name is Subscribed as a Witness to the foregoing instrument of writing, that he has frequently Seen him write, and he believes he has Seen him write his name, And he has no doubt the name aforesaid is in the proper hand writing of said Joseph LeBlanc who is now dead.

C. B. Lord

Sworn to and Subscribed before me this 24th July 1854.

Peter Ferguson
Judge of Probate

And on the Same day also appeared Arnel Marstellere who being duly Sworn by me on his oath Saith, I was personally acquainted with Ann E. Dillon the Testatrix and was present at the time She Signed her name to the foregoing instrument of writing and Saw her, when She did so. She said at that time that said writing was her will, She was then of sound and disposing mind, I also Saw Joseph Le Blond & James Bryne both of whom I Knew and who are now dead Sign their names as witnesses to Said will, which they did in the presence of the Testatrix,

Arnel Marstellere

Sworn to and Subscribed before me this 24 July 1854.

Peter Ferguson
Judge of Probate.

And on the Same day also appeared Delphy Carlin who being by me duly Sworn on his oath Saith, I personally Knew Joseph Le Blond whose name is Subscribed as a witness to the foregoing instrument of writing and have frequently Seen him write Sign his name, And the Signature aforesaid is in the proper hand writing of Said Le Blond, who is now dead.

Delphy Carlin

Sworn to and Subscribed before me this 24 day of July 1854.

Peter Ferguson
Judge of Probate.

25.

26. I. Peter Ferguson Judge of Probate of the County of St Louis having examined the instrument of writing purporting to be the will of Ann E. Dillon and the testimony of Amable Chartran, Charles B. Lord, Arnel Marstellere and Delphy Carlan, Consider that said instrument is proved to be the last will and testament of Ann E. Dillon deceased.

Given under my hand at St Louis this 24th day of July 1854.

Peter Ferguson
Judge of Probate.

State of Missouri
County of St Louis } ss. I. William F. Ferguson Judge of the Probate Court of the County of St Louis Certify that the foregoing is a true Copy of the last Will and testament of Ann E. Dillon deceased and the Probate thereof as the same now remain of Record in the Office of the Judge of Probate of the County of St Louis in the Record of Letters and Wills Book E. page 238 & following Seal In Testimony Whereof I hereto set my hand and affix the Seal of the Probate Court of the County of St Louis at Office in said County this Twenty eighth day of July in the year of our Lord One thousand eight hundred and fifty six.

William F. Ferguson Clerk.

Plaintiff further Read in Evidence

a Certified Copy of Affidavits, appraisements and Accounts of P. M. Dillon Admr of Ann T. Dillon as follows.

Affts. appr. & Accts of P. M. Dillon Admr of A. T. Dillon

State of Illinois
County of St Louis } ss This day personally appeared before me the Clerk of the County Court for the County of St Louis the undersigned Patrick M. Dillon who being duly sworn upon his oath says that to the best of his knowledge there are the following heirs of Ann T. Dillon deceased now in being to wit: Ann Eliza Dillon, Martha Mark Dillon, and Susan Dillon who reside in the County of St Louis in the State of Illinois, And that to the best of his knowledge that the said deceased died without a will, as far as he knows and believes, And that he will well and truly administer all and singular the goods and chattels lands and tenements rights and credits of the said deceased, And pay her debts as far as the assets which may come into his hands will extend, and the law direct, And that he will make a true and perfect inventory of all the goods and chattels rights and credits of the said deceased And account for and pay over according to law all assets which shall come to his hands possession or knowledge

27.

P. M. Dillon

Sworn to and Subscribed before me this tenth day of November 1837.

Henry Chouteau Clerk

An Inventory of the Estate of Ann T. Dillon deceased.

Real Estate - None - Personal Estate None,
Debts due None, Cash None.
There is due from John T. Nash deceased the
Sum of $ 2.301.22
Interest on the above from Sixteenth day of
Nov 1837 to the 16 day of Nov 1838 } 138.37

We the undersigned Witnesses appointed for that purpose attended and assisted P M Dillon Administrator of Ann T. Nash deceased in making the foregoing inventory

Hugh O'Neil
Thomas Andrews.

State of Missouri
County of St Louis } Before me James I. Purdy a Justice of the Peace within and for the County of St Louis came Patrick M. Dillon who being duly Sworn on his oath says that the foregoing Inventory is a full Inventory and description of all the money goods, chattels and Estate Real and personal books, papers and evidences of debt and title of the deceased, And of all debts due or becoming due so far as he can ascertain them, And that he is not indebted or bound in any Contract

to the deceased at the time of her death.
except as stated in the inventory

P. M. Dillon

Sworn and Subscribed to before me this 29th day of January 1839 James T. Purdy Justice of the Peace St Louis.

No. 1347 Dr. Patrick M. Dillon Administrator

In Account Current with the Estate of Ann T. Dillon deceased. Cr.

1845 Deceased Term		1845 Deceased.	
To Balance due by the Estate of John T. Nash deceased paid account to me by Joseph Gamble Admr de bonis non	2,768. 49	By Amt of my demand allowed by this Court against the estate of John T Nash decd on the 16th Nov 1837 Viz Principal	2.301. 22
To Balance due Admr.	881. 73	Interest on Same from 16th Nov 1837 to 16 Dec 1845 for 8 years 30 days at 6 pct	1.116. 07
		Paid Edward Bates & H. R. Gamble in a Suit of the Estate vs John Pitcher No 1.	50 00
		Paid for Drawing deed from Admr of Estate of John T Nash No 2	5 00
		" Clerk fees No 3	77
		" Notice final Settlement No 4	2 75
		" Advertising Letters of admr. No 5	2 00
		" 2 publications of Order of Court of partition of lands of John T Nash. H T Nash No 6.	20 00

29.

		" Advertisement of sale of estate of Rash affidavit Copies of Notice No 7	13 75
		" Commissions on $3.491.56 at 4 p.	138 66
	$3.650 22		$3.650 22

1845 March Term By Balance in favor of Administrator on final Settlement.	$881 73

State of Missouri
County of St Louis } I, William T Ferguson Clerk of the Probate Court of the County of St Louis Certify that the foregoing is a true Copy of the Affidavit and inventory made by Rachel M. Dillon as Administrator of Ann T. Dillon deceased as the same now remain on file in the Office of the Judge of Probate of the County of St Louis And of the Accounts rendered by said Administrator as the same now remains of record in the Office of the Judge aforesaid And In Testimony Whereof I hereto set my hand and affix the Seal of the Probate Court of the County of St Louis at Office in said County this twenty day of July in the year One thousand eight hundred and fifty five

William T Ferguson Cl.

Plaintiff further Read in evidence

the following Certified Copy of Will of P. M. Dillon.

Will of P M Dillon

I Patrick M. Dillon of the City of St Louis in the State of Missouri do make this my last Will and testament

I direct That my debts be paid out of my personal estate if that be sufficient for the purpose, I direct that my Executors immediately dispose of all my personal property by public or private sale on credit or for cash in hand as they may judge best and that as speedily as practicable they proceed to collect all monies which may be owing to me and all the the proceeds of my personal property which may be sold and having closed the administration of my estate as soon as the law will admit they are directed to pay and deliver over to the Trustees hereafter named all monies and effects belonging to my estate which may remain in their hands.

I devise and bequeath to Ferdinand Provenchere and Barton Bates during their joint lives and to the survivor of them and his heirs all my Real estate wheresoever situated and by whatsoever title held together with all moneys and effects which may be in the hands of my Executors after the administration of my estate shall be closed, intending hereby to embrace every description of Real Estate which I may be

in any Money entitled at the time of my death And every description of personal property or effects which may remain after my estate shall be settled up in trust that the said Provendrie and Bates shall at the times and in the manner and upon the terms they shall judge best for my estate sell and convey all my real estate which may be out of the limits of the Township of St Louis, and shall as speedily as may be practicable reduce into cash all effects which they may receive from my Executors And also reduce into cash the amount of such sales of Real Estate, And the said Trustees may if at any time they think it for the interest of my estate sell at the times and in the manner and upon the terms they shall judge best the following Real Estate within the Township of St Louis in the County of St Louis, That is a lot or piece of ground in the City of St Louis bounded as follows, Beginning at the intersection of South line of Stickney Street with the West line of St Ange Avenue, And running thence Southwardly along St Ange Avenue to Park Avenue, Thence Westwardly along the Northern line of Park Avenue four hundred & Seventy Seven and a half feet, Thence Northwardly parallel to St Ange Avenue to Stickney Street, Thence Eastwardly along Stickney Street to the

beginning, Or Said Trustees may lease said lot or piece of ground as it is hereafter provided — other lands within the Township of St Louis in the County of St Louis shall be leased, And the Said Trustees shall from time to time as they receive any money under this trust either from the Sales of property or otherwise proceed to ~~Lease~~ Loan the Same on good Security for the best interest that may be procured,

The Said Trustees shall also proceed to Lease all the other Real Estate within the limits of the Township of St Louis to proper tenants for any term of years Not exceeding twenty, and upon the most favorable terms they can procure, of which they are to be judge. And shall collect and receive the rents issues and profits thereof

The Said Trustees shall divide each year the amount received for interest upon loans & for rents of Real Estate into as many Shares of equal amount as will allow one Share for my wife, And one Share for each of my children who shall be living at the time of my death, And shall pay over Such Shares each year to my Wife and Children respectively, the Shares of Such of the children as may be minors being paid to their guardians,

If any of my children Should die without issue the Share of Such child in the Said income

34. shall be divided among my other children
Upon the death of my wife the share of the
interest and rents payable to her shall be equally
divided among my children, The shares in the
said income which are devised to my daugh-
ters who are at my death married who
may thereafter be married as well such shares
as their own original shares of the said in-
come as the portions which may come to them
from my Wife's share or from any child dying
without issue are to be annually payed to
them for their sole and separate use free from
any control or claim of their husbands, And
it is my express will that the annual income
which may accrue to my children shall
not in any mode be anticipated nor shall
the same be in any way assigned transferred
conveyed or incumbered. And in case either
of my children, and if a daughter whether
married or unmarried and whether with
or without the consent of her husband shall
make any assignment conveyance or incum-
brance of his or her interest in my estate or
any part thereof or of his or her interest of
such daughter in the trust fund and the income
thereof or the interest of such son in the trust
fund and the income thereof shall immediately
cease and determine, And such share and

And the income thereof shall be held by the Trustees, and shall accumulate during the life of such child and upon his or her death shall be paid over disposed of & conveyed as is herein directed in case of the death of any of my children. This Trust is to continue during the lives of my wife and children, but when any of my children shall die leaving issue the Trust as to that child's share shall cease, and such issue shall immediately take in full absolute legal title the share of the Trust fund and property to which such child was then entitled, and the Trustee shall convey it accordingly, But such death and conveyance shall not revoke any lease made by said trustees under the power herein before granted, the term of which was not then expired,

If all my children should die without issue the Trustees shall convey the trust fund and property in such manner and to such persons as may be directed by the last will of my last surviving child, provided such child shall be of the age of legal majority, and such surviving child is hereby authorized to devise and bequeath the said Trust fund and property,

I appoint Edward Bates and Edward Walsh Executors of this my last will and testament

In Testimony Whereof I have hereunto set

my hand this the Twelfth day of January in the year eighteen hundred and fifty.

P. M. Dillon —

The above was Signed by Patrick M. Dillon who published and declared the Same to be his last will and testament in our presence he being then of sound mind, And we at his request and in his presence and in the presence of each other Subscribed our names as witnesses thereto, this Twelfth day of January in the year eighteen hundred and fifty

Archibald Gamble
Ed Maren.

State of Missouri
County of St Louis } Be it Remembered that on this Twenty Seventh day of January in the year of Our Lord one thousand and eight hundred and fifty one before me Peter Ferguson Judge of Probate of the County of St Louis personally appeared Edward Maren who being duly Sworn on his oath Saith, 'I was present and Saw Patrick M Dillon the Testator Sign his name to the foregoing instrument of writing and heard him publish and declare the Same to be his last will and testament, I subscribed my Name as a Witness thereto as did Archibald Gamble the other witness in the presence of said Testator, And at the time of so doing he said Patrick M. Dillon was of sound and disp

ting mind to the best of my Knowledge observation and belief.

Ed Haven.

Sworn to and Subscribed before me this 27th day of January in the year aforesaid.

Also appeared Archibald Gamble who being by me duly sworn on his oath says that he does not recollect when or where he witnessed the above instrument or seeing Wm Dillon sign the same, but he knows that he would not have witnessed the same unless he had seen him do so, And he believes that he signed his name as a witness in the presence of Said Patrick M. Dillon, he does not recollect hearing Said Dillon declare the same to be his will, but is satisfied he must have done so as he this affiant knew it was a will, and Said Dillon was of sound and disposing mind at the time of executing the same as he knew him many years and never knew him otherwise, And that having frequently seen him write and sign his name he believes the signature to Said will to be in the hand writing of Said Dillon.

Archibald Gamble

Sworn to and Subscribed before me this 28th day of January 1851

Peter Ferguson Judge of Probate.

I, Peter Ferguson Judge of Probate of the County of St Louis having examined the preceding instrument in writing purporting and the Testimony of Edward Staren and Archibald Gamble, Subscribing Witnesses thereto Consider that said instrument is duly proven to be the last will and testament of Patrick M. Dillon deceased. (Seal) In Testimony Whereof I hereto set my hand and affix the Seal of the Probate Court of the County of St Louis at Office in said County this Twenty eighth day of January in the year of our Lord One thousand eight hundred and fifty-one.

Peter Ferguson Judge of Probate.

I, Patrick M. Dillon being sick in bed at my own house in the City of St Louis but in full possession of my mind and memory do desire to make some alteration in the provisions of my last will and testament which bears date on the Twelfth day of January eighteen hundred and fifty and for that purpose do make and declare this Codicil to the said Will hereby confirming the said Will in all particulars not herein differently expressed,

Instead of the power given by said

will to the Trustees therein named to sell the lot of ground in the City of St Louis described in said will as beginning at the intersection of the South line of Hickory Street, with the West line of St Ange Avenue & desire to enlarge their power to sell and do hereby give and grant to said Trustees full power in the manner and for the purpose mentioned in said Will to sell not only the lot therein described, but also all the land I may own or be entitled to within the following bounds in the City of St Louis, that is to say all lying between Gratiot Street on the West and St Ange Avenue on the East and between Park Avenue on the South and Chouteau Avenue on the North and also all lying Eastward of St Ange Avenue and between Chouteau Avenue on the North and Hickory Street on the South,

In Testimony Whereof I have signed and sealed this instrument as a Codicil and part of my last Will and Testament, done on Sunday January 12. 1851

P. M. Dillon (L.S.)

Signed Sealed published and declared by the above named P. M. Dillon as a Codicil and part of his last will in presence of the undersigned Witnesses, who at the request of the Testator in his presence and in presence of each other

have signed the same as witness fully believing the Testator to be of sound and disposing mind Done in the back Chamber of W. Dillon this 12th day of January 1851.

Sarah A Eads
Richard Madigan.

State of Missouri }
County of St Louis } Be it Remembered that on this Twenty fourth day of January in the year of our Lord One thousand eight hundred and fifty one before me Peter Clayton Judge of Probate of the County of St Louis personally appeared Sarah A Eads and Richard Madigan who being by me severally duly sworn on their oath say

"We were present and saw Patrick M. Dillon the Testator sign his name to the preceding instrument of writing and heard him publish and declare the same to be a Codicil to his last Will and Testament and that we subscribed our names as Witnesses thereto in the presence of the Testator and of each other And that at the time of so doing he said Patrick M Dillon was of sound and disposing mind to the best of our Knowledge observation and belief

Sarah A Eads and
Richard Madigan

Sworn to and subscribed before me this Twenty fourth

day of January 1851.

Peter Ferguson
Judge of Probate.

I, Peter Ferguson Judge of Probate of the County of St Louis having examined the preceding instrument of writing and the Testimony of Sarah A Eads and Richard Madigan Subscribing witnesses thereto Consider that said instrument is duly proved to be a codicil to the last will and testament of Patrick Mc. Dillon deceased, in said Codicil referred to, Seal In Testimony whereof I hereto Setting hand and affix the Seal of the Probate Court of the County aforesaid at Office in said County this Twenty eighth day of January in the year One thousand eight hundred and fifty one.

Peter Ferguson
Judge of Probate.

State of Missouri
County of St Louis } ss. I, William F Ferguson Clerk of the Probate Court of the County of St Louis in the State of Missouri Certify that the foregoing is a true Copy of the Last Will and testament of Patrick Mc. Dillon deceased And of the Codicil to said Will and of the Probate thereof as the same now remains on file in the Office of the Judge of Probate

42 of the County of St Louis and as the same now remains on record in the Office of the Judge aforesaid in the Record of Letters and Wills Book D. page One hundred & Ninety three & following. Seal In Testimony Whereof I hereto Setting hand and affix the Seal of the Probate Court of the County of St Louis at Office in Said County this Thirtieth day of January in the year of our Said One Thousand eight hundred and fifty one

William F Ferguson Clerk

Filed and Recorded February 4. 1851

S. D. Barlow Recorder.

(Note - No Certificate of Recorder attached - S. Rice Ck)

Plaintiffs gave due proof of the Bond of P. M. Dillon as Administrator of Ann T. Dillon.

Defendant admitted that will of Ann E. Dillon was admitted to Probate on July 24th 1854, Also that Ferdin and Provencher one of the Trustees appointed by the will of P. M. Dillon duly renounced his Trustee ship. Plaintiff further Read in evidence the following abstract and demands allowed against the estate of John T. Nash dec'd

(Not on file)

Abstract of Demands Vs Est J T Nash.

To the Reading aforesaid Abstract defendants in evidence Defendant objected on the ground that it was irrelevant And to the ruling of the Court admitting said abstract in evidence defendant duly excepted.

Here Plaintiff rested his case.

On behalf of defendant Plaintiff Admitted that Patrick Mc. Dillon died in January 1851,

Defendant proved that on the 29 January 1851 Letters Testamentary & of Administration on P. Mc Dillon's Estate were duly granted by the Probate Court of St Louis County to Edward Bates and Edward Walsh who duly qualified as such Executors, Defendants then read in evidence the following Notice and proof of Publication by said Executors.

Notice by Adm. of P. Mc Dillon Dec.

Administrator's Notice

Notice is hereby given that Letters of Administration with the Will annexed on the Estate of the late Patrick Mc. Dillon of St Louis deceased bearing date the 31st day of January 1851 have been

granted to the undersigned by the Judge of the Probate Court of St Louis.

All persons having claims against the said Estate are required to present same for allowance in one year from date of said ~~allowance~~ Letters or they may be precluded from any benefit of said Estate, and if such claims be not presented within three years they will be forever barred

Edward Bates
Edward Walsh } Administrators

State of Missouri
County of St Louis } Personally appeared before me the undersigned a Justice of the Peace within and for the County aforesaid Richard Phillips of the firm of R. Pickering & Co. Publishers of the St Louis Union of the County & State aforesaid who being duly sworn deposed & said that the annexed advertisement was published in the St Louis Union the time below specified on the following days and in the following Numbers Viz:

July	14. 1851	No	29
"	21 "	"	30
"	28 "	"	31
Mar	7 "	"	32

Richard Phillips

Sworn to & Subscribed before me this 3 day of

May 1851

Mann Butler Justice

Filed 10 March 1852.

State of Missouri

County of St Louis } ss. I, Milton H. Wash Clk of the Probate Court of the County of St Louis Certify that the foregoing is a true copy of the Notice of granting of letters to Edward Bates and Edward Walsh on the Estate of Patrick M. Dillon deceased, published in the St Louis Union and the affidavit of Richard Phillips one of the Publishers of said paper as the same remain on file in the Office of the Judge of Probate of the County of St Louis Seal In Testimony Whereof I hereunto set my hand and affix the Seal of the Probate Court of the County of St Louis at Office in the City of St Louis this 14th day of December 1863.

Milton H. Wash Clk.

Defendant Rests.

Defendant then offered the following instructions as Declarations of Law in the Case.

Defts Ins. Refused 1. If said Patrick M. Dillon in procuring and effecting said final Settlement mentioned in the petition was guilty of no fraudulent act or Acts Except such as appear are alleged by plaintiff to appear on the face of the account filed by him said Dillon in court his final Settlement in the the

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Probate Court only other written documents filed and made a record in said Court at the time of such final Settlement, but if said accounts or other written documents so made of Record do show fraud on the part of said Patrick M. Dillon, yet in such case the legal representatives of plaintiffs testator did in contemplation of law know of said fraud at the time of such Settlement.

If therefore the Court find that there was fraud in such final Settlement but that such fraud was contained only in such accounts or other written documents made of record as aforesaid the Court will find for defendant

2. The allowance by the Probate Court in the final Settlement with the Administrator Dillon of the demands and claims mentioned in the plaintiffs petition was a judgment of said Court in favor of said Dillon and against said Estate for the amount of such demands And the only remedy against such judgment of allowance was by appeal and in the manner & within the time prescribed by the Statute

3. If the Court find that the alleged causes of Action mentioned in the petition accrued more than ten years prior to the institution of plaintiffs action the Court will render

judgment for defendant.

4. If the Court find that the cause of action mentioned in the petition accrued more than five years prior to the beginning of the action the Court will give judgment for the defendant.

5. Where a Settlement is made by an administrator with a Probate Court strictly according to the Account filed by the Administrator and no false or dishonest inducements, representations or practice was employed by said administrator either toward the Court or toward any of the parties in interest to procure said Settlement and no suppression of items in said Account is shown in such Case there is no fraud.

6. If the Court find that Edward Bates & Redmond Walsh Executors of Patrick McMillan gave due legal notice of their appointment as said Executors and that all persons having claims against said Estate must present them within three years after such public notice made or they would be forever barred, and if the Court shall further find that the cause of action mentioned in the petition accrued at any time prior to the expiration of three years after such public notice then the Court will find for the defendant

Which instructions were refused by the Court to which ruling of the Court defen-

48. dant then and there duly excepted.

In due time the defendant filed his motion for a New Trial in the words and figures following to wit:

Mo for New Trial

Defendant Comes and moves the Honorable Court to set aside the judgment rendered in this Case and grant a New Trial for these reasons to wit:

1 The judgment is against the law in the Case.

2 The judgment is against the evidence in the Case.

3. The Evidence was insufficient to authorize the judgment.

4. The Court erred in admitting irrelevant and improper evidence offered by plaintiff and objected to by defendants.

5. The Court erred in refusing proper & legal instructions offered by defendants.

Ang W Alexander
Defts Atty.

Which motion the Court Overruled to which ruling of the Court Defendants then and there duly excepted

And on the day aforesaid entering the defendants filed his motion in arrest of judgment in the words and figures following to wit:

Mo in Arrest

The defendant moves the Honorable

Court to arrest the judgment judgment of the Court in this Case for the reason that plaintiff ought to have made other parties defendants together with this defendant because this defendant as appears by the record in this case is a mere trustee in the premises

Aug W Alexander
Defts Atty.

Which Motion the Court Ordered to be Stricken out because the Same was not filed in due time, To which Order of the Court defendant duly excepted, And for as much as the Matters recited herein are not of record, Defendant Now brings this his Bill of Exceptions & prays the Court to Sign the Same And make it part of the Record in the cause which is done.

James C. Moodey
Judge.

State of Missouri
County of St Louis } ss I the undersigned Clerk of the St Louis Circuit Court Certify the foregoing to be a True and Correct Transcript of the Record and Proceedings of Said Court in the case of Louis G. Picot Administrator with the Will Annexed of Ann E. Dillon deceased against Barton Bates, as the Same remain of Record & on file in my Office

In Testimony Whereof I hereto set

50. Setting hand and affix the Seal of said Court at Office in the City of St Louis this the fifth day of May AD Eighteen hundred & sixty-four.

S. Rice Clk.

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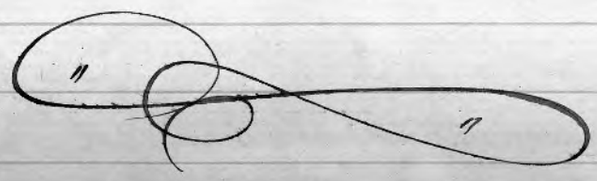

(8) 70

March Term, 1866.

Louis G Picot admr
with the will annexed
of. Ann E Dillon
appellee

vs

Barton Bates
appellant

Transcript to Supreme Court

Filed Sept 27. 1866 A.W. Meade
Whittelsey attx
for appelle

Alexander for
appellant

$10.00/100 paid by Appt.
$15.20 paid by Defendant

Oct.
1866 Apr. 17 Supplement to Record filed
" " 23 Jan'ler filed
" " 25 Aug to Sub. Sts Hrs filed
" May 14 RR
" " 15 Motion for re-hearing filed
" " 28 " " Overruled

Louis G. Picot, Administrator of Ann T. Dillon vs. Barton Bates, Trustee

Respondent

Appellant

IN SUPREME COURT,
TERM, 18

AND now comes the said Appellant and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave ~~to the Jury~~ improper and illegal instructions.
4. That the Court refused to give ~~to the Jury~~ proper and legal instructions offered by Appellant
5. That the ~~verdict~~ finding of facts by the Court was against the evidence.
6. That the verdict was against law.
7. That the ~~verdict~~ finding of facts by the Court was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellant
10. That said Court overruled the motions for a new trial, and in arresting judgment made by Appellant.
11. That said Court overruled ~~in not~~ the demurrer pleaded by Appellant
12. That the Petition does not contain facts sufficient to constitute a cause of action.

Aug. W. Alexander
Appellants Atty.

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court below the St. Louis Circuit Court, in said cause, as assigned by said Appellant

Louis G. Picot administrator of Ann T. Dillon deceased

222

Supreme Court
October Term 1864.

Louis G. Picot, administrator of Ann T. Dillon
Respondent
vs.
Barton Bates, Trustee
Appellant.

Assignment of Errors.

Filed Oct 20. 1864
A. W. Mead
Clk

Aug. W. Alexander
Appellants atty.

No 217 Abstract of Demands Established against the Estate of John T. Nash, deceased, Patrick M. Dillon, Administrator de bonis non.

	7th class.
Patrick M. Dillon, Admr of Ann T. Dillon 16th November 1837	$2301 22

State of Missouri
County of St. Louis } ss. I, N. S. Lindsey Clerk of the Probate Court of the County of St. Louis, do hereby certify that the foregoing is a true copy of the abstract of demands Established against the Estate of John T. Nash, deceased, as the same appears in Abstract of Demands Book ~~A~~ A Page 7.

In witness whereof I have set my hand and affix the seal of said Court at office, this 17th day of April A.D. 1866.

N. S. Lindsey
Clerk

This certified transcript is hereby admitted to supply the deficiency in the record in case in Supreme Court, No. 84, Louis G. Picot, admr with will annexed of Ann E. Dillon vs. Barton Bates

Aug. W. Alexander
Applts Atty.

Whittelsey
Atty for Respt

No. 84.

Supreme Court

Louis G. Picot, admr c. t. a. of Ann E. Dillon Respt
vs.
Barton Bates Applt.

Agreed Supplement to record.

Filed April 17. 1866
C. T. Fitzhugh
Clk

John T. Nash
Copy of Abstract
$0.75

In Supreme Court

Louis G. Picot,
admr. cum
testamento annexo,
of Ann E. Dillon
Respt
vs.
Baston Bates
Applt.

Appellants Brief.

I.

The Court erred in overruling the demurrer.

1. The will of Patrick M. Dillon shows that while the naked legal title vests in Baston Bates, the equitable & beneficial title vests wholly in the two daughters of Dillon & their issue. A decree in this case against the Trustee would have to be satisfied out of the estate of Dillon's heirs exclusively. But such a decree cannot be rendered without bringing them into Court. Their estate cannot be taken away for any alleged

misconduct of the ancestor, not growing out of nor connected with the Trusteeship of Bates, without notice to them & opportunity to defend.

As suggested in the answer, the defendant has & can have no knowledge whatever, in his fiduciary character (in which character alone he is sued), of any of the facts in the case as is shown by the will which grants & defines his powers. He is in no manner a personal representative of Dillon. The will makes Edward Bates & Edward A. the personal representatives.

For Example, what knowledge has defendant in his fiduciary character as to how how many heirs Ann T. Dillon had & who they were? The death of Ann T. Dillon & Ann E. Dillon & the final settlement complained of all occurred, according to the Petition, while Defendant was legally (& it may be actually) an entire stranger to Patrick M. Dillon, — as he is yet a stranger to Ann T. & Ann E. Dillon. Now, there is nothing but the will of P. M. Dillon which can grant Defendant any interest or rights or which can, in contemplation of law, give him any knowledge

or make him the personal representative of Dillon, respecting the matters set forth in the Petition.

If the record shows that defendant had no knowledge, in contemplation of law, as to who & how many were the heirs of Ann T. Dillon, then clearly the others heirs, whom the law presumes to know, ought to be made parties. Suppose, that in fact there were more than three heirs — then this plaintiff would be entitled to less than one third. As this is a proceeding in chancery it is clear that the other parties in interest, or rather the real parties in interest should be brought into court.

2. The Petition shows on its face that the alleged fraud, if any, occurred more than five years, namely thirteen years, before the beginning of this action. Rev. Statutes 1048, Act of limitations Art. II. sec. 3 - last clause.

"Wherefore it is insisted in the present case that it ought to be charged in the bill that the fraud was

discovered within six (five) years, if the fact were so." 3 Peere Williams Rep. 1144. If the fact were not so, this action is barred by the Statute of Limitations.

The discovery of the alleged fraud is made by our Statute, as it was by the British Statute, a distinct, material & traversable fact. Its averment would have enabled defendant to plead another & totally distinct matter of defense. If such new averment had been disproved, it would have been fatal to plaintiff's case. It may be added that a failure to plead an independent & material allegation, is not cured by verdict. 2 Douglas Rep. 683 3 Coun. Rep. 513 Buxendin vs. Sharp. 2 Salkeld. This last requires the State of mind to be pleaded & is stronger than the case at bar. See also 13 Vermont Rep. 70.

II.

There is no fraud.

1. To make out a case of fraud plaintiff must show first, a claim ~~allowed [illegible] to which the~~ Dillon to which he is not in law or Equity entitled. Second, the judgment of the Probate Court allowing such claim.

Third, some trick, some cheat practiced by Dillon either on ~~the~~ some of the parties in interest, or on the Court which allowed the claim, by which an advantage was gained which, but for the deception, could not have been gained & by which, — at least ~~in it~~ as to the parties in interest, — the parties or some of them were actually deceived & had a right to be deceived. — These three facts must coexist to make fraud.

First, the evidence in the case does not show that either of the claims objected to, was illegal & inequitable.

As to the commissions alleged to have been received by Dillon, the Statute in force at free at that time, allowed administrator 6 per cent. commissions &, in addition, vests in the Probate Court the discretionary power to allow

Rev. Stat. of 1835 p. 61. Sec. 15
" " 1845 p. 104. " 27

for specified services, to make "such additional allowance" as it "shall deem reasonable."

In the absence of all evidence touching these services this Court will not review the discretion of the Probate Court. Nor will this Court disturb the allowance given by the Probate Court for any apparent irregularity in the mode of stating the allowance.

As to the Nash claim the evidence is wholly insufficient. The only evidence seems to be the Abstract of demands of Dillon against the Nash estate & the Inventory filed by Dillon of Ann T. Dillon's estate. But the Abstract ~~refers only~~ professes only to contain the demands of Dillon in his fiduciary character as admr. of Ann T. Dillon & presented while he was admr. de bonis non of Nash. What personal claim he may then have had, especially what claim he may have afterward acquired by assignment or otherwise, this Abstract does not show or profess to show.

Again, as to the Inventory of Ann T. Dillon's estate there is no presumption of law that an Inventory is complete, especially in respect of charges against the estate. While it may be true that Dillon's claim was illegal, the evidence does not prove it.

II.

Second, the second essential element in a case of fraud is, proof of the Probate Court allowing these claims.

On this point there is no evidence whatever. The only evidence pointing toward it is the account rendered. But, first, there is no evidence of the order or judgment of the Probate Court allowing and approving the account.

Second the testimony of the Probate Judge shows positively that this is not a final settlement but an account rendered. How many accounts were afterward rendered before the final settlement & whether, if there is an illegal claim set forth in this account, it was afterward reviewed & corrected, does not appear. This Court will not presume fraud in an administrator nor improper action in the Probate Court.

To make out this second element of his alleged case of fraud the plaintiff had to produce, first, the final settlement & second the judgment of the Probate Court allowing the final settlement. He has produced neither.

Third. If the Plaintiff had

estab-lished the first two elements of fraud, he was bound also to show some trick practices by Dillon on the Court or some party in interest by which he gained an advantage not otherwise to have been gained & by which the Court or a party in interest was in fact deceived & had a right to be deceived.

He has not furnished evidence proving or tending to prove that any party or the Court was deceived or had a right to be deceived or that Dillon practiced any trick whatever.

The charge of fraud is therefore utterly unsupported by evidence.

Since there is no evidence touching the final settlement nor the judgment of the judgment of the Probate Court allowing the claims complained, it seems hardly necessary to inquire how the case would stand if such evidence had been given. But the appellant will submit the following suggestions.

1. If it were shown that the consumptions & claims mentioned-

in the Petition were allowed by the Probate Court, then, since such allowance is a judgment of the Court, this Court will be presume it to be correct. The evidence on which the Probate Court rendered the judgment, is not ~~presented~~ preserved for the inspection of this Court; & in its absence this Court will presume that the evidence before the Probate Court was satisfactory & sufficient.

2. To set aside the judgment of the Probate Court on the ground of fraud, where no evidence is presented except a part of the judgment itself, which was as open to the inspection of the Probate Court as it is to this Court, would be to impute to the Probate Court itself a complicity with the alleged fraud of Walton.

3. This Court, in the absence of the Evidence on which the Probate Court acted, will presume not only that there was no fraud but that the judgment was actually right.

4. Mere error does not prove fraud.
Neither does the illegality of a claim prove fraud.
12 Vesey 388 & 391. 20 Mo. Rep. 87. 23 Mo. Rep. 95. — Same 236.

3. If there is no fraud the action fails on two grounds:
First. As this is not an appeal from the judgment of the Probate Court, that judgment cannot be disturbed for except for fraud.
Second. Fraud is the gist of the action. If that fails, his case fails.

III.

This action is barred by the statute of limitations.
5. The statute applies to this case. Kane v. Bloodgood 7 Johns. Chancery Rep. 110. 112 & 113. 117. 121. 127. 27 Mo. Rep. 591. 28 Mo. Rep. 97. 8 Mo. Rep. 286.
The case in 12 Mo. Rep. 3 has no application that was an action to compel admr. to render account, which is exclusively an action in equity.

If the statute runs against a distributee & if it is the duty of even a creditor is bound to have admr. appointed, then this distributee is barred.

Aug. W. Alexander
Applts. Atty.

* See 2 Kent Comm 135 ed. of 1832

No. 84.
In Supreme Court

Louis G. Picot,
Admr &c
vs.
Barton Bates.

Appellant's
Brief.

Filed April 25 1866
O. T. Fitzback
Clk

Aug. W. Alexander
Appltt's atty

Ann E. Dillon's Ex'r | Supreme Court
v | Mar. T. 1866
Baston Bates |

The petition in this case alleged that Ann T. Dillon died in 1837 leaving issue Ann E. plaintiffs testatrix, Martha, and Susan, — that P. M. Dillon her husband took out letters upon her estate, — that as Adm. he collected $2768.49 in the year 1845. from estate of John T. Nash. — That at Decr Term 1845. he made a fraudulent settlement of said estate, by crediting himself with $2301.22 for a demand due him by the estate of said John T. Nash, being the same item with which he had charged himself, and also with the sum of $116.49/100 interest, and that two items were fraudulently charged, had never been allowed against estate of said Ann T. Dillon — that he fraudulently charged commissions &c specifying the items —
— that the testatrix died Oct. 30. 1842, leaving a will which was probated July 24. 1852, but no letters were granted until July 28. 1856, when they were granted to plaintiff —
— That P. M. Dillon, died, leaving a will probated Jany 28. 1857, by which he devised his estate to defendant one Provencher who renounced as trustees for the children of P. M. Dillon.
— that executors were appointed who qualified, and afterward transferred the estate to defendant. — the petition then shows how the issue of P. M. D. took under the will, and were represented by defendant and were not material parties to the suit

Petition then prayed that, the settlement

be concealed and that to avoid circuity of action he might recover the share of Ann E. Dillon in her mothers estate &c Suit begun Aug 12. 1858

Defendant demurred, 1. No cause of action 2. Suit should have been against personal representatives — Demurrer overruled and exception saved — Defendant answered and traversed the petition, — and then pleaded the limitation of the administration Act, three years and often years.

The case went to trial. Plaintiff showed Letters ~~of Adm to P. M. Dillon~~ on estate of Ann E. Dillon c. t. a to the plaintiff granted Aug 28. 1856. — Will of Ann E. Dillon devising all her property to Marie Pommerel ~~probated~~ dated Oct 4. 1842, probated July 24. 1854. — She died Oct. 30. 1842 Administration of estate of Ann T. Dillon, Affidavit of heirs made &c Nov 10. 1837, showing that Ann E. Dillon was one of the three children of Ann T. Dillon — Inventory and accounts — Settlement of Dec T. 1845, showing fraudulent credits &c — Will of P. M. Dillon devising his estate for the benefit of his children to trustees, defendant &c

T. M. Dillon died Jany 1857. letters granted Jany 29. 1857. proof of notice of letters made

~~The court found the~~

The defendant asked several instructions upon the effect of P. M. Dillons settlements, & the question of limitations

The court found the settlements fraudulent, made the proper corrections and gave judgment for Ann E. Dillons share of her mothers estate

motion for new trial filed and overruled — motion in arrest, filed but stricken out because not filed within four days. — and appeal

Dillon's Adm^r
v
Bates

Respondents Brief.

I. The demurrer was properly overruled. It was not made on account of defect of parties. R.C. 1855 p 1231. s 6. 110. The objection was, no cause of action. The petition showed, that there was no person capable of suing until plaintiff was appointed Adm^r of Ann E. Dillon in 1856, and then the administration of Patrick M. Dillon had been closed, and the defendant holding as trustee of an express trust, the beneficiaries were not material parties R.C. 1855 p 1217. 1218. As they took under his will, they had no interest in questioning his acts.

II. P. M. Dillon was as administrator of his wife, trustee for his children for their shares of her personal estate. For that estate and the share coming to Ann E. Dillon, as she died before it was received no one could sue ~~to~~ but her personal representative, and there was no personal representative until plaintiff was appointed Adm^r in 1856 at which time the administration of P. M. Dillons Estate had closed and the assets turned over to defendant.

The statutes of limitations therefore do not apply to this case.

P. M. Dillon was trustee, the plaintiff is only following the trust estate, and seeking an account thereof in the hands of defendant. When he made his settlement in 1845, Ann E. Dillon was dead, there was therefore no person in being capable of suing until 1856, when letters were granted, so that no cause of action accrued to any person capable of suing, or who

could be barred. Ang. Sim C.J.
McDonald v Walter 1 Mo 726, Reilly v Chouquette 18 Mo 200. ~~Richard v Maryland Ins. Co. 8 Cranch 84~~ Murray v East India Co. 5 Barn. & Ald. Polk's Adm'r v Allen 19 Mo. 467 Miller v Woodward 8 Mo. 169. Finney v State to use v 9 Mo 227.
(An administrator is a trustee, and cannot set up the statute of limitations in bar of persons entitled to distribution Ruby v Barnett 12 Mo. 3. 8 De Couche v Santee 3 John. C. 190 Kane v Bloodgood 7 John C. 126.)

Montgomery v Hernandez 12 Wheat. 129 Chambers v Smith's Adm 23 Mo. 174 McDonald v Walter 2 Mo. 48.

Trustee cannot plead statute Ang. Sim s. 168 in cases of fraud Ang Sim. s. 170. Michoud v Girod 4 How. 503, 561.
The statute R.C. 1855 p 1048 s 3. sd. 5, provides that an action for relief upon the ground of fraud shall not be deemed to have accrued until the discovery of the fraud by the aggrieved party.
Until then was some person capable of suing there could be no person who could discover the facts, there was no person capable of making demand or attacking the settlement until plaintiff qualified, as administrator, and he sued within two years.
The judgment of the court upon the facts, was for the right party.

Whittelsey
for Respt.

Ang Lim Ch. 7.
18 Mo. 220 Reilly v
19 " 467 Polk v
8 " 169
9 " 227
12 " 3+8
23 " 174

C

Dillons' Adm

v

Bates

Respts Brief
Whittelsey
for Respts

Filed April 25. 1866
O. T. Fellback
Clk

In Supreme Court.

Louis G. Picot,
Adm^r
vs.
Barton Bates

Statement of Case.

Plaintiff alleges that Ann T. Dillon died in 1837 leaving three children as her heirs & distributees, viz: Ann E. Dillon, plaintiff's testatrix, Martha N. & Susan F., that letters of administration were granted on her estate to Patrick M. Dillon, her husband, who as such administrator, collected $2768.49/100 from the estate of John T. Nash in 1845 & in December term of same year made final settlement with the St Louis Probate Court. This final settlement plaintiff alleges to be erroneous & fraudulent in this that said Patrick charged the estate of said Ann T. with $2301.22/100 principal & $1116.7/100 interest which sums

he claimed against the Estate in his final settlement. Said final settlement is alleged to be further fraudulent in this that said Dillon in said final settlement claimed for Commissions 4 per cent on the sum of $3491.51/100 whereas only $2768.49/100 as is alleged was received by him.

Said Patrick died leaving a will which was probated January 28th 1851 by which he devised to his whole estate to Barton Bates & Ferdinand Provenchere as Trustees. Provenchere duly renounced the trust whereby Barton Bates became & is sole trustee of said estate for the benefit of Dillon's said heirs. By said will Edward Bates & Edward Walsh were made Executors who on the day of February 1851 gave due legal notice of their being appointed & qualified & that all persons having claims against said Patrick's estate were required to present them within three years or they would be forever barred, — as required

by law.

Ann E. Dillon died Oct. 30th 1842 leaving a will whereby she devised her whole Estate to one Marie Pommerel which will was probated July 11th 1854. Letters of administration were granted to plaintiff July 28th 1856 & this action was instituted on the day of 185

Martha N. Dillon died before her father leaving issue who are beneficiaries under said Patrick's will of the estate held by defendant as trustee. Susan F. married Dr. Charles W. Stevens & with her issue takes an use in said estate.

Plaintiff as administrator of Ann E. Dillon prays to set aside the final settlement of said Patrick as being fraudulent & that the settlement be corrected as to the commissions ~~allowed~~ claimed & that it be further corrected as to the claim of $2307.22/100 & $1116.1/100 ~~claimed~~ against said Ann E. Dillon's estate & that defendant be adjudged out of said trust estate to pay him one third part of said amount.

defendants first plea was a demurrer. ~~was a demurrer~~ which was overruled. Defendant then answered denying fraud & ~~denying~~ putting in issue generally the allegations of the Petition & pleading three ~~Statutes~~ & Limitations in bar of the action.

Being a case in Chancery it was tried by the Court & defendant ~~asked~~ offered instructions as declarations of the law of case which the Court refused & gave ~~pd~~ a decree in favor of Plaintiff & the case comes here by appeal.

The only evidence touching the alleged fraud consists in an abstract of demands of Patk Mc Dillon as administrator de bonis non against Estate of John T. Nash, the inventory of Estate of Ann T. Dillon by said Patrick as her administrator & an account rendered by him to the Probate Court as such administrator.

Aug. W. Alexander
Appltt's Atty.

Pick. adm'r
vs
Bales

Statement of
Case by Appellee

Filed April 25 1866
C. T. Fitzpatrick
Clk

Picot Admr of Dillon Respondent
against
Bates Trustee of Dillon Appellant

The Respondents submits that the statute of limitations does not apply to this case, in which the party whom he represents died before she had any claim for her part of her mothers estate and which the party whom the appellant represents collected in after her death. Even in the absence of fraud on the part of the ~~appellant's testator~~ the statute did not begin to run until the granting of letters of administration to respondent.

Although the daughter bequeathed her property – the legatee could not sue –

The bequest of a legacy transfers only an inchoate property to the legatee, to render which complete the assent of the executor is requisite. Even in case the legatee had the possession of the property bequeathed it must be surrended to the personal representative

Toller on Executors 306 & following

~~See also the case of Shepard et al v. Nabors 6 Alabama 637. The reason there given is that~~

No suit could be maintained until the probate of the will, and consequently the statute commenced to run only from that time. Shepard et al v Nabors 6 Alabama 637.

No other evidence than the will need maintain the action.

But the principles and decisions given in Angel on limitations page 55 are conclusive to this cause

The issue of fraud was tried below and the fact of fraud found. The judgment is (p 17 of record)

"That the credits taken by said P. M. Dillon of $2.301.22 & of $1.116.07 in his settlement of the estate of Ann T. Dillon were fraudulently obtained"

It is submitted that if any thing remains for this court to remedy, it is the fixing of the time from which interest should commence, which by the judgment begins from the commencement of the suit

Our statute p 889 allows "interest" for money ~~due~~ ~~as~~ recovered for the use of another, and retained without the owner's knowledge of the receipt; for money due and withheld by an unreasonable and vexatious delay of payment

or settlement of accounts

Here is a case in which the husband administering on the estate of his deceased wife in the most flagrant manner fraudulently absorbs her entire estate and further more to show an apparent indebtedness to the admr in a case wherein he collected a large fund and against which estate there was no demands whatever

J. G. Picot

Picot admr of Dillon respondt against Bates trustee of Dillon respondents. appr.

Statement of Points by Respondt. Picot

Filed April 25. 1866 C. T. Tillman Clk

Louis G. Picot, Admr. of Ann E. Dillon and v. Barton Bates Appt. } In the Supreme Court March T. 1844.

Opinion of the Court.

This was a petition in equity by the administrator of one of several distributees of the estate of their mother, not making the others parties, against the defendant as trustee in an absolute and express trust under the will of the deceased father, who had been administrator of the mother's estate, to set aside an alleged settlement of the administrator's account in the St. Louis Probate Court, on the ground of a false and fraudulent statement of the account, whereby the distributees had been defrauded of their respective shares in the distributable surplus; and the defendant was charged ~~with~~ as having received this surplus from the administrators of the estate, when the estate was settled, under the will, to be disposed of, in accordance with the trusts therein contained. The party represented by the plaintiff was not one of the beneficiaries in the trust created by the will.

The defence rested upon the several grounds, first, that the other distributees were not made parties; second, the statute of limitations; third, that the fraud was not proved; and fourth, that there was no evidence of any settlement or allowance of the account rendered by the administrator.

As to the parties, the petition proceeds upon the assumption that the other distributees are represented by the trustee defendant as beneficiaries under the trusts of the will, and upon the allegation and proofs that all the other distributees of the mother's estate were such beneficiaries and so represented. To this it may be answered that as beneficiaries of the trust merely they were not therefore represented also in their character of distributees of their mother's estate. It may be conceded that this was a demand upon the trust property, which existed prior to the creation of the trust, and that the absolute disposition of the trust property was vested in the trustee, in such manner that the beneficiaries therein would be sufficiently represented by the trustee defendant, in respect of the trust created by the will. (Sto. Eq. Plead. §149, §215; 2 Smith's Eq. pp. 389; Osborne v. Farmer, 2 Hare 654). This could

be so, upon general principles, independent of the statute which is relied on. (Rev. Stat. 1833, p. 1217, § 2). This statute provides that a trustee of an express trust may sue in his own name without joining the beneficiaries with him; but it does not say that he may be sued in that manner. It may be seriously doubted, whether it was the intent of this act, that the same rule should be applied to a trustee defendant. However this may be (and it is unnecessary to decide this question now), we think the general principle of equity pleading may be so far relied on in this case. But the trustee cannot be considered as representing the distributees at all in their character of distributees. Their rights as such have nothing to do with the trusts under the will. So far as these rights are concerned, they are adverse to the will. This is a proceeding by a distributee in pursuit of a fund which has come into the hands of the trustee under the will of the deceased administrator of the mother's estate. The general doctrine of equity is, that, in such a suit, all the distributees, as well as all residuary legatees, must be made parties, as well to avoid multiplicity of suits, as to enable the court to make a complete and binding decree, disposing of the whole matter, unless the others are unknown, or cannot be found within

the jurisdiction of the court. (Sto. Eq. Plead. §73, §89, §90; West v. Randall, 2 Mason, 181; Holles v. Hallet, 2 Pai. Ch. 20; Downe v. Fanning, 4 J. Ch. 199). There are some exceptions to this rule, as where, for instance, there is a certain and fixed trust fund, and each cestui que trust has a certain aliquot part of it, distinct from the others, so that there is no common interest in the object of the bill, as in the case of an assignee of one seventh part of an ascertained trust fund standing in the name of a trustee. (Sto. Eq. Pl., §212). We are by no means satisfied that this is such a case. Here, the aliquot part is not fixed by any instrument, or contract, but depends upon proof of matters of fact and calculation. Some sort of an account must be taken and stated. Where an account is necessary to ascertain the shares, or the parties in interest stand in different classes, or the entirety is in any way to be dealt with, all the distributees must be made parties, before a final decree can be rendered; and it may very well be doubted, whether the trustee has not a right to claim that this shall be done for his own protection, and whether he can be compelled to part with any portion of the trust fund, until all the

parties are brought before the court, so that the whole matter can be determined at once. (Phillipson v. Gatty, 6 Hare, 281; Adams' Eq. 318). The distributees stand in different classes here. When the number, kinship, and class, of the distributees are ascertained by the evidence, the law fixes the shares. These facts were indeed alleged in the petition, and some evidence was produced; but there was no party plaintiff or defendant before the court, who was in a position to contest these facts, and the absent parties distributees could not be bound by the decree to be rendered. In some cases, as where the plaintiff stood alone for his one fourth part of the land fund, and it appeared that other persons, not made parties, were entitled to the other three fourths, the court ordered the other three fourths to be paid into court, with liberty to those persons to apply for their shares. (2 Smith's Eq. Jur. 309). But we find no case, where a final decree was made for one share only. It does not appear that the other distributees were either unknown, or beyond the jurisdiction of the court. No good reason is given why they were not made parties. If they refused to join as plaintiffs, they could have been made

defendants, under the statute. (Rev. Stat. 1835, p. 1218, §3, 4, 5). That they would have been proper parties, there can be no question; and we are inclined to think they were, in the language of the statute, necessary parties to a complete determination and settlement of the questions involved. A demurrer to the petition on the ground of a defect of parties was overruled. We think it should have been sustained. Whether the decree rendered should be reversed on this ground alone, if there were no other, or whether or not, under special circumstances, or for any peculiar reasons appearing in the particular case, a final decree might not, in some instances, be affirmed, we will not now undertake to say. The rule, it seems, is not an inflexible one, and may be dispensed with, where the peculiar circumstances are such as not to admit of its application, or the court would be ousted of its jurisdiction of the case, or where justice could not otherwise be done to a party who had shown himself entitled to relief. (Cockburn v. Thompson, 16 Ves. 328; West v. Randall, 2 Mas. 181).

The statute of limitations was no bar to the suit. The cause of action did not accrue to any person who had capacity to sue, until an administrator of the deceased distributee had been appointed. (Miller v. Woodward, 8 Mo. 169; Polk v. Allen, 19 Mo. 467). To a suit by a distributee for his share against an administrator, holding the fund in trust, the statute of limitations does not apply. No lapse of time is a bar to a direct trust, or a fraud, as between trustee and beneficiary. (Ruby v. Barnet, 12 Mo. 3; Decouche v. Savetier, 3 J. Ch. 190; 2 Smith's Eq. Pr. 62). There is no express statute provision here, which has a particular application to a case of this kind, and modifies the rule of equity. This was not a suit upon any bond, or other demand, which was governed by any special statute. As to the three years bar of the administration act, this was not an ordinary indebtedness or demand against the estate, but a trust fund held in trust for the distributee; and the distributee being dead, there was no person in existence who could sue for this money, until an administrator was appointed, or until the will under which her devisee claimed was admitted to probate.

A devisee cannot show a title to personal estate under a will, until the will has been proved. (Shepard v. Nabors, 6 Ala. 637). As to the discovery of the fraud, it does not appear that the facts constituting the fraud were known to the devisee, before or after the probate of the will, so that any cause of action at law, or in equity, must be deemed to have accrued in her favor, before letters of administration were granted to the plaintiff: and this suit was brought within five years after the date of the letters. Where there is no person to sue, no laches can be imputed. (Reilly v. Blanchard, 18 Mo. 220).

The other grounds of defense may be considered together. It is insisted that there was no proof of any settlement, final or other, nor of any fraud in the account settled. The only evidence which was adduced to establish these facts consisted in a copy of the affidavit and inventory, showing a debt and interest due to the estate from the estate of one Nash, an abstract of demands allowed against the estate of Nash for this debt, and a copy of an account rendered by the administrator

by which it appears that he had charged himself with the amount of this debt and interest as collected from Nash's estate, and credited himself "by amount of my demand allowed by this court against the estate of John D. Nash, deceased", the same sums for principal and interest; and a balance was struck in his favor. This paper is certified from the Probate Court to be a true copy of "the account rendered by said administrator as the same now remains of record in the office of the Judge aforesaid." This was all the proof. It merely shows that this account rendered was handed in to the Judge of the court and remains there among his papers. It is not even filed. There is nothing to show that it ever became a record, nor that any action was ever taken on it by the court; much less, that the account so rendered was ever allowed by the court in any settlement whatever. A settlement must be the act and judgment of the court, of which there must be some record. No record is produced. A settlement of this kind ~~is~~ cannot be presumed here; nor is to be supposed that the Probate Court would allow such an account, without some proof of its correctness; but quite the contrary. It is called to be

inferred, if any inference were to be allowed, that a full record of the proceedings and final settlement would show that this account had not been allowed on settlement, or that the account was just and correct, and that the administrator had paid over all sums due when so ordered by the court. No certified copy of the full record and proceedings is produced. This paper does not appear to have any official character, much less that of a record. We are inclined to think it was not admissible in evidence at all by itself for any purpose. It was not even proved to have been in the handwriting of the administrator. It will be time enough to consider the question of fraud, when some competent evidence shall be produced to establish the fact. Moreover, it does not appear on this record in what manner the deceased wife came to have a separate estate in this personalty. Judgment reversed, and the cause remanded, with leave to the plaintiff to amend his petition.

Judge Wagner concurs.
Judge Lovelace absent.

N. Holmes

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Louis G. Picot, Adm.
of Ann E. Dillon.
Res.

v.

Barton Bates.
appt.

Opinion
Reversed & remanded.

Holmes.

Filed May 14 1866
O. T. Fisleback
Clk

Louis G Picot Adm^r
&c
v
Barton Bates

84 Mar T/66
Supreme Cr

Now comes the plaintiff and respondent and moves the Court to grant a rehearing of this cause, for the reasons

1. That the demurrer filed to the petition in the court below, was not filed alleging as cause of demurrer, "defect of parties generally," or that the beneficiaries under P. M. Dillons will were not made parties, but on the contrary the causes assigned were, 1. No cause of action, 2. That the petition shows no cause of action against defendant, but only against the "personal representatives" of P. M. Dillon, + while the petition showed that they had settled the estate and turned it over to defendant as trustee under the will. Record p. 9.

2. That it was not controverted in the Court below that the settlement made by P. M. Dillon as Adm^r of Ann T. Dillon was a final settlement, and that said account was allowed; and that such was the case, will appear by the instructions asked by defendant. No^s 1 + 2. Rec p 45. 146.

All the evidence was not preserved in the bill of exceptions, because it was supposed, that the settlement presented all the facts necessary for the trial

Whittelsey
p. Resp^t

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Louis G. Picot
Admr &c

v

Barton Bates

Motion for Review

Whittelsey

Filed May 15/66.
O. J. Fishback
Clerk
pr. W. C. Ellis.

Overruled