

purchase the pipe for the defendants, or to do anything at their expense.

*Verdict set aside.*

ALLEN and CLARK, JJ., did not sit: the others concurred.

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HALL v. SMITH & a.

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The widow of a testator, who leaves surviving him any child, or the issue of any child by her, having waived the provisions of the will in her favor, and released her right of dower and homestead, is entitled, after the payment of debts and expenses of administration, to receive one third of all the personal estate, and one third, in fee, of all the real estate, unlimited by other provisions of the will.

After the widow has received her part of the estate, the rest is to be so apportioned and administered as to carry out the provisions of the will, so far as possible.

BILL IN EQUITY, by an executor, to obtain the direction of the court. The testator made certain provisions for his widow, and devised certain real and personal estate in trust for his children. The widow, having waived the provisions of the will in her favor, and released her right of dower and homestead, claims one third of all the personal estate, and one third, in fee, of all the real estate, and desires to have assigned to her, as a part thereof, the real estate devised in trust for the children.

*Hall*, for the plaintiff.

*Hackett and Smith*, for the defendants.

BINGHAM, J. If the widow of a testator, who leaves surviving him any child, or the issue of any child by her, waives the provisions of the will in her favor, she is entitled, after the payment of debts and expenses of administration, to receive one third of all his personal property, in addition to dower and homestead, the same as if there were no will. If she also releases her right of dower and homestead, she is entitled to receive instead thereof, in fee, one third of all his real estate. Gen. Laws, c. 202, ss. 7, 9. The statute, in effect, declares that a will is void as to the widow if she waives the benefit of its provisions, and she shall have the same rights in her husband's estate that she would have had if he had died intestate. In this case the widow is entitled to one third of

all the personal estate, and, having released her right of dower and homestead, one third, in fee, of all the real estate, unlimited by the other provisions of the will. In setting off her real estate, some discretion may be exercised so as not to break up unnecessarily the devises to the children. After her part of the estate is set off and paid over, the rest is to be so divided, distributed, and administered as to carry out the provisions of the will so far as possible, preserving to all the devisees their relative rights.

*Case discharged.*

CLARK, J., did not sit: the others concurred.

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LYMAN, *Ap't*, v. ELSHER, *Ap'ee*.

When a guardian's account is settled by a decree in the probate court upon insufficient notice, and the settlement is satisfactory to a surety on the guardian's bond, but the surety is entitled to a valid decree for his own protection, he may cause a new proceeding to be instituted in that court for a settlement of the account upon due notice; and the mere want of such notice, without any refusal of the probate court to cause due notice to be given, is not a ground on which the surety can appeal from the decree.

PROBATE APPEAL, from a decree determining the amount in the hands of the defendant as guardian upon a settlement of account. The plaintiff, a surety on the defendant's bond, is satisfied with the amount fixed by the decree, but appeals for the alleged reason that the account was settled upon insufficient notice, and that by reason of this defect the decree will be of no avail to the plaintiff in determining the sum for which he is liable as surety.

*Dodge*, for the plaintiff.

The purpose of the appeal is to cause the decree of the probate court to be affirmed so as to protect the plaintiff against all parties. The guardian's surety may appeal. *Jones v. Chase*, 55 N. H. 234; *Bryant v. Allen*, 6 N. H. 116; *Tilton v. Tilton*, 41 N. H. 479.

*Smith*, for the defendant.

BINGHAM, J. The jurisdiction of the probate court in the settlement of guardian accounts is original and exclusive. *Critchett v. Hall*, 56 N. H. 324; *Clark v. Courser*, 29 N. H. 173. If the notice was insufficient to give the probate court jurisdiction, the plaintiff