Brotherton, Marshall VS State of Missouri (to the use of Smith, Philomean by Chouteau, Henry, Guardian) 1854 St. Louis Co. 349/8

(Exec. Paul, René)

575/13

Bond by Paul as security of Buckwith, Frederick

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State of Missouri
County of St. Louis } Be it remembered That heretofore, To wit: on the 22d November 1853. There was filed in the Office of the Clerk of the Circuit Court within and for the County aforesaid, a Transcript from the Probate Court of St. Louis County, and in words & figures as follows Viz:

Transcript

State of Missouri
County of Saint Louis } At a term of the Probate Court begun and held at the Court House in the City and County of Saint Louis and State of Missouri, on the first Monday being the fifth day of September in the year of our Lord one thousand eight hundred and fifty three were present - Peter Ferguson Judge of said Court - William F. Ferguson Clerk - and David Bayles Esquire Marshall of the County of Saint Louis.

Court adjourned from day to day until Saturday morning 24th September 1853. Saturday 24th September 1853.

Court met pursuant to Adjournment - present same Judge

Henry Chouteau Guardian of Philomene Smith
Marshall Brotherton Executor of René Paul deceased } $4000.00 cents 6 class of appeal

Henry Chouteau Guardian of Philomene Smith appears and exhibits his demand against the estate of René Paul deceased founded on a bond alleged to have been entered into by said Paul in the year one thousand eight hundred and forty four as security of Frederick W. Beckwith as Curator of the estate of Philomene Smith a minor, on which demand notice was waived in Court on the twenty fourth day of September eighteen hundred and fifty two, and also exhibits his Petition filed at the June term of this Court in the year eighteen hundred and fifty three, Thereupon Marshall Brotherton Executor of said René Paul appears and the Court overrule the motion of the defendant to dismiss this case, and neither party requiring a Jury the Court examine and allow the sum of four thousand dollars the amount of said bond, in favor of said claimant against said

estate and order the same to be placed in the sixth class, and Marshall Brotherton executor as aforesaid files his affidavit and prays an appeal to the Circuit Court for the County of Saint Louis which is granted, and a certified transcript of the record and proceedings and the original papers in the case is ordered to be transmitted to the clerk of said Circuit Court.

State of Missouri
County of Saint Louis } I William F. Ferguson Clerk of the Probate Court of the County of Saint Louis certify that the foregoing is a true copy of the Record and proceedings in the case of Henry Chouteau Guardian of Philmena Smith against Marshall Brotherton Executor of René Paul deceased as the same now remains of Record in my office. (L.S.) In testimony whereof I hereto set my hand and affix the seal of the Probate Court of the County of Saint Louis at office in said county this twenty first day of November in the year of our Lord one thousand eight hundred and fifty three.

William F. Ferguson Clerk

Petition in Probate Court

The State of Missouri in the relation & to the use of Philmena Smith, plaintiff, against Marshall Brotherton Executor of the last will of René Paul deceased defendant. In the Probate court of St. Louis County. June Term 1853.

Plaintiff states that on the 16th day of March 1844 Frederick W. Beckwith as principal and René Paul as security by their certain bond sealed with their seals and dated the day & year last aforesaid a copy whereof is hereto annexed the original being on file in the office of the Probate Court of St. Louis County, the place where by law it is required to be kept, acknowledged themselves held and firmly bound unto the State of Missouri in the full and just sum of four thousand dollars lawful money of the United States to which payment well and truly to be made they did bind themselves, their heirs, executors and administrators to and for the

use of the said Philomena Smith: The condition of which bond was such that whereas the said Probate Court at the march Term thereof for the year 1843 did appoint the said Fredrick W. Beckwith curator of the above named Philomena Smith a minor then aged six years, Now if the the said Fredrick W. Beckwith should well, truly & faithfully discharge the duties of his said office of curator aforesaid according to law then said obligation to be void, else to remain in full force & virtue. Plaintiff further states that afterwards to wit on the 13 day of March 1844 the said Henry Chauteau was by the said Probate court duly appointed guardian of the person of the said Philomena Smith. Plaintiff states that the said Fredrick W. Beckwith did not well, truly and faithfully discharge the duties of his said office of curator aforesaid according to law. and for assigning breaches of said bond said plaintiff says that a large amount of money belonging to & the property of said Philomena. to wit. The sum of eight thousand dollars came into the hands and possession of the said Beckwith as such curator between the said 16th day of March 1844 and the 19th day of September 1857. to wit: The sum of $189.47 in June 1845. The sum of $6209.00 in the month of June 1846. and the sum of $887.77 in the month of may 1857. and the said Beckwith has not accounted for and paid the same as by the law of the land it was his duty to do. and the said Beckwith has not paid the said several sums of money or any part of either of them to said Chauteau guardian as aforesaid as it was his duty to do. although the payment of the same has been demanded by the said Chauteau. And the said Beckwith has kept no seperate account of the said several sums of money or any part of either of them. but has mixed the said moneys with his own and converted them to his own use. And the said Beckwith has neglected and failed to put the said sums of money or any part thereof to interest upon mortgage or other sufficient security as by law he should have done. And for further breach of said bond plaintiff says that said Beckwith did not make annual settlements of his accounts as such curator of

said Philomena. and for further breach of said Bond the said plaintiff says that heretofore to wit in the month of march 1857 there came into the hands and possession of the said Beckwith three Bonds issued by the city of St. Louis. dated July 21st 1845 payable to B Simpson Comptroller or bearer payable fifty years after date with interest from date at the rate of six per cent per annum payable semi annually. Each for the sum of one thousand dollars and each of the value of one thousand dollars. exclusive of interest. two of which bonds came into the hands of said Beckwith as the property of said Philomena and she was entitled to the one third of the other of said bonds. and the said Beckwith in the said month of march 1857 sold & disposed of the said bonds and converted them to his own use. And for a signing a further breach of said bond plaintiff states that on the 10th day of June 1858 at the June Term of the said Probate Court the said Beckwith did appear in said court and exhibit his account for the annual settlement of his curatorship of the said Philomena Smith. Whereupon said court did examine the same and find that there was a balance against him in favor of the said Philomena of five thousand and forty nine dollars & fifty one cents Yet the said Beckwith disregarding his duties of Curator aforesaid and contrary to law did convert the said sum of Five Thousand and forty nine dollars & fifty one cents to his own use. And for a signing a further breach of said bond plaintiff states that the said Fredrick W. Beckwith as curator of the said Philomena Smith as aforesaid obtained possession of certain bonds to a large amount. to wit. two certain bonds executed by the city of St. Louis in favor of the said Philomena Smith being each for the sum of one thousand dollars and the one third of another bond executed by said city in favor of the said Philomena for one thousand dollars the interest of the said Philomena in said last mentioned bond being three hundred and thirty three dollars and thirty three and

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one third cents, yet the said Beckwith disregarding his duties of Curator aforesaid and contrary to law did on the 18th day of September 1851 sell said bonds and convert the same to his own use. And for a further breach to said bond plaintiff states that on the 28th day of June 1851 at the June Term of the said Probate Court, the said Court did make an order requiring and commanding the said Frederick W. Beckwith curator of the said Philomena Smith to pay to the said Henry Chouteau Guardian of the person of the said Philomena Smith the sum of five hundred dollars, yet the said Beckwith, although there was then a balance against him in favor of the said Philomena Smith of five thousand and forty nine dollars and fifty one cents did not pay to the said Chouteau the said sum of five hundred dollars or any part thereof although demanded. And for a further breach of said bond plaintiff states that on the 10th day of June 1851 there was a balance of five thousand and forty nine dollars & fifty one cents against the said Frederick W. Beckwith in favor of the said Philomena Smith yet the said Beckwith disregarding his duties as curator aforesaid & contrary to law did not put said money or any part thereof at interest secured by mortgage or other sufficient security. Plaintiff states that on the 12th day of April 1852 he was duly appointed by said Probate Court guardian of the person & estate of the said Philomena Smith. By means whereof the said Rene Paul became liable to pay to plaintiff the said sum of Four thousand dollars above demanded. Wherefore plaintiff asks judgment against the estate of the said René Paul deceased for the said sum of Four thousand dollars and costs.

Fremin & Beber attorneys for plaintiff

Motion to dismiss in Probate Court

The State of Missouri in the relation & to the use of Philomena Smith by Henry Chouteau Guardian of said Philomena Smith, Plaintiff against, Marshall Brotherton Executor of the last will of Rene Paul deceased, Defendant, In the Probate Court of St. Louis County June Term A. D. 1853, and said defendant by his attys. comes & moves the Court to dismiss this suit & proceeding for the following reasons, to wit:

1st Because this Court has no jurisdiction of any liability accruing by reason of a breach of any bond with collateral conditions.

2d Because this is a proceeding against the estate of Rene Paul to establish an alleged demand, which accrued as is alleged by reason of the said Rene Paul in his life time having executed a certain bond as security of Frederick W. Beckwith. The same being to establish an alledged claim of unliquidated damages as a Curators bond & against the security, & this Court therefore has no jurisdiction over the same as is stated in said amended complaint.

3d Because there is no legal demand or statement of any demand against the said Marshall Brotherton as Executor of said Rene Paul exhibited or now before the Court as required by law.

4th Because the allegations & statements in the said amended complaint seek to annull & destroy the annual settlements made by said Frederick W. Beckwith as Curator of said Philomena Smith in said Court & made according to law.

5th Because the said amended complaint seeks to do away & destroy the effect of said settlements made as aforesaid which have the force of Judgments. 5 Because said amended complaint seeks to go behind said settlements made as aforesaid.

6th Because said amended complaint seeks to set aside said settlements made as aforesaid without alledging any fraud.

7th Because said amended complaint does not charge or allege any fraud on the part of said Beckwith as Curator as aforesaid in making said settlements.

8th Because the statements & allegations in the said amended petition are inconsistant & irreconcilable with each other.

9th Because the said amended complaint does not pray for the proper judgment. 10th Because there is no affidavit to said amended complaint. 11th Because there is no sufficient demand or statement of a demand before this Court upon which this court can render a judgment or make an allowance. 12th Because this Court cannot

under any judgment or make any allowance against said Defendant upon said bond for the causes mentioned in said amended complaint as therein stated & set forth. Lackland & Jamison, attys. for Defendant.

Affidavit for appeal in Probate Court

State of Missouri, County of St. Louis
Henry Chouteau as Guardian of Philomena Smith vs. Marshall Brotherton as Executor of Rene Paul. In the St. Louis Probate Court September Term 1853. County of St. Louis. And the said Marshall Brotherton being duly sworn upon his oath states, That he believes the decission & judgment rendered by the said court in the above entitled cause is wrong, illegal & erroneous & desires an appeal to the St. Louis Circuit Court & That the said appeal is not taken for the purpose of vexation or delay, but because the said affiant believes that the said Appellant Marshall Brotherton as Executor of Rene Paul is aggrieved by the said decission of the said Court. M. Brotherton
Sworn to & subscribed before me on this 24th day of September 1853. Peter Ferguson Judge of Probate

Afterwards at the April Term 1854 of our Circuit Court on Monday 24th April 1854 the following proceedings were had herein Viz:

Mo: to dismiss filed

Henry Chouteau Guardian &c
vs
Marshall Brotherton Executor &c
} Motion to dismiss filed.

Afterwards at the same Term of our said Court on Friday the 28th April 1854 the following further proceedings were had herein Viz:

Motion overruled

State of Missouri in relation and to the use of Philomena Smith by Henry Chouteau Guardian. vs. Marshall Brotherton Executor of Rene Paul deceased. Appeal, Judgment. Now at this day come the parties aforesaid, by their respective attorneys, and the Court having duly heard and considered the motion of said defendant to dismiss, and being thereof fully advised, doth order that said motion be overruled: and thereupon come a Jury, to wit: B. F. Brand, John Young, Joseph S. Hull, Archibald E. Ame, Edward E. Archer

William Gaines, Andrew J. Mercer, David S. Jamison, William Braun, Samuel H. Lillis, Michael Butler, and David Reed. Twelve good and lawful men, who being duly elected, tried and sworn, the

Judgt. matters in controversy well and truly to try. The trial of the cause having been finished, the Jurors aforesaid, upon their oaths aforesaid, do find that said defendant. Executor of the estate of Bene Paul, is indebted to said plaintiff in the sum of Four thousand dollars, the amount of a bond entered into by said Paul, as security of the Curator of the estate of Philmene Smith. It is therefore considered and adjudged, that said plaintiff recover of said defendant, Executor of Bene Paul deceased, to the use aforesaid, the sum aforesaid, in form aforesaid, as found, together with its costs and charges herein expended and that this cause be certified to the Saint Louis Probate Court, to be proceeded in, according to the statute in such cases made and provided.

Afterwards at the same Term of our said Court, on Saturday 29th. April 1852, the following further proceedings were had herein viz:

Mo: for new trial filed — State of Missouri to use &c of Philmene Smith vs. M. Brotherton, Executor of Bene Paul } Motion for new trial filed.

Afterwards at the same Term of our said Court on Friday 2d. June 1852, the following further proceedings were had herein viz:

Mo: overruld Bill of Excep. tions filed & appeal granted — The State of Missouri, to use &c. vs. Marshall Brotherton Ex. of B. Paul } The Court having duly heard and considered the motion of said defendant, by his attorney for a new trial, and being thereof fully advised, doth order that said motion be overruled. Bill of Exceptions filed. Thereupon the said defendant by his attorney, prays an appeal to the Supreme Court, which is granted.

Which said Bill of Exceptions is as follows viz:

Bill of Exceptions — The State of Missouri to use of Philmene Smith &c Plff. vs. Marshall Brotherton, Executor of Bene Paul Deft. In St. Louis Circuit Court. April Term 1852. County of St. Louis.

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Be it remembered that on the 24 of April 1852 said Deft filed a Motion to dismiss said cause.

Motion to dismiss

The State of Mo. to use of Philumna Smith, by Henry Chouteau Guardian of said P. Smith, Plaintiff, vs. Marshall Brotherton Executor of Rene Paul, Defendant. In the St. Louis Circuit Court April Term 1852. County of St. Louis. And the said defendant comes & moves the Court to dismiss the above entitled cause & the whole proceedings, for the following reasons, to wit:
1st Because the Court below the St. Louis Probate Court had no jurisdiction over said cause. 2d Because the said Probate Court has no jurisdiction of any liability accruing by reason of a breach of any bond with collateral conditions. 3. Because said suit is a proceeding against the estate of Rene Paul to establish an alledged demand which accrued as is alledged by reason of the said Rene Paul in his lifetime having executed a certain bond as security of Fredrick W. Beckwith. The same being to establish an alledged claim of unliquidated damages on a Curators bond & against the security & the said Probate Court had no jurisdiction over the same as is stated in said amended complaint. 4th Because there was no legal demand or statement of any demand against the said Marshall Brotherton as Executor of said Rene Paul, exhibited or filed in the said Probate Court. 5th Because the allegations & statements in the said amended complaint or petition seek to annull & destroy the annual settlements made by said Beckwith as Curator of said Philomena Smith in said Probate Court & made according to law. 6th Because the said amended complaint seeks to do away & destroy the effect of said settlements made as aforesaid, which have the force & effect of Judgments. 7th Because the said amended complaint seeks to go behind said settlements made as aforesaid. 8th Because the said amended complaint seeks to set aside the said settlements made as aforesaid without alledging any fraud. 8th Because the said amended complaint does not charge or alledge any fraud on the part of said Beckwith as Curator as aforesaid in making said settlements.

9. Because the said amended complaint does not pray for the proper Judgment. 10. Because there is no affidavit to said amended complaint. 11. Because there was no sufficient demand or statement of any demand before the said Probate Court upon which the said Probate court could render a judgment or make an allowance. 12th Because the said Probate Court could not render any judgment or make any allowance against said defendant upon said bond for the causes mentioned in said amended complaint as therein stated & set forth.

W. C. Jamison atty for Deft.

which said motion the Court overruled. To which decision of the Court in overruling said motion the Deft at the moment excepted. & on the trial of said cause which was on the 28 of April 1852, the Plff. read in evidence a duly certified copy of the appointment and the bond of F. W. Beckwith & Rene Paul (dated March 16, 1844)

See the same on Pages 12 & 13 of this Transcript.

The Plffs then offerd in evidence a certified copy of the settlement & accounts of Frederick W. Becktwith as curator of Philomene Smith made in the St. Louis Probate Court, in the years 1844, 1845. 1846, 1847, 1848. 1849 & 1850, which were objected to by Deft. on the grund that it was not a complete record & did not contain all the settlements made in said court by said Becktwith as curator as aforesaid, which objection said Court overruld & permitted said copy of said settlements & accounts as aforesaid to be read in evidence. to which ruling of the court in overruling said objection & permitting said copy to be read in evidence the Deft excepted at the moment, which accounts & settlements are as follows.

Settlements & accounts in Probate Court from 1844 to 1850 both inclusive

State of Missouri
County of Saint Louis } At a Term of the Probate Court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Missouri on the first monday being the sixth day of March in the year of our Lord one thousand eight hundred and forty three. were present. Peter Ferguson Judge of said Court. Geroge K. Kennerly Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Wednesday 8th March 1843. Wednesday 8th March 1843. Court met pursuant to adjournment. present same Judge.

Frederick W. Becktwith Curator of Philomene Smith } Curator appointed.

On motion of Frederick W. Becktwith the Court appoint him curator of the estate of Philomene Smith a minor aged six years and order that he enter into bond in the sum of Four thousand dollars with sufficient security conditiond for the faithful discharge of his duties as such curator, whereupon he accepts the appointment and offers Thomas F. Smith as his security who is approved of by the court and the bond required is executed and filed.

Know all men by these presents. that I Frederick W. Becktwith as principal, and I René Paul as security, are held and firmly bound

unto the State of Missouri, in the full and just sum of Four Thousand dollars, lawful money of the United States, to which payment well and truly to be made, we bind ourselves, our heirs, Executors and administrators, to and for the use of Philmene Smith a minor hereinafter named and mentioned. The condition hereof is such, that Whereas, Fredrick W. Beckwith above named has, at the March Term 1843, of the Probate Court, for the county of St. Louis, been appointed Curator of the above named Philmene Smith a minor of the age of seven years now this new bond witnesseth; if the said Fredrick W. Beckwith above bounden, shall well, truly and faithfully discharge the duties of his office as curator aforesaid, according to law, then this obligation to be void, else to remain in full force and virtue. Dated and sealed at St. Louis, this seventh day of March 1844. Fred W. Beckwith (SS) R. Paul (SS) Recorded 16 day of March 1844.

Peter Ferguson, Judge of Probate.

No 975 1844 June Term — Dr. Fredrick W. Beckwith, Curator, In account current with his ward Philmene Smith a minor Cr.

To Cash received of Gabriel S. Chouteau administrator of Therese C. Chouteau dec'd		$200.00
" Cash received of James Page for the sale of wood		10.00
" Rec'd of G. S. Chouteau your portion of lands in Pike County sold as Estate of Auguste Chouteau Dec'd.		8.57
		$218.57
1844 June Term To Balance in hands of Curator		6.02
1845 June Term To Cash received of Gab'l S. Chouteau proportion of land sold in Pike County		8.57
" G. S. Chouteau Adm'r T. C. Chouteau by order of Probate Court		117.38
" Received of G. S. Chouteau proportion of slaves of Estate of T. C. Chouteau		57.50
		189.47
1845 June Term To Balance in hands of Curator		$87.90
1846 June Term " amt of claim vs Estate of Thomas T. Smith 5th class		$2137.50

unto the State of Missouri, in the full and just sum of Four Thousand dollars lawful money of the United States, to which payment well and truly to be made, we bind ourselves, our heirs, Executors and administrators, to and for the use of Philomine Smith a minor hereinafter named and mentioned. The condition hereof is such, that Whereas, Frederick W. Beckwith above named has, at the March Term 1843, of the Probate Court for the county of St. Louis, been appointed Curator of the above named Philomine Smith a minor of the age of seven years now this new bond witnesseth; if the said Frederick W. Beckwith above bounden, shall well, truly and faithfully discharge the duties of his office as Curator aforesaid, according to law, then this obligation to be void, else to remain in full force and virtue. Dated and sealed at St. Louis, this seventh day of March 1844. Fred W. Beckwith (Ps) R. Paul (Ps) Recorded 16 day of March 1844.

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1845 June Term To Cash received of Gab'l S. Chouteau proportion of land sold in Pike County		8.57
" G. S. Chouteau adm'r T. C. Chouteau by order of Probate Court		117.38
" Received of G. S. Chouteau proportion of slaves of Estate of T. C. Chouteau		57.50
		189.47
1845 June Term To Balance in hands of Curator		$87.90
1846 June Term " amt of claim vs Estate of Thomas T. Smith 5th class	$2137.50	

	" Do Do 6th class 1834.00	
	3971.50	
	Less attorneys fees for proving & collecting claim 119.13	3852.37
	" Proceeds of sale in partition of block No. 7 in City Court 2 city	2000.00
	bonds $1000. each $2000. 1/3 of bond of $1000.00 is 3	333.33
	1/3 of cash $71.56 is	23.85
		6297.45
1846 June Term	To Balance in hands of Curator	6016.77
1847 June Term	To Cash received of William Milburn Sheriff of St. Louis County for land sold in St. Louis County in partition of heirs of Therese C. Chouteau deceased	183.90
		6200.67
1847 June Term	To Balance in hands of Curator	$5960.21
1848 June Term	To Interest on Amt of cash in hand	212.58
		6172.79
1848 June Term	To Balance in hands of Curator	$5988.72
1849 June Term	To one years Interest on $3000.00 @ 6%	180.00
		6168.72
1849 June Term	To Balance in hands of Curator	$6030.56
1850 June Term	To one years Interest on $4000.00 @ 6%	240.00
		$6270.56
1844 June Term	By cash paid Thomas F. Smith your father for you	$75.00
1843 May 14 August 10	" paid same for you $50. (15) Paid passage to Louisville $5.00	55.00
1844 January	" remitted Mrs Bullitt for you for board &c	50.00
1844 May 13	" Remitted Mrs Bullitt for you	30.00
March 9	" Paid L. E. Lawless $2.25 By Balance in hands of Curator 6 cts	8.57
		218.57
1845 June Term	By cash paid State & County Taxes No. 1.	$35.76
	" Judge of Probate fees No. 2	2.29
	" W. H. Cozzens map showing the property of Thos. F. Smith in partition with his children No. 3.	6.67
	" City Taxes for 1844 No. 4.	56.85
	By Balance in hands of Curator	87.90
		$189.47

1846 June Term	By cash paid Henry Chouteau Guardian No 1	$116.71
	" City Taxes No 2 $16.56 City Taxes No 3. $18.45	35.01
	" City Taxes No 4 $6.96 City Taxes No 5. $17.50	24.46
	" City Taxes No 6 $12.56 City Taxes 1845 No 7 $14.85	27.41
	" City Taxes 1845 No 8 $8.01 State & County Taxes 1845 No 9 $11.23	19.23
	" same 1845 No 10 $28.20 Probate fees No 11 $1.25	29.45
	" ½ of T. W. Risques fees $26.75. ½ costs printing $1.66	28.41
	By Balance in hands of Curator	6016.77
		6297.45
1847 June Term	By cash paid Henry Chouteau for tuition, clothing &c No 1	$98.98
	" City Taxes 2d Ward 1846 No 2	16.50
	" City Taxes 1846. 2d ward No 3 $24.85 City Tax 1846. 1st ward No 4 $12.30	37.15
	" same No 5. $15.75. City Tax 1846 1st ward No 6. $15.01	30.75
	" same No 7 $4.80. same No 8 $7.20. same No 9 $7.20	19.20
	" State & County Tax 1846 No 10 $23.77 Same No 11 $12.42	36.19
	" Probate fees No 12	1.73
	By Balance in hands of Curator	5960.21
		$6203.67
1848 June Term	By Cash paid Spalding & Tiffany No 1	$ 11.01
	" Thos Mahoney for grading &c No 2	26.47
	" City Tax 1st & 2d ward No 3.	25.93
	" City Taxes No 4 $17.13 Same No 5 $15.75	32.88
	" Same No 6 $5.04 Same No 7 $16.53 Same No 8 $12.10	33.67
	" Same No 9 $10.76 State & County Taxes No 10 $40.63	51.39
	" Same No 11 $3.73 By Balance in hands of Curator $5988.72	5992.45
		6172.79
1849 June Term	By Cash paid Probate fees No 1 $1.53 Same No 2 $1.15	$ 2.68
	" State & County Tax for 1846 No 3 $14.50 City Tax for 1848 No 4 $25.83	40.33
	" City Tax No 5 $23.26 City Tax No 6 $5.88	29.14
	" City Tax No 7 $18.14 City Tax No 8 $18.37	36.51
	" City Tax No 9 $29.51. Balance in hands of Curator $6030 56/100	6060.06
		6168.72

1851
June Term

By cash paid H Chouteau Guardian for Mrs Hunters Milliners bill (1)	11.50
" Sundries $2.12½ a Lecurs bill $1.84	3.96
" Miss Mauro Tuition $14. J.S. Mathews Shoes $7.87	21.87
" Miss Mauro Tuition $16.60 Mrs B Hunter Milliners Bill $5.00	21.60
" Books & Stationery $10.00 Dr Hale Dentist $3.00	13.00
" A Lefevre for goods $33.78 a Duhring do $17.87	51.65
" J.S. Mathews Shoes $5.88 cash $5. a Duhring goods $16.51. Dr Vitals for Tuition $70.	97.39
" J.S. Mathews Shoes $8.53 Wm Adriance goods $21.06	29.61
" Dr Vitals 2 qrs Tuition $140. for erecting Tomb. Lettering. crofs walling & filling in grave of mother of ward $123. 60/100	263.60
" C Balmers bill Tuition $13.00 Jn.S. Mathews Shoes $7.55/100	20.65
" Mrs Hunters Bill millinery $17.00 Wm Adriance goods $45.80/100	62.80
" A Lefevre do $14.45/100 Sacred Heart Convent for board & Tuition $74.00	88.45
" E Laureal for drawing lefsons $6.25 C Balmer musick lefsons $13.20	19.35
" Clothing, Book, Stationary &c $63.91 E Laureal drawing Lefsons $5.50	69.41
" Wm Adriance goods $17.83 C. Balmer musick $15.70	33.53
" A Lefevre goods $13.63 J.S. Mathews shoes $9.25	22.88
" Tuition at Seminary of Sacred Heart $74. Petty Expenses No 1 $17.50	91.50
" City Tax 1849 (No 2) $33.95 City Tax 1849 (No 3) $8.40	42.35
" City Tax 1849 (No 4) $42.79 City Tax 1849 (No 5) $41.63	84.42
" City Tax 1849 (6) $5.88 City Tax for 1849 (7) $23.63	29.51
" City Tax 1849 (8) $19.00 State & County Tax 1849 (9) $13.26	32.92
" Same Same (10) $30.36 State & County Tax 1849 (11) $77.68/100	108.04
" Probate fees (12)	1.05
By Balance in hands of Guardian	5149.52
	$6270.56

State of Missouri
County of Saint Louis } ss. At a Term of the Probate Court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Missouri on the first monday of June being the third day of said month in the year of our Lord one thousand eight hundred

and forty four were present Peter Ferguson Judge of said Court George H. Kennerly Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Monday 10th June 1844. Monday 10th June 1844 Court met pursuant to adjournment. present same Judge.

Annual settlement 1844 — Frederick W. Beckwith Curator of Philomene Smith } Annual Settlement. Frederick W. Beckwith curator as aforesaid appears and exhibits his account for the annual settlement of his curatorship of Philomene Smith whereupon the court examine and find that assets have come to his hands to the amount of Two hundred and eighteen dollars fifty seven cents and that he has paid out Two hundred and twelve dollars fifty five cents leaving a balance against him in favor of his ward of Six dollars two cents —

State of Missouri. County of Saint Louis Ss. At a term of the Probate court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Missouri on the first Monday being the second day of June in the year of our Lord one thousand eight hundred and forty five were present Peter Ferguson Judge of said Court William S. McKnight Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Tuesday 10 June 1845. Tuesday 10th June 1845. Court met pursuant to adjournment. present same Judge.

Settlement 1845 — Frederick W. Beckwith Curator of Philomene Smith } Annual Settlement. Frederick W. Beckwith appears and exhibits his account for the annual settlement of his Curatorship of Philomene Smith whereupon the Court examine and find that at his last settlement with the Court there was a balance against him in favor of his ward of six dollars two cents that he has since received one hundred and eighty three dollars forty five cents and that he has paid out one hundred and one dollars fifty seven cents leaving a balance against him in favor of his ward of eighty seven dollars ninety cents —

State of Missouri County of Saint Louis Ss. At a term of the Probate Court begun and held at the City of Saint Louis within and for the County of Saint Louis in the State of Missouri, on the first Monday

being the first day of June in the year of our Lord one Thousand eight hundred and forty six, were present Peter Ferguson Judge of said Court, William S. Mc Knight Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Monday 8th June 1846, Monday 8th June 1846. Court met pursuant to adjournment, present same Judge -

Annual set. Element 1846

Frederick W. Beckwith, Curator of Philmene Smith. Annual settlement. Frederick W. Beckwith appears and exhibits his account for the annual settlement of his curatorship of Philmene Smith whereupon the Court examine and find that at this last settlement with the court there was a balance against him in favor of his ward of Eighty seven dollars ninety cents that he has since recived Six Thousand Two hundred and nine dollars fifty five cents and that he has paid out Two hundred and eighty dollars sixty eight cents leaving a balance against him in favor of his ward of Six Thousand and sixteen dollars seventy seven cents.

State of Misouri County of Saint Louis Ss. At a term of the Probate Court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Misouri, on the first monday of June being the seventh day of said month in the year of our Lord one Thousand eight hundred and forty seven, were present, Peter Ferguson Judge of said Court William S. Mc Knight Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Wednesday 16th June 1847, Wednesday 16th June 1847 Court met pursuant to adjournment present same Judge.

Annual set. Element 1847

Frederick W. Beckwith curator of Philmene Smith. Annual Settlement. Frederick W. Beckwith appears and exhibits his account for the annual settlement of his curatorship of Philmene Smith whereupon the Court examine and find that at his last settlement with the Court there was a balance against him in favor of his ward of Six Thousand and sixteen dollars seventy seven cents that he has since recived one hundred and eighty three dollars ninety cents, and that he has paid out two hundred and forty

dollars forty six cents leaving a balance against him in favor of his ward of Five Thousand nine hundred and sixty dollars Twenty one cents.

State of Missouri. County of Saint Louis ss. At a term of the Probate Court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Missouri on the first monday of June being the fifth day of said month in the year of our Lord One Thousand eight hundred and forty eight. were present. Peter Ferguson Judge of said Court. William S. McKnight Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Monday 12th June 1848. Monday 12th June 1848. Court met pursuant to adjournment. present same Judge.

Annual Settlement 1848

Fredrick W. Beckwith Curator of Philmens Smith. annual Settlement. Fredrick W. Beckwith appears and exhibits his account for the annual settlement of his Guardianship of Philmens Smith whereupon the Court examins and find that at his last settlement with the Court there was a balance against him in favor of his ward of Five Thousand nine hundred and sixty dollars Twenty one cents that the interest is Two hundred and twelve dollars fifty eight cents and that he has paid out one hundred and eighty four dollars seven cents leaving a balance against him in favor of his ward of Five Thousand nine hundred and eighty eight dollars seventy two cents.

State of Missouri County of Saint Louis ss. At a Term of the Probate Court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Missouri on the first monday of June being the fourth day of said month in the year of our Lord one Thousand eight hundred and forty nine. were present. Peter Ferguson Judge of said Court. John F. Long Esquire marshall of the County of Saint Louis. Court adjourned from day to day until Wednesday 20th June 1849. Wednesday 20th June 1849. Court met pursuant to adjournment. present same Judge.

Annl. Settlement 1849

Fredrick W. Beckwith Curator of Philmens Smith. Annual Settlement. Fredrick W. Beckwith appears and exhibits his account

for the annual settlement of his Curatorship of Philmens Smith on examination where of it appears that at his last settlement with the court there was a balance against him in favor of his ward of Five Thousand nine hundred and eighty eight dollars seventy two cents that he has received one hundred and eighty dollars and has paid out one hundred and thirty eight dollars sixteen cents leaving a balance in his hands in favor of his ward of Six Thousand and thirty dollars fifty six cents.

State of Missouri. County of Saint Louis ss. At a Term of the Probate Court begun and held at the city of Saint Louis within and for the county of Saint Louis in the State of Missouri on the first monday of June being the third day of said month in the year of our Lord one Thousand eight hundred and fifty were present. Peter Ferguson Judge of said Court. William F. Ferguson clerk and John F. Long Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until monday 10th June 1850. Monday 10th June 1850. Court met pursuant to adjournment. present same Judge. Frederick W. Beckwith Guardian of Philmens Smith. Annual Settlement.

Annl. Settlement 1850

Frederick W. Beckwith appears and exhibits his account for the annual settlement of his Guardianship of Philmens Smith whereupon the court examine and find that at his last settlement with the Court there was a balance in his hands in favor of his ward of Six Thousand and thirty dollars fifty six cents. that the interest received is two hundred and forty dollars and that he is entitled to credits to the amount of twelve hundred and twenty one dollars five cents leaving a balance against him in favor of his ward of Five Thousand and forty nine dollars fifty one cents.

State of Missouri
County of St. Louis ss. I William F. Ferguson clerk of the Probate Court of the County of Saint Louis in the State of Missouri certify that the forgoing is a True copy of the appointment of Frederick W. Beckwith as Curator of the estate of Philmens Smith therein

named, a true copy of the new bond made by said Beckwith as Curator aforesaid and by B. Paul his security therein, a true copy of the several accounts rendered by said Beckwith as curator in the years 1844, 1845, 1846, 1847, 1848, 1849 and 1850 and a true copy of the several settlements of Frederick W. Beckwith curator of Philmena Smith with the Probate court of the County of Saint Louis for the same years as the same now severally remain of Record in the office of the Judge of Probate of the county aforesaid. (L.S.) In testimony whereof I hereto set my hand and affix the seal of the Probate Court of the County of Saint Louis at office in said county this twenty sixth day of August in the year of our Lord one thousand eight hundred and fifty two.

William F. Ferguson Clerk.

The Plff then read in evidence a certified copy of the appointment of Henry Chouteau as Guardian of the person & estate of Philsmena Smith, which was April 12, 1852.

State of Missouri
County of Saint Louis } At a term of the Probate Court begun and held at the city of Saint Louis within and for the County of Saint Louis in the State of Missouri on the first monday of March being the first day of said month in the year of our Lord one thousand eight hundred and fifty two, were present. Peter Ferguson Judge of said Court. William F. Ferguson Clerk and David T. Mc Cullough Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Monday 12th April 1852. Monday 12th April 1852. Court met pursuant to adjournment, present same Judge.

H Chouteau appt. Guardian

Henry Chouteau Guardian of Philmena Smith, Guardian Chosen. Philmena Smith appears and states that she was fifteen years of age on the twenty ninth day of November last and moves to be allowed to make choice of a Guardian which she is permitted to do, on which she chooses Henry Chouteau who is approved of and appointed guardian of the person and estate of said

minor, and the Court order that he enter into bond in the sum of Ten thousand dollars with sufficient security conditiond according to law, Whereupon he accepts such guardianship and offers Gabriel S. Chouteau as his security who is approved of by the Court and the bond required is executed and filed.

State of Missouri
County of St. Louis ss. I William F. Ferguson clerk of the Probate Court of the county of Saint Louis in the State of Missouri certify that the foregoing is a true copy of the proceedings of said Court in the appointment of Henry Chouteau as Guardian of the person and estate of Philomene Smith therein named as the same now remains amongst the Records of said Court of Record in the office of the Judge of Probate of the County of St. Louis. (L.S.) In testimony whereof I hereto set my hand and affix the seal of the Probate Court of the County of Saint Louis at office in said County this Twenty fifth day of August in the year of our Lord one thousand eight hundred and fifty two. William F. Ferguson Clerk.

Then offered in evidence a certified copy of an order made by the St. Louis Probate court at the June Term 1851, requiring said Beckwith as curator of Philomina Smith to pay $500 to Henry Chouteau Guardian of the person of said P. Smith.

Order on Curator to pay H Chouteau Gdn $500.

State of Missouri } In the Probate Court for St. Louis County
County of Saint Louis ss. } June Term 1851.

Henry Chouteau vs. Frederick W. Beckwith curator of Philomene Smith. order to pay Guardian $500. 00 cents. Henry Chouteau Guardian of the person of Philomene Smith appears and shows that he has given notice to Frederick W. Beckwith curator of the estate of said minor of his intention to apply to the court at the present Term thereof to make the necessary appropriation of money of said minor in the hands of said Curator to pay the sums already expended by said Guardian for the support, maintainance and education of said Philomene and said Curator not having appeard

or shown any cause why an appropriation as asked for should not be made the court order that said Frederick W. Beckwith Curator of the estate of Philomene Smith do pay to said Henry Chouteau as her guardian and on her account the sum of five hundred dollars.

State of Missouri
County of St. Louis } I William F. Ferguson clerk of the Probate Court of the county aforesaid certify that the foregoing is a true copy from the Records of said Court in the Office of the Judge of Probate of St. Louis County. (L.S.) Given under my hand and the seal of said Court at office in the county aforesaid this third day of September 1851. William F. Ferguson Clerk. which was objected to by Deft & overruled by the Court & read in to which decision of the Court the Deft at the moment excepted. Plaintiff also gave in evidence the notice to said Beckwith.

Notice to Beckwith

To Frederick W. Beckwith Curator of the estate of Philomene Smith. Take notice. That on the thirtieth day of the present month of June, or as soon thereafter as counsel can be heard, I shall apply to the Probate Court for the county of St. Louis. in the State of Missouri to make the necessary appropriation of money of said minor, in your hands, to pay the sums already expended by me for the support, maintainance and education of the said Philomene Smith, and of such other sum as to the said Court shall seem proper for her education and maintainance for the balance of the present year. When and where you are requested to attend if you think proper. St. Louis 7th June 1851. Henry Chouteau Gdn of Philomene Smith

The Plff then proved by David P. McCullough marshall of St. Louis county that he served a copy of said order on said Beckwith & demanded the said $500. on the 12 of Sept 1851, & it was admitted that said Beckwith as Curator as aforesaid made no settlement in the Probate Court at the June Term 1851. & Plff then closed.

The Deft offered in evidence a certified copy of the final settlement

& also the account of said Beckwith as curator as aforesaid made in said Probate Court at the June Term 1852.

1850 June Term	To Balance in hands of Curator	$5049.52
1852 June Term	To amount of Cash received of I. A. Lebaume for her Interest in Edward Chouteau's Estate	887.77
	" Interest on $3400 ^{33} from 1st Septr 1851 to 14 June 1852 @ %	161.51
		$6098.80
1852 June Term	To Balance in hands of Curator	$5561.84
1852 June Term	By Cash paid for Curbing (1)	32.88
	" Herman Stencost for paving (2)	17.20
	" H. B. Belt Sheriffs fees (3) $3.29 Probate fees (4) $2.85	6.14
	" City Taxes for 1848 (5) $28 ^{69} City Taxes for 1850 (6) $23. $\frac{24}{100}$	51.93
	" Same Same (7) $22 ^{91} City Tax for 1850 (8) $27.15	50.06
	" Same 1850 (9) $7.36 Same 1850 (10) $9.94	17.30
	" Same 1850 (11) $16. ^{51} City Tax for 1850 (12) $14 $\frac{91}{100}$	31.42
	" City Taxes for 1851 (13) $30. ^{25} Same 1851 (14) $11 ^{00}	41.25
	" Same 1851 (15) $49 $\frac{83}{100}$ City Taxes for 1851 (16) $11. $\frac{88}{100}$	61.71
	" Same 1851 (17) $40 $\frac{41}{100}$ Same 1851 (18) $19 $\frac{80}{100}$	60.21
	" State & County Tax 1850 (19) $12 ^{82} State & Co Taxes for 1850 (20) $36.85	49.67
	" Same 1850 (21) $17 $\frac{28}{100}$ Same for 1848 (22) $7.92	25.15
	" Same 1850 (23) $3 $\frac{91}{100}$ State & County Tax for 1851 (24) $65 $\frac{52}{100}$	69.43
	" Same for 1850 (25)	22.61
	By Balance in hands of Curator	5561.84
		6098.80

State of Missouri County of Saint Louis ss. At a Term of the Probate Court begun and held at the City of Saint Louis within and for the County of Saint Louis in the State of Missouri on the first monday of June being the seventh day of said month in the year of our Lord one thousand eight hundred and fifty two were present Peter Ferguson Judge of said Court, William F. Ferguson Clerk and David T. McCullough Esquire Marshall of the County of Saint Louis. Court adjourned from day to day until Saturday 19th

June 1852. Saturday 19th June 1852. Court met pursuant to adjournment. present same Judge.

Settlement 1852

Frederick W. Beckwith Curator of Philomene Smith. Final settlement & order to pay Succeser. Frederick W. Beckwith appears and exhibits his account for the final settlement of his curatorship of Philomene Smith whereupon the Court examine and find that at his last settlement with the Court there was a balance in his hands in favor of his ward of Five Thousand and forty nine dollars fifty two cents that he has since received one thousand and forty nine dollars twenty eight cents and has paid out Five hundred and thirty six dollars ninety six cents leaving a balance against him in favor of his ward of Five Thousand five hundred and sixty one dollars eighty four cents, which sum the Court order him to pay to Henry Chouteau now the Guardian of the person and estate of said minor and the Court order that on the production of his receipt therefor that he be finally discharged.

State of Missouri
County of St. Louis } I William F. Ferguson Clerk of the Probate Court of the County of St. Louis in said State certify that the forgoing is a true & correct copy of the last & final account rendered by Frederick W. Beckwith as curator of the estate of Philomene Smith & also of the final settlements of his accounts as the same now remains of record in the office of the Judge of Probate of the County of St. Louis (L.S.) In Testimony whereof I hereto set my hand & affix the seal of the Probate Court of the County of St. Louis at office in said county this 22 day of April eighteen hundred & fifty four. William F. Ferguson Clerk.

which was objected to by Plff & overruled by the Court & the same was read in evidence to which decision of the Court the Plff at the moment excepted. The Deft then offerd in evidence a certified copy of the Bond of said Beckwith & Louis C. Smith dated Sept 19. 1851.

Know all men by these presents. That I Frederick W. Beckwith

Bond of Beckwith V Smith

as principal, and Louis C. Smith as security, are held and firmly bound unto the State of Misouri, in the full and just sum of Four Thousand dollars, lawful money of the United States to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators to and for the use of Philmeno Smith a minor hereinafter named The condition hereof is such, that whereas, The Probate Court for The County of St. Louis, at the March term thereof in the year 1843 appointed Frederick W. Beckwith Curator of the above named Philmeno Smith a minor then aged six years. Now if the said Frederick W. Beckwith above bounden shall well, truly and faithfully discharge the duties of his office of Curator aforesaid according to law, then this obligation to be void, otherwise to remain in full force and virtue. Dated and sealed at St. Louis this nineteenth day of September 1851. F. W. Beckwith (seal) Louis C. Smith (seal)
Filed 19th September 1851. William F. Ferguson Clerk.

State of Misouri
County of St. Louis } I William F. Ferguson Clerk of the Probate Court of the County of Saint Louis in the State of Misouri certify that the foregoing is a true copy of the new bond of Frederick W. Beckwith as curator of the estate of Philmeno Smith as the same now remains of Record in the office of the Judge of Probate of the County of St. Louis. (L.S.) In Testimony whereof I hereto set my hand and affix the seal of the Probate Court of the County of Saint Louis at office in said County this twenty second day of April in the year of our Lord one thousand eight hundred and fifty four. William F. Ferguson Clerk.

which was objected to by Plff & overruled by the Court & the same was then read in evidence. to which decision of the Court the Plff excepted at the moment. It was admitted that Rene Paul died May 20. 1851 & that Marshall Brotherton was his executor. This was all the evidence in the cause. The Plff then asked the Court to give the following instruction No 1

Plffs Instruction

Instruction No 1. given for plaintiff -
That if the Jury find, that Beckwith in June 1852, was indebted to his ward Philmene Smith in the sum of $5849.57 - That said Beckwith failed to make a settlement in the Probate Court at the June Term 1857, & failed to pay the $500. ordered by the Probate Court at June Term 1857 after the same was demanded, & that Paul was his security at that time, the jury ought to find for the Plff. the amount of such indebtedness not exceeding $4,000. unless the Deft. has shewn to the satisfaction of the Jury that Beckwith at the date of the bond executed in 1857 had still in his hands the amount of funds belonging to his ward, & the final settlement made in June 1852 read in evidence by the Deft. is insufficient for that purpose.
which said instruction the court gave, to which decision of the Court in giving said instruction the Deft at the moment excepted.
The Deft asked the ten following instructions Nos 1.2.3.4.5.6.7.8.9.& 10

Defts Instructions

1. If the Jury believe from the evidence, that on the 19 day of September 1857 Frederick W. Beckwith as principal & Louis C. Smith as security executed the curators bond read in evidence by Deft, & that the said Beckwith as curator of Philmene Smith on the 19th June 1852 made a final settlement in the St. Louis Probate Court, then said Plaintiff cannot recover.
2. If the jury believe from the evidence, that Frederick W. Beckwith & Louis C. Smith on the 19 of September 1857 executed the curators bond read in evidence by Deft. that Rene Paul died may 20th 1857, & that said Beckwith as curator of Philmene Smith on the 19 of June 1852, made a final settlement in the St. Louis Probate Court, then said Plaintiff cannot recover.
3. If the Jury believe from the evidence that Frederick W. Beckwith as principal & Louis C. Smith as security on the 19 of September 1857, executed the curators bond read in evidence by the Deft, & that said Beckwith as curator of Philmene Smith on the 19 of June 1852 made a final settlement in St. Louis

Probate Court, Then said Louis C. Smith is liable to said Plaintiff for the amount Then due by said Beckwith as curator of said Philomene Smith.

4. To entitle the Plaintiff to recover she must prove to the satisfaction of the Jury that Frederick W. Beckwith as Curator of Philomene Smith was guilty of some default after the execution of the bond sued upon & before the 19 of September 1857. If the Jury believe that said Beckwith & Louis C. Smith executed the bond read in evidence by the Deft.

5. If the Jury find for the Plaintiff, then said Plaintiff is only entitled to recover the amount of damages sustained by said Philomene Smith on account of the misconduct of Frederick W. Beckwith as her curator while said Rene Paul was security on said bond sued upon.

6. The presumption of law is that Frederick W. Beckwith as Curator of Philomene Smith did his duty as such Curator until the contrary appears.

7. The court instructs the jury that the Plaintiff cannot recover on any of the breaches as set out in the petition, except the one for the non payment of the $500. ordered to be paid by the St. Louis Probate Court.

8. The presumption is that Frederick W. Beckwith had the funds of his wards at the time of his final settlement.

9. The presumption is that F. W. Beckwith as curator of Philomene Smith had in his possession the funds & property of his said ward at the time that he made his settlement in the Probate Court, until the contrary is shown.

10. The Court instructs the jury, that there is no evidence of any breach of the bond sued upon as set forth in the petition, except the one for the non payment of the $500, as ordered by the Probate Court at June Term 1857, & the one for failure to make an annual settlement by said Beckwith as curator of Philomene

Smith at the June Term 1857, & the Plff. can only recover the amount of damages sustaind by said Philmene Smith on account of said two breaches.

The Court gave Nos 4. 5 & 6, & refused to give Nos 1. 2. 3. 7. 8. 9. & 10. To which decision of the Court in refusing to give said instructions the Deft excepted at the moment. The Jury found a verdict for Plff for $4000. The Deft in due time filed a motion for a new trial.

Motion for New Trial

The State of Missouri to use of Philmene Smith &c Plaintiff vs. Marshall Brotherton Executor of Reno Paul Defendant. In the St. Louis Circuit Court. April Term 1854. And the said Defendant comes & moves the Court to set aside the verdict rendered in said cause & grant a new trial for the following reasons, to wit: 1st Because the Court errd in admitting illegal testimony on the trial. 2d Because the Court errd in giving illegal & erroneous instructions to the Jury. 3d Because the Court errd in refusing to give to the Jury, legal & proper instructions. 4. Because the Court errd in declaring the law applicable to the case. 5th Because the verdict is against the instructions of the Court. 6th Because the instructions given are inconsistant & irreconcilable. 7th Because the instructions confused the jury. 8th Because the verdict is against the weight of evidence. 9th Because the verdict is excessive. 10. Because there is no evidence to sustain the verdict. 11th Because the verdict ought to have been for the defendant.

W. C. Jamison Atty. for Deft.

which motion the Court overruld to which the Deft at the moment excepted. To all which rulings & decissions of the Court the Deft. at the moment excepted & tendered his bill of exceptions & prays the Court to sign the same & be made a part of the record. which is accordingly done.

A. Hamilton
Judge &c

State of Missouri
County of St. Louis } I William J. Hammond Clerk of the Circuit Court within and for the County aforesaid

certify The foregoing To be a full and complete Transcript of The Record & Proceedings in The case of The State of Missouri To use of Philomene Smith vs Marshall Brotherton Executor of René Paul Deceased as The same now remains of Record in my office.

In Testimony whereof I hereto set my hand and affix The seal of said Court at office in The City of St. Louis This This Tieth day of June Eighteen hundred and fifty four.

Wm. F. Hammond clerk

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(13)

March. T. 1855

The State of Missouri to use of Philomene Smith by Henry Chouteau Guardian respondent

Transcript
vs. Record

Marshall Brotherton
Executor René Paul Decd. appt.

Appl. Circuit Court.

Cline & Jamison
attys. for appellant

Freeman & Kelso, } respt.
Glover & K. for }

Filed 5th October 1854.
Wm. L. Glanville
clk.

Fee $12. Paid by
W. C. Jamison

The State to use of Philomena Smith by Henry Chouteau her Guardian, Respondent
vs
Marshall Brotherton Executor of Rene Paul Appellant

Supreme Court October Term 1854 Appeal from St Louis Circuit Court

Assignment of Errors,

And the said Appellant comes & says, it is manifest from the record in the above entitled cause, that the St Louis Circuit Court committed various errors in said cause & he assigns the following as errors committed by said Court, to wit;

1st The said Circuit Court committed error in overruling the motion of said Appellant to dismiss said cause,

2d, The said Court erred in admitting illegal evidence on the trial of said cause.

3, The said Court erred in giving illegal & erroneous instructions to the jury

4, The said Court erred in refusing to give to the jury legal & proper instructions

5, The said Court erred in declaring the law applicable to the case

6, The said Court erred in overruling the motion of Appellant for a new trial.

Cline & Garrison
Attys for Appellant,

And the said respondent says there is no error in the said record & proceedings

Glover & Rubinstein
Wm Reber for
Respondent

No. 119

Supreme Court
October Term

The State to use of Phil=
=omena Smith &c,
Respondent
vs
Marshall Brotherton
Executor of Rene Pond
Appellant

Assignment of Errors

Filed 12 October 1857.
Wm. L. Glanville
Clk

Clerk & Garrison
Attys. for Appellant

(2)

The State of Missouri in the relation & to the use of Philanera Smith by Henry Chauteau her Guardian, Respondent

vs

Marshall Brotherton Executor of Rene Paul, Appellant

Dw the Supreme Court. March Term 1855. Appeal from the St. Louis Circuit Court No. 124,

Statement by Appellant.

At the Sept. Term 1852, of the St. Louis Probate Court Henry Chauteau Guardian of Philanera Smith exhibited a demand against the estate of Rene Paul, founded on a bond alleged to have been executed by said Paul in 1844 as security of Frederick N. Beckwith as Curator of said Smith upon which notice was waived by said Executor, & at the June Term 1853 of said Court the said Chauteau Guardian as aforesaid amended his statement exhibited as aforesaid by filing a petition stating, that on the 16 of March 1844, said Beckwith as principal & said Paul as security executed their bond in the penal sum of $4000. X, conditioned that if said Beckwith should well, truly & faithfully discharge the duties of his office as Curator of said Smith, who had been appointed at March Term 1843, of said Probate Court, according to law, then said bond to be void, else to remain in full force & virtue - that said Chauteau was on the 13 of March 1844 duly appointed the Guardian of the person of said Smith & alleged as breaches of said bond, that $8000. belonging to said Smith came into the hands of said Beckwith as Curator as aforesaid between March 16 1844 & Sept. 19, 1851, to wit; $189.47/100 in June 1845 - $6209, X in June 1846, & $887.77/100 in May 1851 & that he did not account for & pay the same as by law it was his duty to do. - that he did not keep a seperate account of said sums of money, but mixed the same with his own & converted the same to his own use - that he neglected & failed to put said money to interest upon mortgage or other security - that he did not make annual

settlement as Curator as aforesaid – that there came into the hands of said Beckwith in March 1851 three city bonds dated July 21. 1845 payable to R, Simpson or bearer payable 50 years after date with interest each for $1000 two of which belonged to said Smith & are three of the other, & that he sold & converted them to his own use – that at the June Term 1850 of said Probate Court said Beckwith as Curator as aforesaid made his annual settlement, whereupon the Court found a balance against him to the amount of $5049, 41/100 & that he converted the same to his own use – that he as Curator as aforesaid obtained possession of two bonds executed by the City of St. Louis in favor of said Smith each for $1000 & one third of another bond executed as aforesaid for $1000 of which said Smith was entitled to $333, 33/100 1/3 which he on the 18 of Sept, 1851 sold & converted to his own use – that said Probate Court at the June Term 1851 ordered said Curator to pay to said Chouteau Guardian as aforesaid $500 which he did not do. – that at the June Term 1850 there was a balance of $5049, 41 against said Curator & that he did not put said money at interest secured by mortgage or other security, & further stated that on the 12 of April 1852 said Chouteau was appointed by said Court, Guardian of the person & estate of said Smith & asked for judgment against said estate of Paul for $4000. Said Executor at June Term 1853 of said Probate Court made a motion to dismiss said suit, 1st Because said Probate Court had no jurisdiction over the same – 2d Because the said Guardian had mistaken his remedy, & 3th Because the amended petition was insufficient, – which motion the Court overruled & on the trial thereof a judgment was rendered in favor of said Chouteau Guardian of said Smith against said estate for $4000. Said Executor appealed to the Circuit Court & there renewed his motion to dismiss, which was overruled. Exception duly taken – On the trial in the Circuit Court Elfl. read in evidence a copy of the appointment of said Beckwith as Curator of said Smith & the bond executed

by him & said Paul dated March 16, 1844 & conditioned as stated in said amended petition, & then offered in evidence a certified copy of the settlements & accounts of said Beckwith as Curator of said Smith made in the Probate Court in the years 1844, 1845, 1846, 1847, 1848, 1849 & 1850, which was objected to by Defts. in the manner that it was not a complete record & did not contain all the settlements made in said Court by said Curator, - overruled, & the same read in evidence, to which Defts. excepted - Henry Chauteau was appointed the Guardian of the person & estate of said Smith April 12, 1852. - At June Term 1851 of the Probate Court an order was made requiring said Beckwith to pay said Henry Chauteau Guardian of the person of said Smith $500. & on the 12 of Sept, 1851, a copy of said order was delivered to said Beckwith & at said time the said sum of $500 was demanded. Said Beckwith as Curator of said Smith made no settlement in the Probate Court at the June Term 1851. Defts. offered in evidence a duly certified copy of the final settlement & the accounts of said Beckwith as Curator of said Smith made in the Probate Court at June Term 1852, which was objected to by Defts., overruled & the same read in evidence, to which Defts. duly excepted, - by which it appeared that said Beckwith as Curator as aforesaid charged himself with $5044 51/100 being balance against him at his last settlement & also other items, & at said settlement the Court found a balance of $3561,84 which the Court then & there ordered him to pay to said Chauteau Guardian of said Smith. Defts. offered in evidence a duly certified copy of the Curator's bond of said Beckwith as Curator of said Smith, executed by him as principal & Lewis G. Smith as security, dated Sept. 19, 1851 & conditioned as the said other bond, which was objected to by Defts., overruled & the same read in evidence - Defts. duly excepted - It was admitted that said Paul died

1

(85)

May 20, 1851 & that Marshall Brotherton was his executor
At instance of Plff, the Court gave the following instructions
to which Defts, excepted.
That if the jury find that Beckwith in June 1850 was in=
=debted to his ward Philomena Smith in the sum of $5045.57
- that said Beckwith failed to make a settlement in the Probate
Court at the June Term 1851 & failed to pay the $500 & ordered by
the Probate Court at June Term 1851 after the same was
demanded & that Paul was his security at that time,
the jury ought to find for the Plff, the amount of such
indebtedness not exceeding $4000, unless the
Defts, has shewn to the satisfaction of the jury that
Beckwith at the date of the Bond executed in 1851 had
had still in his hands the amount of funds belonging
to his ward & that final settlement made in June
1852 read in evidence by the Defts, is insufficient for
that purpose. The Defts asked the 10 following
instructions - the Court gave the 4, 5 & 6. & refused
to give the 1, 2, 3, 7, 8, 9 & 10, to which Defts duly excepted
1st If the jury believe from the evidence, that on the 19 day of
September 1851 Frederick N. Beckwith as principal & Louis C.
Smith as security executed the Curator, bond read in evi=
=dence by Defts, & that the said Beckwith as Curator of
said Philomena Smith on the 19 of June 1852 made a
final settlement in the St Louis Probate Court, then
said Plff cannot recover
2d If the jury believe from the evidence, that Frederick N. Beck=
=with & Louis C. Smith on the 19 of Sept, 1851 executed the Curator
bond read in evidence by Defts - that Rene Paul died May 20, 1851
& that said Beckwith as Curator of Philomena Smith on
the 19 of June 1852 made a final settlement in the St Louis
Probate Court, then said Plaintiff cannot recover.
3d If the jury believe from the evidence that Frederick N.
Beckwith as principal & Louis C. Smith as security on the

Given

Refused

Refused

19 of September 1851 executed the Curator bond read in evidence by the Defts, & that said Beckwith as Curator of Philomena Smith on the 19 of June 1852 made a final Settlement in St. Louis Probate Court, that said Louis C. Smith is liable to said Plaintiff for the amount that due by said Beckwith as Curator of said Philomena Smith

Refused

4th To entitle the Plaintiff to recover she must prove to the satisfaction of the jury, that Frederick W. Beckwith as Curator of Philomena Smith was guilty of some default after the execution of the bond sued upon & before the 19 of September 1851, if the jury believe that said Beckwith & Louis C. Smith executed the bond read in evidence by the Defts,

Given

5th If the jury find for the Plaintiff, then said Plaintiff only entitled to recover the amount of damages sustained by said Philomena Smith on account of the misconduct of Frederick W. Beckwith as her Curator while said Bond was security as said bond sued upon

Given

6, The presumption of law is that Frederick W. Beckwith as Curator of Philomena Smith did his duty as such Curator until the contrary appears

Refused

7, The Court instruct the jury that the Plaintiff cannot recover on any of the breaches as set out in the petition except, that one for the non payment of the $500 ordered to be paid by the St. Louis Probate Court,

Refused

8, The presumption is that Frederick W. Beckwith had the funds of his ward at the time of his final settle=ment,

Refused

9, The presumption is that F. W. Beckwith as Curator of Philomena Smith had in his possession the funds & property of his said ward at the time that he made his settlement in the Probate Court, until the contrary is shown,

10, The Court instructs the jury, that there is no evidence of any breach of the bond sued upon as set forth in the petition, except the one for the non payment of the $500 as ordered by the Probate Court at June Term 1851 & the one for failing to make an annual settlement by said Beckwith as Curator of Philemon Smith at the June Term 1851 & the Defft. can only recover the amount of damages sustained by said Philemon Smith on account of said two breaches.

Refused

The jury without argument found for the Defft. $4000 & Defft. only filed a motion for a new trial, which was overruled & only excepted to & appealed to this Court,

Clark & Garrison
Attys. for Appt,

No. 124

The State of Missouri to use &c, Respondent

vs

Marshall Brotherton Executor of Rene Paul Appellant

Statement by Appellant

Claire & Jamison for Apt,

Filed 13th April 1853

W. L. Glanville Cl.

(33)

In the Sup. Court. March Term 1855

State of Mo. to the use of Philomena Smith by Henry Chouteau her Guardian } Respondent

vs

Marshall Brotherton as Exc. of Rene Paul died } appellant No 124. of cases to March Term 1855

This case was commenced in the Probate Court of St Louis Co.

At the June Term 1853 of said Court a demand in writing, in the name of the plaintiff as indicated in the caption was presented for allowance against the estate of Rene Paul. the said Brotherton being his Executor. the dependant appeared and waived notice, The statement recited that on the 16. March 1844 J. W. Beckwith as principal and the said Paul as security executed their bond to the State in the penal sum of $4000. conditioned for the faithful discharge of the duties of said Beckwith as curator of Philomena Smith - Beckwith having been appointed as such Curator in March 1843. That the said Henry Chouteau was appointed in March 1844 Guardian of her person.

The breaches assigned were

1st That between the 16th March 1844 and September 1851. the sum of $8000 came into Beckwith hands as such curator which he failed to account for or pay over as required by law, and as demanded by her guardian Chouteau

2nd That Beckwith kept no separate account

of the money received by him as such curator but mixed the same with his own. and converted the same to his own use

3rd That Beckwith neglected to put the said money at interest upon mortgage or other security

4th That Beckwith did not make annual settlements of his accounts as such curator

5th That in March 1851 Three bonds of the City of Ottawa each for $1000. drawing interest from date payable in 5 years came into his hands. That 2 of the bonds and a check in the other belonged to said Philomena. which Beckwith converted to his own use in March 1851

6th That at Beckwith's settlement with the Probate Court in June 1850 a balance of $5049.51. was found against him as such curator which he converted to his own use

7th That in June 1851 the Probate court made an order requiring Beckwith to pay to Chenbeau as guardian aforesaid $500 which he failed to do. though he had in his hands of her money $5049.57. and the same was demanded of him

8th That he did not put at interest the balance in his hands in June 1850

That Chenbeau on the 12. April 1852 was appointed by the Probate Court guardian of the person and Estate of said Philomena

The petition asked for judgment against the Estate of Paul

In the Probate Court the defendant filed a motion to dismiss the suit.

Because the Probate court had no jurisdiction.

of the case & Became a cause of action resulting from a breach of a penal bond could not be allowed in the Probate Court

The Motion was overruled and on a trial judgment was rendered against the defts for $4000. The case was taken by appeal to the circuit Court where a like motion was made and overruled

On the trial the plaintiff proved the appointment of Beckwith as curator as aforesaid. the said Bond executed by him and Paul. the appointment of Chisham as the guardian of her person and his appointment in april 1852 as the guardian of her person and property.

The order of the Court in June 1851 requiring Beckwith to pay to Chisham as such guardian $500. of which due notice was given and demand made. The plaintiff also gave in evidence certified transcripts of the settlements made by Beckwith in the years 1844. 1845. 1846. 1847. 1848. 1849 & 1850 as such curator with the Probate Court. each of which settlements showed a ballance in his hands and the settlement in 1850 showed a ballance of $5049.57. to the giving of which evidence the defts objected & excepted for the reason that the transcripts from the Probate Court did not show all the settlements which had been made. It was admitted that Beckwith made no settlement with the Probate Court during the year 1857.

On the part of the defts it was shown that Paul died in May 1851. The defendant also read in evidence a copy of the Bond executed in Sept. 1851 by Beckwith as aforesaid and

Louis C. Smith as security in the penal sum (81)
of $4000 conditioned for the faithful discharge
of his duties as Curator of Philomena Smith.
The defendant also gave in evidence a
transcript from the Probate Court shewing
a settlement made by Beckurth in June
1852 at which time he was indebted to his
ward $3561.84 which he was ordered to pay
to Henry Chenleau and on the production
of Chenleau's receipt therefor he should
be finally discharged

At the instance of the plaintiff the Court
Gave the following instructions, to which the
defendant excepted

1. If the jury ~~believe~~ find that Beckurth
in June 1850 was indebted to his ward Philomena
Smith in the sum of $3729.31. that said
Beckurth failed to make a settlement in the
Probate Court at the June Term 1851. & failed to pay
the $800 ordered by the Probate Court at June Term 1851
after the same was demanded, and Paul was his secu-
rity at that time. the jury ought to find for the plaintiff
the amount of such indebtedness not exceeding $4000
unless the Defendant has shewn to the satisfaction of the jury
that Beckurth at the date of the bond executed in 1851
had paid in his hands the amount of funds belonging
to his ward. and the final settlement made in
June 1852 read in evidence by the defendant
is insufficient for that purpose

The defendant asked the 10 following instructions
the 4.th 5.th 6.th of which were given and the others refused

of the case & Because a cause of action resulting from a breach of a penal bond could not be allowed in the Probate Court

The motion was overruled and on a trial judgment was rendered against the deft for $4000. The case was taken by appeal to the circuit Court where a like motion was made and overruled

On the trial the plaintiff proved the appointment of Beckwith as curator as aforesaid. The said Bond executed by him and Paul. the appointment of Chouteau as the guardian of her person and his appointment in April 1852 as the guardian of her person and property.

The order of the Court in June 1851 requiring Beckwith to pay to Chouteau as such guardian $500. of which due notice was given and demand made. The plaintiff also gave in evidence certified transcripts of the settlements made by Beckwith in the years 1844. 1845. 1846. 1847. 1848. 1849 & 1850 as such curator with the Probate Court. each of which settlements showed a ballance in his hands and the settlement in 1850 showed a ballance of $5049.57. to the giving of which evidence the deft objected & excepted for the reason that the transcripts from the Probate Court did not show all the settlements which had been made. It was admitted that Beckwith made no settlement with the Probate Court during the year 1857.

On the part of the deft it was shown that Paul died in May 1851. The defendant also read in evidence copy of the Bond executed in Sept. 1851 by Beckwith as principal and

Respass

1st. If the jury believe from the evidence that on the 19th day of Sept. 1851 Benedict W Beckwith as principal and Lewis C Smith as security executed the Curators bond read in evidence by Pltff & that said Beckwith as Curator of Philomena Smith on the 19. June 1852 made a final settlement in the Shelby Probate Court. then said Plaintiff cannot recover

Respass

2nd. If the jury believe from the evidence that Beckwith & Lewis C. Smith on the 19 Sept. 1851 executed the Curators bond read in evidence by Pltff. that Rene Paul died May 20. 1851 & that said Beckwith as Curator of Philomena Smith on the 19. June 1852 made a final settlement in the Shelby Probate Court. then said Pltff cannot recover

Respass

3rd. If the jury believe from the evidence that Beckwith as principal and Lewis C Smith as security on the 19th Sept 1851 executed the Curators bond read in evidence by the Pltff & that said Beckwith as Curator of Philomena Smith on the 19. June 1852 made a final settlement in the Shelby Probate Court. then said Lewis C Smith is liable to said Pltff. for the amount then due by said Beckwith as curator of said Philomena Smith

Error

4th. To entitle the plaintiff to recover the must prove to the satisfaction of the jury that Beckwith as Curator of Philomena Smith has guilty of some default after the execution of the bond sued upon & before the 19. Sept. 1851. if the jury believe that said Beckwith & Lewis C Smith executed the bond read in evidence by the Pltff

Error

5th. If the jury find for the Plaintiff the said Pltff is only entitled to recover the amount of damages sustained by said Philomena Smith on account of the mis conduct of said Beckwith as her Curator while said Rene Paul was security on said bond sued upon

Error

6th. The presumption of law is that Beckwith as Curator of Philomena Smith did his duty as such Curator until the Contrary appears

7. The court instructed the jury that the Plff. cannot recover on any of the breaches assigned in the petition except the one for the non payment of the $500. ordered to be paid by the Probate

Refused

8th. The presumption is that Beckwith had the funds of his ward at the time of his final settlement

Refused

9. The presumption is that Beckwith as Curator of Phelonera Smith had in his possession the funds & property of his ward at the time he made his settlement in the Probate Court until the contrary is shown

Refused

10th. The Court instructs the jury that there is no evidence of any breaches of the bond sued upon as set forth in the petition except the one for the non payment of the $500. as ordered by the Probate Court at June Term 1857 & the one for failure to make an annual settlement by said Beckwith as Curator of Phelonera Smith at June Term 1851. and the Plaintiff can only recover the amount of damage sustained by said Phelonera Smith on account of said breaches.

The verdict was for $4 over. Motion for new trial. and the case is brought here by appeal

No 124 - Sup. Ct.
March Term 1855

State to the use of
Philomena Smith
v
Brotherton. Ex of
Rene Paul

Statement of the Case
by Glover & Richardson
for the Respondent

(103)

In the Supreme Court
March Term 1855 –

State to the use of Philomena
Smith by her Guardian Respondent
vs No 124.
Brotherton Executor of
Rene Paul } Applt –

Points and authorities by Glover & Richardson for the Respondent

1st There is nothing in the motions, made in the Probate and Circuit courts to dismiss the Case, for if there was a breach of the bond on which Paul was security, the relator had a "demand" against his estate which could be exhibited for allowance in the Probate Court according to the 5th 6th & 7th clauses Sect. 1. Art IV. title Administration Rev Stat. 1845 & Sect. 8. same Art. or might first be established by a judgment of a court of record, in the ordinary course of proceeding according to the 7th sect. of said 4th Article. See also Sect. 13. title "Courts"
This question of jurisdiction was before this Court in Smith vs Weaver: Adm. 10. Mo. 234 and was considered not debatable.
So also in Moore Ex & vs Brown 14. Mo 165 it was decided, that a demand against an estate in the nature of an action of trover, was properly presented in the County Court.

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2nd. The plaintiff had the right to proceed on the bond against the security before any indebtedness had been previously established, or any judgment obtained against the principal

Oldham & Broadus vs Trimble 15. Mo. 225.

3rd The motion to dismiss was properly overruled if any one breach was properly assigned

Hale to use &c vs Campbell et al 10. Mo. 724

4th It was not necessary that the relator should have filed an affidavit in the Probate Court; the oath might have been administered 'ore tenus', and nothing is to be infered against the plaintiff, on this point, from the silence of the record.

Rankin vs. Perry. 5 Mo. 501.

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March Term 1855 –

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Smith by her Guardian Respondent
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Brotherton Executor of
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Rankin v. Perry. 5 Mo. 301.

5th There is no pretence that Beckwith did not owe his ward more than the penalty of the bond - but the real controversy is whether she shall ~~shall~~ look to the worthless bond of Beckwith and Smith, or can recover on the bond in which Paul was security

The only question of any importance before this Court, is as to the propriety of the instruction given by the Court at the instance of the Plaintiff. If this instruction is correct, then it was proper in the Court below to refuse the 1st 2nd 3rd 7th 8th 9th and 10th instructions asked by the defendant, If it was improperly given, the judgment must fall.

All of the settlements made by Beckwith from the commencement of his term of office to the time of Paul's death shewed that he was indebted to his ward, and the last settlement, (before Paul's death) in June 1850 shewed that he owed her upwards of five thousand dollars.

He failed, without any excuse being given for it - to make his annual settlement, at the June Term 1851 as he was required by law to do, and he failed to pay the $500. which he was ordered by the Court in June 1851 to pay, though he was duly notified of the order, and payment demanded.

The controlling idea in the instance - For is that of Beckwith was indebted to his ward as shewn in his settlement made in

June 1850. and failed and refused to pay Her the said $500 which he was ordered by the Court in June 1851 to pay. the presumption was that he did not pay because he did not have the money of his ward on hand, and the onus thereby was put on the defendant to shew that he did have her funds on hand, at the date of the last bond.

It seems clear of the objection to the admissibility of Beckwith's declaration, for the presumption is created, by an act, or rather by the omission to act, and not by a declaration

The failure to pay Cannot reasonably be imputed to any other cause than that he did not have the money, Then is a motive for every act. and in the absence of other evidence. no other presumption Can arise. but that he did not have the money on hand

This Court decided in the case of Notley et al vs Callaway Co. 11 Mo. 447. that the refusal of a County Treasurer to pay a warrant ~~drawn~~ drawn upon the Treasury. was presumed to be based upon the want of funds in the Treasury

If Beckwith did not have five hundred dollars on hand, which Can be the only apparent reason for his not paying it, it is simply absurd to presume that he had on hand five thousand dollars

If then it was proper under the proofs in the cause to put on the defendant the burthen of shewing that Beckwith had still in his hands the funds belonging to his ward at the date of the last bond, the settlement made by him in June 1832 was insufficient for that purpose.

The last settlement only showed that at that time he owed his ward $3361, the amount was not produced in Court, and the settlement does not state that he had the money on hand, It does not reach even the dignity of a declaration by Beckwith that he had the money, and such a declaration if made, would not be evidence for him. If by any act, before the last settlement, the presumption has been raised, that he did not have the money on hand. it was not rebutted by the settlement.

Admitting that the settlement amounted to a declaration by Beckwith that he had the money of his ward on hand at that time it would be incompetent testimony, for his declaration standing alone, could not repel any legal presumption against him. He could not relieve himself from the presumption by a simple declaration unsupported by other facts

The last settlement can have no greater virtue than a

simple declaration. that he had the money on hand, and the case is no better for the defendant. than if no Settlement had been made after 1850. and he relied simply upon a declaration after the date of the last bond. that he had the funds on hand

6th. The 1st 2nd & 3rd instructions asked by the defendant Contained in different words the same idea, and asserted the proposition that Beckwith's ~~proposed~~ Settlement in 1852 was sufficient to defeat the plaintiffs case.

The 7th 9th & 10th were the converse of the proposition in our instruction.

The 8th was substantially given in the 4th 5th & 6th.

No 124.

Supt. Ct. March Term 1855

Hale to use of

Philomena Smith

vs

Brotherton Ex^d

Rene Paul

Points and authorities

by Glover & Richards for

for the Respondent

(24)

State to use of Philomena Smith & c. } In the Supreme
Respondent } Court, March
vs } Term 1855
Marshall Brotherton Executor of } Appeal from the
Rene Paul, Appellant } St. Louis Circuit Court

Brief of Appellant

1. We contend that the Court below erred in over=
=ruling the motion to dismiss said suit, made by
Rene Paul's Executor

1st The Probate Court has only jurisdiction against a security of his Executor on a Curator's bond, where the Court has ordered the Curator to pay, & in such case the proceeding must be by scire facias. Session Act of 1850 & 1851 page 211, "An act concerning Probate Courts, executors, administrators, Guardians & Curators" section 11,. Revised Code of 1845 Administration Article 5th sections 11, 12, 13 & 14 Chambers & Knapp Edt, page 513. The Probate Court has no jurisdiction except that given by Statute - It has no jurisdiction to try title to land. 16 Missouri R. 473 Shields vs Ashley's Adms, - It has no jurisdiction where off-set is greater than the demand presented against the estate 15 Missouri R, 385, Dennica vs Thomas Adms, - It has no jurisdiction against Adms, for a specific performance of a contract unless the same is in writing & signed by the deceased, 19 Mo. Repts, 647, Schutter's Adms vs Winkle Adms, - And although it has exclusive original jurisdiction of controversies respecting the duties of administrators, yet that jurisdiction can only be exercised in the manner prescribed by Statute - 16 Mo. Repts, 437 Powers vs Blakey's Adms,

2d The Probate Court cannot render a judgment on a penal bond, for in such case the judgment is for the amount of the penalty, with leave to take out execution for the amount of damages sustained.

(12)

3, The prayer of the petition is for the amount of the penalty of the bond, whereas it should be for judgment for the amt. of the penalty with leave to take out execution for the amt. of damages sustained

4, There is no affidavit to the petition

II The Court below erred in admitting in evidence the certified copy of the accounts & settlements of F. W. Beckwith as Curator of said P. Smith offered in evidence by Plff., because it did not contain all the accounts & settlements made by him in said Court & was not a full & complete transcript of the record.

III, The instruction given by the Court below at the instance of the Plff. was clearly wrong,

1st The Court tells the jury in said instruction as a question of law that if the Curator failed to make one annual settlement & failed to pay $500 which he was ordered to pay, therefore he converted $5049, 51/100 of his Wards money to his own use. We say the Court exceeded its province in giving said instruction, because it was for the jury to assess the amount of damages upon the proof of the breaches of the bond as alleged or any one of them.

2d, Whether the Curator converted $5049, 51/100 of his Wards money to his own use, was a question of fact for the jury to pass upon & not the Court.

3d The evidence did not warrant the giving of said instruction. There was no proof tending to establish any of the breaches alleged, except the failure to make one annual settlement & the failure to pay $500, ordered to be paid.

4th Said instruction required the Defl, the Executor of the security to prove that the Curator did not convert to his own use the said sum of $5049, 51/100 the balance against him upon settlement at June Term 1850, whereas we hold it was

encumbent upon the Defft. to prove satisfactorily to the jury that said Curator converted the said balance to his own use to entitle said Defft. to recover the same. 17 Mo. 431,

5th At the final settlement of said Curator made at June Term 1852 a balance of $5561, 84/100 was found against him (in which was included the said sum of $5049, 51/100 balance at June Term 1850) & an order then made for the payment of the same, was a sufficient accounting for said balance of $5049, 51/100 found at June Term 1850,

6th The said final settlement of said Curator made at June Term 1852 has the force & effect of a judgment. 15 Mo. R. 229 Oldham vs Trimble - 9 Mo. R. 366, Caldwell vs Lockridge. And can only be impeached for fraud &c & in such case it must be done by a Court having Equity jurisdiction. 14 Mo. 116, Story vs Wilkerson - 15 Mo. 229 Oldham vs Trimble. 15 Mo. 293 State to use &c vs Collier

7, The Curator was only bound to pay the money in his hands belonging to his Ward, when ordered by the Probate Court, & there was no order of payment made at any of his settlements until the final settlement at June Term 1852, at which time Louis C Smith was the security of said Curator & liable for said balance. Said Curator with said Smith as security having given a new bond dated, duly approved & filed Sept. 19, 1881 operated as a discharge of said Pierre Paul & his estate for all acts of said Curator subsequent to the execution of said bond, Revised Code of 1845. securities section 17, Chambers & Knapp's Adt, page 521, In the case of Warren etal vs State to use of Wilkins 11 Mo. R, page 583, it was held where an executor is placed in the hands of a constable shortly before the expiration of a term for which he had been elected, but not returnable until after the commencement of a term for which he is reelected & not until after he has given bond for the latter term,

the securities on the first bond will not be liable for a failure to pay over the money on the return day - there being no obligation on the curatrix to pay & no default until that time.

IV The court ought to have given the 8 instructions asked by Defft, because the Curator at his final settlement having charged himself with the balance found against him at the previous settlement & the Probate Court approved & recognized the same to be true & correct & found a balance then against him & ordered him to pay the same, it is a fair & reasonable presumption that he had performed his duty & that he then had in his hands the balance of the funds of his ward found against him at said settlement. In the case of Nolly vs Calloway County Court 11 Mo. R. 447 it was held that an officer will not be presumed to have applied the public funds to his private purposes.

V The court ought to have given the 10 instructions asked by Defft,

1st Because it was applicable to the case as made.

2d Because there was no evidence showing or tending to show any of the breaches of said bond as set out in the amended petition, except the two mentioned in said instruction.

3d Because the Plaintiff could legally only recover the amount of damages sustained, by reason of the breaches of said bond, as alleged & proved

Cline & Garrison
Attys. for Defft.

No. 124

State to use of F. Smith &c &c
Respondent
vs
Rene Paul, Executor
Appellant

Brief of Appellant

Cline & Garrison
for Appt.

State use of Smith &
vs
Brotherton Executor of
Rene Paul,

1 The plaintiff made a prima facie case, which was not rebutted by showing the final Settlement made by Beckwith (the curator) after the Execution of the new Bond in 1851.

To establish the liabity of the Security- it is only necessary to show that money has come to the hands of his principal who, on being lawfully called on, has failed to account for and pay it.-

Nolley vs Callaway Co Court 11 Mo R. 447.
3 Strobharts R 327.
~~See also 2 Strobharts Equity R. 166.~~

The Security can not relieve himself from liability by showing that his principal has given a new Bond with other Security and made a Statement of his accounts (or Settlement), in which he has brought forward a balance received under his first Bond.

Nolley's case and 3 Strobh above.-

In Nolleys case the Suit was on the Second Bond against the Second Securities.- The plaintiff gave in evidence

= the last general Settlement (made un=
der the Second Bond), and this was
held to make a prima facie case
But the defendants overthrew and
rebutted it, by showing the funds
had been received under the prior Bond.=

The situation of the parties is re=
versed in this cause. We sue on the
first Bond and show that moneys
were received under it. And defend=
ant sets up the Settlement under the Second
Bond to defeat a recovery.=

If we had sued on the Second
Bond and offered the evidence which
the present defendant has offered we
would have made out a prima facie
Case.= but the Security on the Second
Bond would have defeated us by show=
the evidence which we have offered in
this cause,= on the authority of Molleys
case.= Shall not the evidence which
will defeat the action in the one case
enable us to recover in the other?
Shall the evidence be sufficient to
defeat the action on the last Bond,
and yet not be sufficient to maintain
it on the first?

Such a construction would de=
feat the ends of Justice, and the Secu=
rities on both bonds would, in nine
cases out of ten, escape all liability.

It is said, and very justly said, I admit, that you must show a default in the principal before you can sue the Security. -

But after you show the principal has received moneys and so became liable to account and pay, if when being lawfully called on to do so, he fails. - ~~the liability~~ if there is a default - and the liability of the Security ought to be fixed and perfect - until he shows there was no default during the time he was such Security. =

The duty of the Curator is to put the money of his ward out on interest and to account for and pay the same when required, and it is much easier and more proper for the Security to show he has done his duty, when apparently he has not than for the ward to show that he has converted it to his own use, or otherwise spoliated it. —

This can only be done in rare instances - And if the burthen of proof is transferred from the Security to the ward - in almost all cases of defaulting guardians (and administrators), (and they the persons usually ruled to give new Bonds), the Securities will escape all liability. =

It should not be a good answer for the Security when sued on the first

=Bond to say that the Curator made a Settlement (which is nothing more than stating an account) under the second Bond.=

Such Settlement is no evidence that the Curator has the fund in his hands at the time he makes his Settlement - Indeed it does not purport that he has the fund It is only an acknowledgment that he has had it and is liable for it.-

I mean such Settlement is no evidence. when all the facts appear - No sufficient evidence to charge the second Securites.-

This is a question of great importance with reperence to the security of the Estates of dead men as well as infants.— For if the defendants construction of the law is, out of tenderness for Securites) sustained, all the ~~safe~~ Safeguards the law has so industriously thrown around infants' estates, are illusory.

I Say then that on the whole evidence in this cause it was not necessary for us to go further and shew an actual Spoliation of the Estate by the Curator during the time of the first

Bond in order to establish a default under it. - But as matter of sound policy and law it rested on the Defendant to show that the Curator who failed to pay to his successor, had the moneys of his ward in his hands at the time the Second Bond was given, and had faithfully done his duty up to that time. —

2. If however we were bound in addition to show an actual delinquency on the part of the Curator under his first bond we have done so. - For among other things we have shown a failure to make settlement of his accounts in 1851 and a failure to pay $500. to the Guardian of the person of his ward when ordered by the Probate Court. — ~~This was before the Second Bond was given.~~

Slight proof is sufficient to put the Admr (or Curator) in default
State vs Price & Lusk 17 Mo R. 431.

3 It was the duty of the Curator to pay the money in his hands to his successor, on his appointment. —
9 Mo R 231.

4 No Demand was necessary 9 Mo R 778
10 ibid 725.

5, "But the defendant gave in evidence an Order of the Probate Court, on the Curator (Beckwith), to pay the moneys to Chouteau. And so cured the defect (if any such there was) in the plaintiffs evidence.—

124

State use of Smith
Respt

vs

Brotherton Executor
of R. Paul, appte

Brief of Respondent
By Reber
& counsel.