Miller, John Gov State MO ⟷ VS ⟷ Chamberlain, Eliza 1828 4th Cir 151/12
use of creditors of Estate Chamberlain Byrd, Stephen Cape Giradeau

Rutter, Edmund
Perr, Samuel

$1503

Rev; Byrd as security holder liable for "waste" building by administrix

RG 600
Supreme Court of Missouri
Case Files

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Number of Items 1

John Miller Governor of the State of Missouri, for the use of the creditors of the estate of Jason Chamberlain deceased

vs Debt

Stephen Byrd Impleaded with Eliza Chamberlain, Edmund Roller & Samuel Pen

142

Byrd
vs
Miller } hro

5 may 1848

Plaintiff

Plea before the judge of the Circuit Court of the fourth Judicial Circuit of the State of Missouri of the Term of December, in the year of Our Lord One thousand Eight hundred and twenty six.

Time of filing

Be it remembered that on the 30th day of December in the year aforesaid were filed with the Clerk of the Circuit Court of the County of Cape Girardeau in said Circuit, a certain declaration in debt

action

between John Miller Governor of the State of Missouri, for the use of the Creditors of the Estate of Jason Chamberlain deceased against Eliza Chamberlain, Stephen Byrd, Edmund Rutter and Samuel Perr.

parties.

Which said declaration is in the following words.

Declaration "John Miller Governor of the State of Missouri, for the use of the Creditors of the Estate of Jason Chamberlain deceased vs Eliza Chamberlain, Stephen Byrd, Edmund Rutter and Samuel Perr. } In the Circuit Court, for the County of Cape Girardeau, in the State of Missouri, Term of December AD 1826.

To Wit, John Miller, Governor of the State of Missouri, for the use of the creditors of the estate of Jason Chamberlain deceased, complains of Eliza Chamberlain Stephen Byrd, Edmund Rutter and Samuel Perr in an action, that the said defendants render to this plaintiff, the sum of Ten thousand dollars; which said sum they said defendants owe to and unjustly detain from this plaintiff

Decl.
Cont.d

"For that whereas the said defendants, on the "Eighteenth of August A.D. Eighteen hundred and "twenty, at the said County, made his certain "Writing obligatory to William Clark Governor of the "Territory of Missouri, the date whereof is on the "same day and year as will be seen by said "Writing in the Office of the Judge of probate for said "County, a certified copy of which is now here to "the Court shewn, by which said Writing obligatory "it is witnessed as follows, (To Wit) Know all "men by these presents that We Eliza Chamberlain "Stephen Byers, Edmund Rutter and Samuel Perr of the "County of Cape Girardeau are held and firmly bound "to William Clark Governor of the Territory of Miss-"ouri or his successors in Office in the sum of Ten "thousand dollars, for payment whereof, well "and truly to be made, we bind Ourselves, Our heirs "Executors, & administrators jointly and severally firmly "by these presents, sealed with Our seals, the "Eighth day of August in the year of Our Lord "Ourthousand Eight hundred and twenty, The "Condition of this Obligation is such, that "if the within bounden Eliza Chamberlain "administratrix of all and singular the goods "and Chattels, rights and Credits of Batson "Chamberlain deceased, do make or cause "to be made, a true and perfect inventory "of all and singular the goods and Chattels "rights Credits of the said deceased, which "have or shall come to the hands possession "or knowledge of her the said Eliza Chamberlain "or into the hands and possession of any "other person or persons for her, and the "same so made do Exhibit or cause to be "Exhibited into the Office of the Circuit Court "for the County of Cape Girardeau, at or before "the third Monday of December next ensuing "and the same goods chattels, rights & Credits

"and all other the goods chattels, rights, and
"credits of the said deceased, at the time of
"the death of the said deceased, which at
"any time after shall come to the hands or
"possession of the said Eliza Chamberlain
"or into the hands or possession of any other
"person or persons for her, do well and truly
"administer according to Law: And further
"do make or cause to be made a true and
"just account of her said administration
"at or before the Eighth day of August, in the
"year One thousand Eight hundred and twenty-
"One, and all the rest and residue of the said
"goods and chattels, rights and credits, which
"shall be found remaining upon the said
"administratrix's account, the same being first
"Examined and allowed by the Circuit Court for
"the County where the said administration is
"granted, and shall deliver and shall pay
"to such person or persons respectively as the
"said Court, by their decree and sentence
"pursuant to the true intent and meaning of this
"act shall appoint and direct; And if it shall
"hereafter appear, that any last Will and
"Testament was made by the said deceased
"and the Executor or Executors therein named
"do Exhibit the same into the Office of the
"said Court, making request to have it allow-
"ed and approved, and the same will is
"allowed and approved by said Court;
"then if the said Eliza Chamberlain, within
"bounden bring thereto requested to render
"and deliver her said letters of administra-
"then this obligation to be void, and of no effect
"otherwise to remain in full force and effect.

"Signed Sealed and
"acknowledged in presence
"of Timothy Flint

Eliza Chamberlain (Seal)
Stephen Byrd (Seal)
Edmund Butler (Seal)
Samuel Perr (Seal)

Declaration continued

and the said plaintiff in fact says that the said Eliza hath not rendered a just and true account of the said administration, but hath Committed Wast, and greatly mismanaged the said Estate in this (to Wit) that the said Eliza returned into the Clerks office of the Circuit Court aforesaid, One inventory of the property of said Estate, amounting to five hundred thirty seven dollars seventy four cents One other inventory of the property of said Estate as property set apart for said Eliza, Widow of said deceased, amounting to twohundred forty two dollars, Out of which the said Eliza has returned, as sold, a small part of said property, only the sum of Twohundred Ninety three dollars forty three Cents, the residue of said property not sold together with the avails of the property sold, the said Eliza has disposed of and appropriated to to her own separate use and benefit leaving the Creditors of the said Estate wholly unpaid. Further the said plaintiff saith - Further this plaintiff in fact saith, that the said Eliza hath not rendered a true and perfect inventory of all and singular the goods and chattels, rights and Credits of the said deceased, nor hath said Eliza Exhibited a just and true account and inventory of all and singular the goods and chattels, rights and credits of said deceased, which have come to her hands into the office of the Circuit Court for the County of Cape Girardeau, the County Court nor probate Court of said County - Further this plaintiff saith that the said Eliza hath not rendered a just and true account of her said administration, nor in any way accounted for the same - Further this plaintiff saith that the said Jason Chamberlain, at the

"time of his death was in possession of One large
"sum of money about his person and another
"large sum of money in the dwelling house of
"the said Jason, both of which sums of money
"amounting to a large amount, (Tol Oit) to the
"sum of Thirty five hundred dollars, which said
"Money the said Eliza hath neither made
"an inventory of nor in any way acounted
"for the same, but hath wholly disposed
"of the same privately, to her own use, and
"hath wholly wasted and disposed the same
"Further the said plaintiff saith, that the
"said Eliza hath privately collected large
"sums of money, from different individuals
"and sources the credit of said Estate, amounting
"in all to a large sum (Tol Oit) To the amount
"of two thousand dollars, which sum so received
"the said Eliza hath rendered no account
"of, but hath privately applied the same
"to her own use, leaving the creditors as
"aforesaid wholly unpaid, by means of which
"wast and mismanagement as aforesaid, the
"said Creditors have been unable to obtain
"said Estate, the payment of their just debts,
"to the damage of said plaintiff, four thou-
"sand dollars, and therefore he sues to the
"use of said Creditors by J Ranney his atty

Appearance of N Bird One of the defts. On the Seventh day of the term first aforesaid, and on the 18th day of said month of December, before the same Judge -

"One of the defendants Stephen Byrd, Waving
"the necessity of process herein, now Voluntarily
"Enters his appearance

April T. 1827 9th day Afterwards (tol Oit) At the Term of April 1827. & On the Ninth day of said Term, before the same Judge the following proceedings were had between the parties aforesaid.

Plea filed, "The defendant by R J Thomas Comes and files

"a plea herein, to which the plaintiff joins
"issue, and this cause is continued to the next
"term of this Court.

Which said plea is as follows:

Copy of plea "Stephen Byrd Impleaded with
"Eliza Chamberlain Edmund
"Rutter and Samuel Pew
ads
"John Miller Governor &c
"for the use of the Creditors of
"Jason Chamberlain deceased

plea &c

And the said Stephen Byrd comes and defends the wrong
"and injury, when &c and says, that he does
"not owe to the said plaintiff, the debt
"in the declaration mentioned, or any part
"thereof, and of this he puts himself upon
"the Country. R S Thomas atty for deft.

Issue "And the plaintiff do the like.
I Kanney for plaintiff

Aug T. 1827 — afterwards (to Wit) At the Term of August in the
year last aforesaid, the following proceedings
were had between the parties aforesaid —

Continuance. "The parties by their attorneys appear, and by consent
"this cause is continued to the next term of
"this Court.

December Term 1827. — afterwards, to Wit, At the Term of December, in
the year last aforesaid, before the same Judge
at Jackson, the following proceedings were had
between the parties aforesaid —

Submission "And now at this day comes the parties
"by their attorneys, and neither party requiring
"a trial by jury, this cause with all things
"concerning the same, are submitted to the
"Court, by whom the law and the facts are
"determined; and the Court after hearing the
under "Evidence and argument of Counsel, take
advisement "time to consider thereof —

Decr. T. 1828. 12th day Term

Afterwards (To Wit) At the Term last aforesaid on the 22d of said month of December, before the same judge, the following Proceedings were had between the Parties aforesaid—

finding

"The Court now being sufficiently advised of "and Concerning the premises, find that the "said defendant is indebted to the plaintiff "in the sum of Ten thousand dollars, the debt in "the declaration mentioned, and assess by reason "of the breaches of the Condition of the bond in the "plaintiffs declaration alledged and declared

Dams $1503.19¼ assessed.

"on to the sum of Fifteen hundred and three "dollars and nineteen Cents and the fourth "of a Cent. Whereupon it is Considered "by the Court now here, that the plaintiff have "and recover against said defendant, the "sum of Ten thousand Dollars, the debt "in the plaintiffs declaration mentioned, together "with his Costs and Charges in this behalf "Expended; Which judgement may be discharged "by the payment of the above Fifteen hun-"dred and three dollars and nineteen Cents "and the fourth of a cent, damages, as aforesaid "assessed, with legal interest on the same "until paid; together with the Costs and "Charges in this behalf Expended, and in "accordance with the Article of Agreement between "the parties herein, on file; It is further "Ordered that the said damages be paid as "herein appointed, on Established claims, to the "following named Creditors of the said Estate, of "Jason Chamberlain deceased, (together with "such interest as may accrue on such ap-"portionments): To William Drope for the use "of Benjamin Babcock, Three hundred and "sixty seven dollars, and fifteen Cents. Russell "E Peacock twenty One dollars and fifty three "Cents= Nathan Vanhorn Sixty three dollars

Judgment Continued

"and twenty One cents: Lewis Dixon nine dollars "and ten cents: Henry Whittenburgh Ninety six "dollars and twenty three cents: Christian Gates "twenty six dollars and Eighty Seven cents; Armour "and Sudie twenty One dollars and Eighty five "cents; Johnson Ranney One hundred and four "dollars and sixty cents; Thomas Neale "Nine dollars and seventytwo cents: Josiah "Lee use of Stephen Pyre Seven dollars and "forty six cents; John Cross use of Jones, One "hundred and three dollars and seventy nine cents, "Lyne Starling Surviving part &c. Two hundred "and fifty six dollars and ninety four cents, "Rufus Easton twenty nine dollars and seventytwo "cents, James Russell Twenty Eight dollars and "ninety nine cents, William Russell two hundred "and forty four dollars and sixty nine cents. "Abner Gray use of Henry Sanford Fifty two "dollars and Eight cents, and Simon Brock "jun: Fifty Eight dollars and sixty Eight cents- "And the Clerk on issuing the Execution herein, "will make the necessary Endorsements, as to the "Orders herein made, in relation to the damages "and apportionments: By agreement of the "parties herein, Execution is stayed until the "next August Term of this Court.

Stay of Execution

Bill of Exceptions filed-

"During the progress of the trial of this cause, the "defendants filed a Bill of Exceptions, which was "signed by the Court &c- which said Bill of Exceptions is in the words following —

Copy of Bill &c.

"John Miller Governor of the "State of Missouri, for the use of "the Creditors of Jason Chamberlain "vs "Stephen Pyre Impleaded with "Eliza Chamberlain, Edmund "Butler and Samuel Pyre.

Debt. In the Circuit Court of Cape Girardeau County.

Decr. T. 1828. 12th day Term

Afterwards (To Wit) At the Term last aforesaid in the 22d of said month of December, before the same judge, the following Proceedings were had between the Parties aforesaid -

finding

"The Court now being sufficiently advised of "and Concerning the premises, find that the "said defendant is indebted to the plaintiff "in the sum of Ten thousand dollars, the debt in "the declaration mentioned, and assess by reason "of the breaches of the Condition of the bond in the "plaintiffs declaration alledged and declared

Dams $1503.19¼ assessed.

"on to the sum of Fifteen hundred and three "dollars and nineteen Cents and the fourth "of a Cent. Whereupon it is Considered "by the Court now here, that the plaintiff have "and recover against said defendant, the "sum of Ten thousand Dollars, the debt "in the plaintiffs declaration mentioned, together "with his Costs and Charges in this behalf "Expended; Which judgement may be discharged "by the payment of the above Fifteen hun-"dred and three dollars and nineteen Cents "and the fourth of a cent, damages, as aforesaid "assessed, with legal interest on the same "until paid; together with the Costs and "Charges in this behalf Expended, and in "accordance with the Article of Agreement between "the parties herein, on file; It is further "Ordered that the said damages be paid as "herein appointed, on Established claims, to the "following named Creditors of the said Estate, of "Jason Chamberlain deceased, (together with "such interest as may accrue on such ap-"portionments): To William Drope for the use "of Benjamin Babcock, Three hundred and "sixty seven dollars, and fifteen Cents. Russell "E Peacock twenty One dollars and fifty three "Cents = Nathan Vanhorn Sixty three dollars

Judgment Continued

"and twenty One cents: Lewis Dixon nine dollars "and ten cents: Henry Whittenburgh Ninety six "dollars and twenty three cents: Christian Gates "twenty six dollars and Eighty seven cents; Armour "and Tucker twenty One dollars and Eighty five "cents; Johnson Ramney One hundred and four "dollars and sixty cents; Thomas Neale "Nine dollars and seventytwo cents: Josiah "Lee use of Stephen Pyro Seven dollars and "forty six cents; John Cross use of Jones, One "hundred and three dollars and seventy nine cents, "Lyne Starling Surviving Part &c. Two hundred "and fifty six dollars and ninety four cents, "Rufus Easton twenty nine dollars and seventytwo "cents, James Russell Twenty Eight dollars and "ninety nine cents, William Russell two hundred "and forty four dollars and sixty nine cents. "Abner Gray use of Henry Sanford Fifty two "dollars and Eight cents, and Simon Block "jun: Fifty Eight dollars and sixty Eight cents- "And the Clerk on issuing the Execution herein, "will make the necessary Endorsements, as to the "Orders herein made, in relation to the damages "and apportionments: By agreement of the "Parties herein, Execution is stayed until the "next August Term of this Court.

Stay of Execution

Bill of Exceptions filed-

"During the progress of the trial of this cause, the "defendant filed a Bill of Exceptions, which was "signed by the Court &c.- which said Bill of Exceptions is in the words following —

Copy of Bill Ex.

"John Miller Governor of the "State of Missouri, for the use of "the Creditors of Jason Chamberlain "vs "Stephen Pyro Impleaded with "Eliza Chamberlain, Edmund "Butler and Samuel Pyro

Debt. In the Circuit Court of Cape Girardeau County.

"Be it remembered that on trial of this Cause, it was
"agreed by the parties, that the defendant should
"be permitted to give in Evidence, all Equitable
"matters relating to the administration of the said
"Eliza as administratrix of the Estate of her deceased
"husband, the said Jason Chamberlain: The said
"defendant then proved on the trial of said Cause
"that previous to the death of the said Cham-
"berlain, he had dug and walled a cellar on a lott
"in the town of Jackson, that after his death
"the said Eliza, before the said Estate was declared
"to be insolvent, went on to build, and did actually
"build a brick house on the said lott, on the
"foundation made by the said Jason (in his
"lifetime as aforesaid). And it was proven
"that the building the said house, could not
"have cost the said Eliza less than Twelve or
"thirteen hundred dollars; The defendant further
"proved on the trial, that the administration
"of said Estate was taken from the said Eliza
"and given to said defendant; that in the
"year 1822 on his application to the Circuit Court
"of the County of Cape Girardeau, Ordered him the
"said defendant as administrator de bonis non
"to sell all the real Estate of Jason Chamberlain:
"that in pursuance of the said Order, he did sell
"at public sale, the said real Estate, amongst
"the rest he sold the said lott and brick house
"in the town of Jackson to Capt P. Lashmutt,
"who was the highest bidder for seven hundred
"and seventy five dollars, all of which money he
"had paid by Order of the County Court of said
"County, to the Creditors of said Jason Chamberlain:
"the defendant further proved on the trial, that
"at the time of the sale of said lot by said
"administrator, the lott on which said Brickhouse
"was built with the Cellar walled as aforesaid,
"was not worth more than One hundred dollars,
"the defendant claimed on the trial as an

Bill of Ex. Cont.d

"Equitable credit (under the agreement of parties "aforesaid) six hundred and seventy five "dollars, the difference between what the "said lott with Celler as aforesaid, was "worth at the time of the sale aforesaid, and "what the lott with the house aforesaid "sold for, which was applied to the benefit "of the Creditors aforesaid, but the Court "rejected the said testimony, to Which Opinion "of the Court the defendant by his Counsel "Excepts and prays that this his bill "of Exceptions may be signed and sealed "and made part of the record—

John D Cook (L.S.)

Copy of agreement between parties

The following is a copy of the agreement filed between the parties aforesaid,

"Colo Bird has proposed to go into the Circuit "Court and enter his appearance without writ, "to such suits as the Creditors of Chamberlain "may institute against him for waste on the "administration bond; all Creditors may institute "suit and he will agree with the Creditors "to try One to Establish the amount of waste, "and that judgement shall be entered up against "him for the waste in favor of Each Creditor, in "proportion to the whole amount wasted & the "parties are to permit Colo Bird to make use of "any equitable defence he may have, and all "suits but One are to abide the Event of the "suit tried; Either party to have the same "rights for Continuance as if writs were issued "I see no objection to this proposition and am "Willing on my part to agree to it so far as I am "attorney for claimants—

James Russell for himself and William Russell & J Kanney for himself and as attorney for Easton Gates, Dropo to use of Babcock, for

Armour & Juden, an Vaahorn
and for Abner Gray-

"Each of all the Creditors are to Contribute their pro-
"portion of Costs according to the amount of their
"several Claims against Chamberlains estate,

J. Ranney

Lyne Starling By P. R. Garrett his agent
G. A. Bird for his principals, Simon
Block Sen. & for Robert Simpson survivor
of Simpson & Quarles and for
Henry Whittenburgh.
James Evans as Attorney of Benjamin Patterson
and in behalf of David Patterson.
John Cross for B. A. Jones in right of his
wife Maria J. Jones-

Endorsement on back of agreement

On which said agreement is an endorsement in the
words following-

"In the suit to be Commenced according to the within
"agreement, the plaintiff is not required in the
"declaration to state the names of the Creditors
"to whose use the suit is brought, nor any thing de-
"scriptive as to their Claims or amounts due; The
"same may be shown to the Court without pleading
"so that the Court may apportion the amount re-
"covered amongst said Creditors. J. Ranney attny for
Cross. W & J Russell, Lewis Dixon
Neale, Thomas, C Gates, and the
rest of the Creditors of Cham-
berlains Estate, & R. E. Heacock
Stephen Byrd defendant

Certificate

I Henry Sanford Clerk of the said Circuit Court, Certify
that the foregoing six pages Contain a full true and perfect
transcript of the plaint aforesaid between the parties therein
named as fully as the same appears of record in my office

Tax $1.00
Copy — 3.42
Certy — 50
$4.92

In Witness whereof I hereunto set my hand
and affix the seal of said Court, at Office
this 15th of May 1828

H. Sanford Clk

142

556 Copy Record.

(16)

Supreme Court. 4th Judicial District

May Term 1828.

Stephen Byrd (impleaded with Eliza Chamberlain Edmund Rutter and Samuel Pew)

versus } Debt in Error.

John Miller Governor of the State of Missouri for the use of the Creditors of the Estate of Jason Chamberlain deceased)

Filed May 15th 1828.

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C. S. Thomas, D. Clk

Stephen Byrd Kothers
vs.
John Miller Governor &c

In the Supreme Court 4th Judicial ~~Court~~ district December Term 1828

And now the said Stephen comes and says that in the record and proceedings aforsaid and also in giving the judgment aforsaid there is manifest error in this (towit) that by the record aforsaid it appears that the judgment aforsaid in form aforsaid was given for the said John against the said Stephen and others whereas by the law of the land the said judgment ought to have been given for the said ~~George against~~ Stephen against the said John, and the said Stephen prays that the judgment aforsaid for the errors aforsaid and other errors in the record and proceedings aforsaid may be reversed annulled and altogether held for nothing and that he may be restored to all things which he hath lost by reason of said judgment and herein assigns the following Special errors

1 The Circuit Court erred in not allowing the Credit of Six hundred and seventy five dollars, the difference in the value of the lot before and after the Hous was built, under the agreement of the parties

2 The Court below erred in not receiving the testimony (under the agreement of the parties) relative to the difference in the value of the lot before and after this hous was built, as stated in the bill of Exceptions

There is no error in the record and proceeding aforsaid

I Ramsey for deft in error

Watkins for Byrd and others

Byrd & others 142
versus
Miller Governor &c

Assignment of Error
by Watkins.

Filed Decem. 1st 1858

C. S. Thomas
D C C R

John Miller Governor of the state of Missouri for the use of the creditors of the estate of Jason Chamberlain dec^d.

Y Debt.

Stephen Byrd, in pleaded with Eliza Chamberlain & al:

To Johnson Ramey attorney of record for the above plaintiff. Take notice that I have sued out a writ of error on the judg^t. in the above cause rendered in the circuit court of the county of Cape Girardeau. Missouri

Stephen Byrd pltff in error
by his attorneys
Watkins Scott & Allen

Jackson 18. Augt. 1828.

Served the within Notice on Johnson Raney by Giving him A true Copy of the within in Jackson Byrd Township this 18th day of August 1828 Wm G Byrd Deputy Sheriff

Notice
Byrd
vs
Miller Governor &c

Filed Dec. 1. 1828
C. S. Thomas
D. Clerk

Governor for the use &c.
ads
Byrd

On error from the Cape Girardeau Circuit Court

This originally an action of debt brought on an office bond against defendant as the security for wast committed by Elsa Chamberlain administratrix of the estate of Jason Chamberlain deceased issue was taken on the plea of Nil ~~dedid~~ debit the wast being established -- the defendant on trial offered evidence to shew that said Elsa as administrating after the death of Chamberlain had proceeded to build a brick house on a town lot of said deceased that a part of said lot and the ground including said brick building was afterwards sold for $775 and the money divided amongst the creditors of said estate and that said part of said lot if sold without said building was not worth more than $100 which testimony was offered by said defendant to establish a credit in favor of the said defendant - The Court rejected the evidence and the defendant excepted to the opinion of the Court and brought his writ of error to this Court.

The only point present to the Court is did the Court err in rejecting the testimony offered.

It is contended that the Court did not err - The rule of law in this case which must govern is that the administrator must be considered as chargable for all assets in hand and can only be discharged therefrom but by disbursements made in the way of his duty pointed out by law - In this case it should seem that the defendant wished a credit on the alledged ground that the administratrix had expended $1200 - $1300 money of the estate without the assent of the creditors against law on the uncertainty of proof that the ground with the building would sell for for more than the vacant ground that it was sold and the creditors received the money -

The law ~~in this~~ of administration Geyers Dig page 43 - Sec 7 page 48 Sec. 23 & 26 settles this question - That the administrator is chargeable with the amount of funds which come to his hands for the payment of debts in the shape he receives such funds - and there is likewise

good reason in the law — which prevents the administrator speculating upon the funds of a deceased at the risk of a creditor where he has no agency in the appointment of such trustee —

General principal of law

Every individual having the possession of the funds of another ~~but~~ must either have an authority by ~~from~~ law or the express or implied assent of the person whose funds they are to authorise him to make any disposition thereof an he is obliged to return the same and he is estopped from saying that the situation or interest of the proprietor is bettered by an act of a trustee in defiance of the authority and rights of such proprietor

J Ranney for
ptff in error

Bypd 142
vs
Governor for me
Points in affirmance
of judgment
J Ranney for
deft in error

Filed Apr. 7. 1829
C. S. Thomas
Clerk S. Court

Stephen Beppo & others
versus
Milton Governor &c

In the Supreme Court
4th Judicial District
December Term 1828

Statement of the case on the part of the plaintiffs in error

This was an agreed case brought by the Creditors of Jason Chamberlain deceased against Eliza Chamberlain administratrix and her Securities Beppo and others, on the administration bond for wast &c. Previous to the commencement of the suit in the court below the parties entered into an agreement which is included in the record to permit the defendants to give in testimony and avail themselves on the trial of all equitable matter; or in other words as they were permitted to set up all equitable defence. In pursuance of this agreement Beppo and the other defendants proved that Chamberlain in his life time intended to build a house in the town of Jackson, and had actually gone so far as to dig the cellar and wall it up. That after his death Mrs Chamberlain his administratrix (before it was ascertained that the estate would be insolvent) went on and completed the building which cost 12 or 1300 $ It was further proved that the administration of the estate was taken from Mrs Chamberlain and given to Beppo: that he as administrator De Bonis, now was ordered to sell all the real estate of

Chamberlain, amongst which he sold this house and lot for the sum of seven hundred and seventy five dollars, which was appropriated to the payment of the debts of the assignor. It was also proven that at the time of the sale of the lot by the administrator, the lot on which the house was built with the cellar walled, was not worth more than one hundred dollars. On which testimony the defendants claimed a credit of $675 the difference in the value of the lot in its unimproved and improved state. But the Court refused to allow it, and rejected the testimony. The plaintiffs in error contend that they (under the agreement) were entitled to this Credit: and that the Circuit Court erred in not allowing it to them. This is the only question involved in the Cause. There are two errors assigned but they both resolve themselves into one. The first question which presents itself is "Whether the defendants below were, according to the principals of equity entitled to the Credit of $675" The plaintiffs in error contend that they were. Equity is intended to soften the Severity of the Common Law and whenever a case of peculiar hardship presents itself Chancery will afford relief. Whenever the object or consideration is meritorious equity will always interpose. See 1 Harrison's Chancery page 26 & 39

2d If according to the principals of equity they were entitled to this Credit it is contended that the Court below (under the agreement) erred in not allowing it to them,

Scott & Watkins for plffs in error

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Bryce and others
vs.
Miller Governor &c

Statement of the Case
on the part of the plaintiffs
in Error

filed apl. 7. 1809
C. A. Thomas
D. Clk. Court

Byrd Lothers
vs
Governor

I dissent from the opinion of the court believing that in equity no allowance would be made to the administratrix for building a house on the ~~premises~~ land of the intestate; on the contrary that at law and in equity it is a waste to expend the money of the intestate in this manner; and that the administratrix would lose her money equally as if she had built a house on the land of any living person without his assent

G Tompkins

142

Byrd & al
vs opinion
Governor
535
filed Sept. 1829
C. S. Thomas
D. Clk. S. Court.

Exam^d

The Governor of Missouri
to the use &c
as
Stephen Byrd impleaded &c)

This was an action of debt com=
=menced in the Circuit Court, against Byrd
as the security in an Administration Bond.—
On the trial, an agreement between the
defendant & the creditors of the deceased was
read in evidence, by which it appears as follows, "that
"Col^o Byrd proposed to go into ~~the Circuit~~ court and
"enter his appearance without writ, to such
"suits as the creditors of Chamberlain may
"institute against him, for waste on the
"administration Bond; all creditors may
"institute suit and he will agree with the
"creditors to try one to establish the amount of
"waste, and that Judgment shall be entered
"up against him for the waste, in favour of
"each creditor, in proportion to the whole a=
"=mount wasted & the parties are to permit
"Col. Bird to make use of any equitable
"defence he may have" &c.—
Several breaches were assigned, & on the
plea of nil debet, the waste was established to
the amount of $1503.19¼ — The defendant then

"proved, that previous to the death of the intestate
"Chamberlain" he had dug & walled a cellar on
"a lot in the town of Jackson that after his
"death, the said Eliza (Administratrix) before the
"said estate was declared to be insolvent, went on
"to build, and did actually build a brick house on
"said lot, on the foundation made by the said
"Jason (the intestate) in his life time as afore=
"=said; and it was proven that the building the
"said house could not have cost the said Eliza
"(the Administratrix) less than twelve or thirteen
"hundred dollars: the defendant further proved
"on the trial that the administration of said
"estate was taken from said Administratrix
"& given to said defendant; that in the year
"1822 on his (defendants) application to the
"circuit court of the county of Cape Girardeau
"(the Court) ordered him the said defendant
"as Administrator de bonis non, to sell all
"the real estate of Jason Chamberlain (the in=
"=testate) that in pursuance of said order he
"did sell at public sale the said real estate=
"=amongst the rest, he sold the said lot & brick=
"=house in the town of Jackson for seven hundred
& seventy five dollars, all of which he paid by
order of the county court, to the creditors of said

"Chamberlain: the defendant further proved on
"the trial that at the time of said sale of said
"lot by said Administrator the lot on which
"said brick-house was built, with the cellar walls
"as aforesaid, was not worth more than one
"hundred dollars & the defendant claimed as
"an equitable credit (under the agreement
"of the parties as aforesaid) six hundred &
"seventy five dollars, the difference between
"what said lot with the cellar aforesaid was
"worth at the time of the sale aforesaid, and
"what the lot with the house aforesaid sold
"for, which was applied to the payment of
"the debts due; but the Circuit Court rejected
"the testimony & gave Judgment for the full
"amount of the estate wasted - to which the
"defendant excepted & By a bill of exceptions,
"has spread the agreement & evidence upon the
"record. —

The only question to be considered is. —
did the Circuit Court err in rejecting the
testimony. — As to the strict law of the case, there
can be no doubt. The administratrix in building
the house, made a gross misapplication of the
funds of the estate & her security were liable
for the waste committed. By the agreement
however, the defendant may well claim

a credit for the improved value of the estate which had been applied towards the payment of the debts due by the intestate. It will ever be a difficult matter to determine under such circumstances the amount to be allowed; but when the proof can be made there can be no good reason why it should not avail the defendant. It would be any thing else than equitable to allow the creditors to receive the improved value of the estate & then to recover the full amount of the assets which had been wasted or misapplied toward the improvement. - The circuit Court erred therefore in rejecting the testimony & the judgment must be reversed & the cause remanded for further proceedings conformably to this opinion.

Mr McGirk
N Wash

Judges

142.
Opinion.
Dorsey
vs
Governor &c
535

Filed 9 apr 1825
C. S. Thomas
Clk of Court
Com &c

N Wash

Placita.

Pleas before the judge of the Circuit Court of the fourth judicial Circuit of the State of Missouri, of the term of December, in the year of our Lord One thousand Eight hundred and twenty six.

Time of filing.

Be it remembered that on the 30th day of December, in the year aforesaid, was filed with the Clerk of the Circuit Court for the County of Cape Girardeau in said State, a certain declaration, in debt, between John Miller Governor of the State of Missouri, (for the use of the Creditors of the estate of Jason Chamberlain deceased) against Stephen Byrd Eliza Chamberlain, Edmund Rutter and Samuel Perr. which said declaration is in the words following. (to wit)

Declaration

" John Miller Governor of the
" State of Missouri, for the use
" of the Creditors of the Estate of
" Jason Chamberlain deceased
vs
" Eliza Chamberlain, Stephen
" Byrd, Edmund Rutter and
" Samuel Perr

In the Circuit Court, for the County of Cape Girardeau, in the State of Missouri Term of December A.D. 1826. (to wit)

" John Miller Governor of the State of Missouri
" for the use of the Creditors of the Estate of Jason
" Chamberlain deceased, Complains of Eliza
" Chamberlain, Stephen Byrd, Edmund Rutter and
" Samuel Perr in an action that the said
" defendants render to this plaintiff the sum
" of Ten Thousand dollars, which said sum,
" they said defendants, owe to, and unjustly
" detain from this plaintiff. For that whereas
" the said defendants on the eighteenth day of
" August A.d. eighteen hundred and twenty,
" at the said County, made his certain writing
" obligatory to William Clark, Governor of the
" territory of Missouri, the date whereof

Declaration Continued

"is on the same day and year, as will be seen by said
"writing in the office of the judge of probate for
"said County, a certified copy of which is now
"here to the Court shewn, by which said writing
"obligatory, it is witnessed as follows, (to wit)
"Know all men by these presents that we Eliza
"Chamberlain, Stephen Byrd, Edmund Rutter
"and Samuel Orr, of the County of Cape
"Girardeau, are held and firmly bound ~~to~~
"William Clark Governor of the Territory of
"Missouri or his successors in office, in the
"sum of Ten thousand dollars, for payment
"whereof well and truly to be made, we bind
"Ourselves, Our heirs, executors and administrators
"jointly and severally, firmly by these presents,
"sealed with Our seals the eighth day of
"August, in the year of Our Lord Ourthou-
"sand Eight hundred and forty- The Condi-
"tion of this obligation is such, that if the
"within bounden Eliza Chamberlain ad-
"ministratrix of all and singular the goods
"and chattels, rights and credits of Lasin
"Chamberlain deceased, do make or cause
"to be made a true and perfect inventory of all and singular
"the goods and chattles rights credits of the said de-
"ceased, which have or shall come to the hands
"possession or knowledge of her the said Eliza Chamber-
"lain or into the hands and possession of any other
"person or persons for her, and the same so made do
"exhibit or cause to be exhibited into the office of the circuit
"Court for the County of Cape Girardeau at or before the
"third monday of December next ensuing and the
"same goods Chattles rights & Credits and all other the
"the goods Chattles rights and credits of the said de-
ceased at the time of the death of the said deceased

"which at any time after shall come to the hands or
"possession of the said Eliza Chamberlain or into the hands
"or possession of any other person or persons for her dowell
"and truly administer according to law and further da
"make or cause to be made a true and just account of
"her said administration at or before the Eighth day of
"August in the year one thousand eight hundred and
"twenty one, and all the rest and residue of the said goods
"and chattles, rights and credits which shall be found
"remaining upon the said administratrix's account,
"the same being first examined and allowed by the Cir-
"cuit Court for the County where the said administration
"is granted and shall deliver and shall pay to such
"person or persons respectfully as the said Court by their
"decree and sentence pursuant to the true intent and
"meaning of this act shall appoint and direct; and
"if it shall hereafter appear that any last will and
"testament was made by the said deceased and
"the executor or executors therein named do exhibit
"the same into the office of the said Court making
"request to have it allowed and approved; and the
"same will is allowed and approved by said Court;
"then if the said Eliza Chamberlain within bounden
"being thereto requested to render and deliver her said
"letters of administration this obligation to be void,
"and of no effect otherwise to remain in full force and
"effect.—

Signed sealed and acknowledged in presence of Timothy Flint

Eliza Chamberlain (Seal)
Stephen Byrd (Seal)
Edmund Potter (Seal)
Samuel Peck (Seal)

Declaration Continued

And the said plaintiff in fact says that the said Eliza hath not rendered a just and true account of the said Administration but hath committed waste and greatly mismanaged the said estate in this Suit, that the said Eliza returned into the clerks office of the Circuit Court aforesaid one inventory of the property of said estate amounting five hundred thirty seven dollars seventy four cents, One other inventory of the property of said estate as property set apart for said Eliza, widow of said deceased amounting to two hundred forty two dollars, out of which the said Eliza has returned as sold a small part of said property, only the sum of Two hundred ninety three dollars forty three cents, the residue of said property not sold together with the avails of the property sold the said Eliza has disposed of and appropriated to to her own seperate use and benefit leaving the creditors of the said said estate wholly unpaid. Further the said Plaintiff saith - Further this plaintiff in fact saith that the said Eliza hath not rendered a true and perfect inventory of all and singular the goods and chattles, rights and credits of the said deceased, nor hath the said Eliza Exhibited a just and true account and inventory of all and singular the goods and chattles rights and credits of said deceased, which have come to her hands into the office of the circuit Court for the County of Cape Girardeau the County Court nor probate Court ~~of said~~ Court of said County. Further this plaintiff saith that the said Eliza hath not rendered a just and true account of her said administration nor in any way accounted for the same. Further this plaintiff saith that the said Jason Chamberlain at the time of his death was in possession of one Large

„sum of money about his person and another
„large sum of money in the dwelling house of
„the said Jason, both of which sums of money
„amounting to a large amount (To wit) to the
„sum of, Thirty five hundred dollars, which said
„money the said Eliza hath neither made
„an inventory of, nor in anyway accounted for the
„same, but hath wholly disposed of the same
„privatly to her own use and hath whol-
„ly wasted and disposed the same - Further
„the said plaintiff saith that the said
„Eliza hath privatly collected large sums of
„money from different individuals, and sour-
„ces, the credit of said estate amounting
„in all to a large sum (To wit) To the amount
„of Two thousand dollars, which sum so received
„the said Eliza hath rendered no account
„but hath privately applied the same to her
„own use, leaving the Creditors as aforesaid
„wholly unpaid by means of which
„wast and mismanagement as aforesaid, the
„said Creditors have been unable to obtain
„said estate the payment of their just debts,
„to the damage of said plaintiff four thou-
„sand dollars, and therefore he sues to the use of Cred
„itors by (1) J Ramey his atty

On the appearance of S Byrd one of the defts

On the 7th day of the term first aforesaid and on
the 18th day of said month of December before the
same judge

„One of the defendants Stephen Byrd waveing the
„necessity of process herein, now voluntarily enters
„his appearance

April T 1827 9th day

Afterwards (to wit) at the term of April 1827 & on the
ninth day of said term before the same Judge
the following proceedings were had between the par-

ties aforesaid

plea filed "The defendant by R S Thomas comes and
"files a plea herein to which the plaintiff joins
"issue and this cause is continued to the next term
"of this court —

Copy of plea Which said plea is as follows:

"Stephen Byrd Impleaded with
"Eliza Chamberlain Edmund Rutter
"and Samuel Pew
"ads
"John Miller Governor &c for the use
"of the creditors of Jason Chamberlain
"deceased

plea &c

And the said
"Stephen Byrd comes and defends the wrong and
"injury when &c and says that he does not owe to
"the said plaintiff the debt in the declaration
"mentioned or any part thereof, and of this he puts
"himself upon the country.

R S Thomas atty for deft

Issue And the plaintiff doth the like

J Ramsey for plaintiff —

Aug 1827 Afterwards (to wit) at the term of August in
the year last aforesaid, the following proceedings
were had between the parties aforesaid.

Continuance "The parties by their attorneys appear and by con
"sent this cause is continued to the next term of this
"Court

December Term 1827 Afterwards (to wit) at the term of December in the
year last aforesaid, before the same judge at Jackson
the following proceedings were had between the
"parties aforesaid

Submission "And now at this day comes the parties by their
"attorneys and neither party requiring a trial by jury
"this cause with all things concerning the same
"are submitted to the Court by whom the law and

under advisement

"the facts are determined; and the Court after "hearing the evidence and argument of Counsel "take time to consider thereof-

Dec. 1828 12th day Term

Afterwards (To Wit) at the term last aforesaid on the 22d of said month of December before the same Judge the following proceedings wer had between the parties aforesaid

"The Court now being sufficiently advised of and concerning the premises, find that the said defendant "is indebted to the plaintiff in the sum of Ten thousand dollars the debt in the declaration mentioned "and assess by reason of the breaches of the Condition "of the bond in the plaintiffs declaration alledged "and declared on the sum of Fifteen hundred and

Dam. $1503.19¼ assessed

"three dollars and nineteen Cents and the fourth of "a cent- Whereupon it is considered by the Court now here "that the plaintiff have and recover against said de"fendant the sum of Ten thousand dollars, the debt "in the plaintiffs declaration mentioned, together "with his costs and charges in this behalf expended "Which Judgment may be discharged by the pay"ment of the above Fifteen hundred and three "dollars and nineteen Cents and the fourth of a "cent damages as aforesaid assessed, with legal "interest on the same until paid: Together with "the costs and charges in this behalf Expended, "and in accordance with the article of agreement "between the parties herein on file: It is further ar"dered that the said Damages be paid as herein "appointed on Established Claims, to the following "named Creditors of the said estate of Jason Cham"berlain deceased (together with such interest as may "accrue on such appointments) To William Drope "for the use of Benjamin Babcock Three hundred

Judgment Continued

" sixty seven dollars and fifteen Cents. Russell E. Hea-
" cock twenty one dollars and fifty three Cents = Nathan
" Vanhorn Sixty three dollars and twenty one Cents:
" Lewis Dixon nine dollars and ten Cents: Henry
" Whittenburgh Ninety six dollars and twenty three
" cents: Christian Gates twenty six dollars and eighty
" ~~seven~~ cents: Armour and Judin twenty one dollars
" and Eighty five Cents: Johnson Ramey One hun-
" dred and four dollars and sixty Cents: Thomas Neale
" nine dollars and seventy two cents: Josiah Lee use
" of Stephen Byrd Seven dollars and forty six Cents:
" John Cross use of Jones one hundred and three
" dollars and seventy nine Cents; Lyme Starling
" surviving part &c. Two hundred and fifty six dollars
" and ninety four cents; Rufus Easton twenty nine dollars
" and seventy two Cents, James Russell Twenty eight
" dollars and ninety nine Cents; William Russell
" two hundred and forty four dollars and sixty nine
" Cents Abner Gray use of Henry Lanford Fifty two
" dollars and Eight Cents, and Simon Block
" Junr. Fifty Eight dollars and sixty sixty eight cents-
" And the clerk on issueing the execution herein will
" make the necessary indorsements as to the orders
" herein made in relation to the damages and appor-
" tionments: By agreement of the Parties herein
" Execution is stayed until the next August time of
" this Court

Bill of Exceptions filed

" During the progress of the trial of this Cause,
" the defendant filed a bill of exceptions which
" was signed by the Court &c. - which said bill of
" Exceptions is in the words following -

Copy of bill Ex.

" John Miller Govener of the
" State of Missouri for the
" use of the Creditors of Jason Chamberlain

Debt In the
Circuit Court
of Cape Girar-

April Term 1829 On the 15th of may 1828 a record of the proceedings in this Case was certified to the supreme Court in obediance to a writ of Error and at the april Term 1829 was filed in the office of the Clerk of said Circuit Court a copy of the record reversing the said judgement of the said Circuit Court at which term the following proceedings were had

" John Miller Governor of the " State of Missouri for the " use of the Creditors of the " Estate of Jason Chamberlain " deceased " vs " Stephen Byrd impleaded with " Eliza Chamberlain Edmund " Rutter and Samuel Lew	Debt. Cause remanded from the supreme Court

" The parties by their attorneys Come and file the opinion and decision " of the supreme Court in this Case & this Cause " is Continued.

Decision of the supreme court filed continued

Augt 1829 August Term 1829 = 6th day of the term present, the same judge

" John Miller Governor of the " State of Missouri for the use of " the Creditors of the estate of Ja " son Chamberlain deceased " vs " Stephen Byrd Impleaded with " Eliza Chamberlain Edmund Rutter " and Samuel Lew	Debt — This Cause is Continued to the next

Continued " time of this Court.

December 21st 1829 7th day of the term the circuit
" court met at 10 O'clock A.M according to adjourn-
ment present the same judge

December 31 1829

" John Miller Governor of the State of Missouri
" for the use of the Creditors of the estate of
" Jason Chamberlain deceased
" Versus
" Stephen Byrd impleaded with Eliza
" Chamberlain Edmund Rutter and
" Samuel Reid — } Debt

" and now at this
" day comes the parties by their attorneys, and the
" defendants by Messrs Scott and Watkins regain-
" ing a trial by jury, whereupon on their motion
" Ordered that the sheriff summon a jury herein
" Whereupon the jurors came 1 Berryman Roe,
" 2 James O Morrison 3 William Sugate 4 Joseph
" Dunn 5 Jacob Sides 6 William Graeroft 7
" Jonathan Kinder 8 Jacob Rhodes 9 Fielding
" Glasscock 10 William Matthews 11 Joel
" Renfroe 12 and James Dunlap twelve good
" and lawful men who being duly Elected and
" sworn to well and truly try the issue joined
" between the parties, and the Court and jury
" not having had the hearing of the evidence
" in this case, by consent of parties it is ordered
" that the jurors aforesaid be permitted to
" retire until nine O'clock to morrow morning
" when they are required to meet before the bar of
" this Court and proceed in the trial of this
" Cause —

December 22d 1829 8th day
" The circuit court met at 9 on O'clock A.M according

to adjournment present the same Judge

John Miller Governor of the State of Missouri
to the use of the Creditors of the estate
Jason Chamberlain decd.
Versus
Stephen Byrd impleaded with Eliza
Chamberlain Edmund Rutter & Samuel Rut } Debt

The parties by
their attorneys appear and the jurors empanelled tried and
sworn in this case being called appear before the bar
of this Court, who after hearing the evidence and argu-
ment of Counsel on their oaths aforesaid do say — We
of the jury find the defendant not indebted in manner
and form as alledged in the plaintiffs declaration
mentioned — Whereupon the plaintiff moves the Court
to grant a new trial in this case on reasons herein filed.

Judgment

motion for new trial

January 5th 1830 19th day of the term —
present the same Judge

John Miller Governor of the state of
Missouri for the use of the Creditors of the
Estate of Jason Chamberlain deceased
Versus
Stephen Byrd impleaded with
Eliza Chamberlain Edmund Rut-
ter and Samuel Rut } Debt — On a motion for a new trial

The parties by their
attorneys appear and the Court after inspecting the
reasons in support of the motion in this case and
hearing the ~~[illegible]~~ argument of the Counsel — It is
considered that the verdict in this Case be set aside
and that a new trial in this Case be granted on the
payment of the Costs — Whereupon the defendant
filed his bill of exceptions which being signed by the
Court is filed and made a part of the record in this
Case.

new trial granted

which bill of exceptions is in the words following to wit:

Bill Ex.

"Govenor
" vs } action of debt
"Byrd

" Be it remembered that in this case
"the jury found for the defendant and the plaintiff
"moved for a new trial which was granted by the
"Court on the Ground that the finding of the jury
"was against evidence the evidence of the case was
"as follows-
"State of Missouri Cape Girardeau Circuit Court
"John Miller Govenor of the State of
"Missouri for the use of the Credit
"ors of the Estate of Jason Chamber-
"lain deceased
" Versus } Debt
"Stephen Byrd impleaded with
"Eliza Chamberlain Edmund Rutter &
"Samuel Pew

" By virtue of a Commission
"of the honorable the Circuit Court of the State of
"Missouri for the County of Cape Girardeau per-
"sonally appeared before me J Foster a justice
"of the peace for Cincinnati Township, Hamil-
"ton & State of Ohio, Timothy Flint who being
"of lawful age, and duly sworn deposeth and
"saith some time in the year 1810 this deponent
"was then a resident of the town of Jackson in the
"County of Cape Girardeau State of Missouri, when
"the news arrived at that place of the death of
"Jason Chamberlain who was drowned in one
"of the branches of White ~~water~~ river that this
"disponent was the person who communicated
"the news of his death to his wife Eliza Cham-
"berlain that a few days after a certain Edmund
"Rutter left the town of Jackson with intent as
"this deponent understood to ascertain the Circum-
"stances of his death to secure his property it being
"understood the deceased had a considerable

„sum of money in his possession at the time of his
„death as also the deceas^d had a store of goods in
„the neighborhood or County where he died that
„said Rutter went as a friend or agent for his family
„that on the return of the said Rutter it is the impression
„of this deponent that he brought a sum of money
„to the widow of the deceased & that about that time
„this deponent more than once saw several parcels of
„money in the posession of the widow of the deceas^d and
„remembers particularly one parcel was labeled William
„Russell, this deponent further saith his mind is for-
„cibly impressed that the widow of the deceased inform-
„ed him that the deceased had left a sum or some
„money with her on his leaving home with injunc-
„tions not to lay out or expend during his absence
„& further that about that about time a sum
„of money was put into his hands by Mrs Cham-
„berlain desireing him to count it which he did,
„that it amounted to twenty one hundred dollars all
„in bank notes to the best of his belief and that during
„that time that this deponent continu^d in the family of
„Mrs. Chamberlain, he several times saw a bag
„which he understood contained gold and was so
„informed by Mrs Chamberlain the amount of
„which he does not know & that the above sums of
„money were part of the effects left by Mr Chamberlain
„and further saith not:-

„Sworn to & subscribed before
„me this 28th June 1827
James Foster Jost Peace

Timothy Flint

„Also at the same time and place Abagail Flint
„being of lawful age and duly sworn deposeth and
„saith that some time after the decease of Mr Cham-
„berlain Mrs Chamberlain told her that the person
„who had been sent to secure the money and ef-
„fects of the deceas^d where he had died had
„brought back a sum above one thousand dollars
„but under two but cannot recollect the exact
„amount and further that Mrs Chamberlain

Bill of Exceptions Continued

"informd this deponent that Mr Chamberlain "had left some money in the house on his leaving "home previous to his decease which money she "informed this deponent ~~she was not she~~ was not to "use in his absence that part of the said money "was sold as she believes & further saith not -

"Sworn to and subscribed
"before me this 28th June 1827 } Abigail Flint
"James Foster Justice Peace

"Also at the same time time and place Emeline "Flint who being of lawful age and duly sworn "deposeth and saith sometime after the decease "of Mr Chamberlain & while this deponent remain "ed in the family of Mrs Chamberlain with her "parents that she assisted Mrs in counting several "parcels of money she believes three parcels that the "sum she counted was three thousand dollars & "upwards as she believes that she understood at the "time that the above sum of two thousand dollars "and upwards was money brought by Edmund "Rutter from where Mr Chamberlain died and "this deponent further saith that the above par "cels were under cover & labelled & further saith not -

"Sworn to & subscribed
"before me this 28th June } Emeline H Flint
"1827. James Foster just peace

The State of Ohio Haml. county ss

I James Foster a justice of the "peace for said township and county do hereby cer "tify that the above & foregoing depositions were "taken by me on the time and at the place named "in the notice & dedimus enclosed & in the presence "of the deffts Counsel = Given under my hand & "seal this 29th June 1827 Received my costs in the "the above from plaintiff Counsel 250 J Foster Jast peace
"$250 J Foster -

I Daniel Garro Clerk of the Court of Common Pleas

"within and for the said County do hereby Certify
"that James Foster before whom the foregoing
"depositions appear to have been taken is an acting
"justice of the peace duly Elected qualified and
"Commissioned and full truth and Credit and
"Credit are due to all his acts as such -

"In testimony whereof I have hereunto
"set my hand and the seal of said
Court at Cincinnatti this 28th day of
June AD 1827. Danl. Garro Clk -

L S

State of Ohio
Hamilton County } ss I George P. Turner president
Judge of the ninth circuit of the
"Court of Common pleas for the state of sd. do certify
"that Daniel Garro Esqr. is Clerk of our said Court
"for the County of sd. and his Certificate is in
"due form of law - Given under my hand & seal
"at Cincinnatti this 29 of June 1827
Geo P. Turner

"State of Missouri County of Cape Girardeau
"Toulit - Stephen Byrd one of the securities of Eliza
"Chamberlain administratrix of the estate of Jason
"Chamberlain deceased on her administration
"bond - being duly sworn deposeth and saith
"that he has good reason to believe that the
"said Eliza Chamberlain administratrix is wast
"ing or mismanaging the estate of the said
"deceased Stephen Byrd

"Sworn & subscribed to before
"me the undersigned a justice
"of the peace for Byrd township
"County of Cape Girardeau State
"of Missouri this 24th April 1821
"William Creath JP

"It was proved that Chamberlain died in the
"last of June or first of July 1820. It was also proved
"that Mrs Chamberlain left this state in may
"1821 and has never returned her letters were vacated

Bill of Ex. Continued

"and ~~in a~~ administration debonisnon was granted
"to Byrd in August 1821 ~~and~~ ~~has never~~ ~~[illegible]~~
"~~[illegible]~~ ~~Her letters~~ She Mrs Chamberlain never
"made any settlement with the County Court, The
"inventory and list of sales was also read in
"evidence — To which opinion of the Court the defen-
"dant excepts and tenders this bill of exceptions
"which is signed sealed and made part of the re-
"cord John O'Cook (Seal)

April T 1830 April 14th 1830 3d day of the term
The Circuit Court met at nine O'clock A.M.
according to adjournment present the same judge

John Miller Governor of the State of Missouri
who sues to the use of the Creditors of the Cred-
itors of the estate of Jason Chamberlain deceased } Debt
Versus
Stephen Byrd Impleaded with Eliza
"Chamberlain Edmund Rutter and Samuel Pew
" } and now
"at this day Come the parties aforesaid by their at-
"torneys whereupon On motion of the defendant the
"Sheriff returned the following jury (Towit)

"1 John Allen	7 Alexander Middleton
"2 James Thompson	8 Christopher Hoss
"3 Joseph Abernethie	9 Thomas Johnson
"4 Frederick Overfield	10 Alpheus W Bascom
"5 Milton Harris	11 Reuben Carr
"6 Edward L Harris	12 Thomas J Wheeler

"twelve good and lawful money who being duly elected
"tried and sworn to well and truly try the issue join-
"ed between the parties herein and the Court
"& jury not having had the hearing of the
"evidence in this Case by Consent of the par-
"ties it is ordered by the Court, the jurors of the
"jury aforesaid, be permitted to retire until
"nine O'clock to morrow, when they are required
"to meet at the bar of this Court to proceed in the

trial of this Cause.

April 15th 1830 4th day of the term
Present the same judge

John Miller Governor of the state of Missouri
who sues to the use of the Creditors of Estate
of Jason Chamberlain deceased
Versus
Stephen Byrd Impleaded with Edgar
Chamberlain Edmund Rutter & Samuel Pew
} Debt

The parties by
their attorneys appear, and the jurors Empanelled and
sworn to try the issue between the parties herein, being
called Come, and the Court and jury having heard
the evidence and argument of Counsel, the jurors afore
said on their oath do say - We the jury find that the
said defendant does owe to the plaintiff, the sum of
Ten thousand dollars as alledged in the plaintiffs
declaration and assess the plaintiffs damage
by reason of the breaches assigned in the plaintiffs
said declaration to nine hundred and forty five dollars
and fifty six cents = Whereupon the defendant
moves the Court for a new trial in this case on rea
sons herein filed, which motion after argument of
Counsel is by the Court overuled; Whereupon it is con
sidered by the Court that the plaintiff recover
against the defendant the sum of Ten thousand
dollars the debt in the plaintiffs declaration
mentioned together with his Costs in this suit expended
Whereupon the plaintiff now here freely remits
seventy one dollars and fifty cents of the damages
aforesaid assessed which said judgment may be
discharged by the payment of the sum of Eight
hundred and seventy four dollars and six cents the
residue of the said damages assessed with legal interest
on the same until paid together with the costs afore
said; and in accordance with the agreement of the
parties hereon filed; It is ordered that the said dam
ages be paid as herein after appointed among the
Creditors of the estate of the said Jason Chamberlain

Judgment

Judgement Continued

"deceased (Toalit) To William Drope for the use of
"Benjamin Babcock Two hundred and twelve dollars
"& forty eight Cents = To Russell E Heacock twelve dollars
"and forty six Cents and three fourths = To Nathan
"Panhorn thirty six dollars and forty one and a fourth
"Cents. To Lewis Dixon Five dollars twenty seven &
"a fourth Cents = To Henry Whittenburgh fifty five
"dollars sixty nine and three fourths Cents = * To Armour
"& Juden Twelve dollars and sixty five Cents = To Johnson
"Ramney sixty dollars and fifty four cents To Thomas Neale
"Five dollars & sixty three and a fourth Cents; Josiah
"Lee's Executor four dollars thirty two and a fourth Cents;
"To John Cross for the use of Jones forty nine dollars
"and seventy five Cents: To James Russell sixteen dollars
"and seventy Eight Cents To Lynne Harling Survivor &c
"one hundred and forty eight dollars seventy Cents = Rufus
"Easton seventeen dollars twenty one and a half Cents
"To William Russell one hundred and forty one
"dollars sixty and a half Cents = To A Gray for the use of
"Henry Lanford Forty five dollars four and three
"fourth Cents To Simon Block thirty three dollars
"and ninety six Cents During the trial of this Cause
"the defendant filed a bill a bill of Exceptions which
"was signed by the Court filed and made a part
"of the record in this Case.

* Fifteen dollars fifty five and a fourth Cents.

Bill of Ex. filed

Which bill of Exceptions is in the words following

Bill of Exceptions

"John Miller Governor of the state of Missouri
"for the use of the creditors of the Estate of Jason
"Chamberlain dec.

vs

"Stephen Byrd Impleaded with Eliza Cham
"berlain Edmund Rutter and Samuel Pew

Debt in the Circuit Court of the County of Cape Girardeau

"Be it remtered
"that on the trial of this cause the defendant by his
"Counsel objected to the reading of and moved the court
"to exclude from the jury as incompetent & irrelevant
"testimony under the declaration the depositions of Timo-

„thy Flint Abagail Flint and Emeline H Flint
„and which are in the words and Figures follow
„ing viz. State of Missouri Cape Girardeau Circuit
„Court
„John Miller Governor of the state of Missouri
„for the use of the creditors of the Estate of Jason
„Chamberlain deceased - } Debt
„Versus
„Stephen Byrd impleaded with Eliza Cham
„berlain Edmund Rutter and Samuel Kw

By virtue of a comis-
„sion of the Honorable the Circuit Court of the state
„of Missouri for the County of Cape Girardeau person
„ally appeard before me J Foster a justice of the peace
„for Cincinnati township Hamilton & State of Ohio,
„Timothy Flint, who being of lawful age, and duly
„sworn deposeth and saith, some time in the
„year 1819, this deponent was then a resident of the
„town of Jackson, in the County of Cape Giradeia, state
„of Missouri, when the news arrived at that place,
„of the death of Jason Chamberlain, who was drowned
„on one of the branches of White river, that this
„deponent was the person who Communicated
„the news of his death to his wife Eliza Chamber
„lain; that a few days after a Certain Edmund
„Rutter, left the town of Jackson with intent as
„this deponent understood to ascertain the
„Circumstances of his death to secure his property
„it being understood the deceasd had a considera
„ble sum of money in his possesion at the time of
„his death, as also the deceasd had a store of goods
„in the neighborhood or County where he died;
„that said Rutter went as a friend or agent, for his
„family that on the return of the said Rutter, it is the
„impression of this deponent that he brought a sum
„of money to the widow of the deceased, & that about
„that time this deponent more than once saw seve-
„ral parcels of money in the possesion of the widow of
„the deceased and remembers particularly one parcel
„was labeled P William Russell, this deponent further

Bill of Exceptions Continued

"saith his mind is forcibly impressed that the
"widow of the deceas^d informed him that the
"deceas^d had left a sum or same money with her
"on his leaveing home with injunctions not to
"lay out or expend during his absence & further
"that about that time a sum of money was put
"into his hands by Mrs Chamberlain desireing him
"to count it which he did, that it amounted to
"twenty one hundred dollars all in bank notes
"to the best of his belief, and that during the time
"~~in the family~~ that this deponent Continu^d in the
"family of Mr Chamberlain he several times saw a bag
"which he understood Contained Gold & was so inform
"ed by Mrs. Chamberlain, the amount of which
"he does not know & that the above sums of money
"were part of the effects left by Mrs Chamberlain
"& further saith not + Sworn to and Timothy Flint
subscribed, before me this 28th June
1827 James Foster Just. peace

"Also at the same time and place Abagail Flint
"being of lawful age & duly sworn deposeth and
"saith that some time after the decease of Mr Cham
"berlain Mrs + Chamberlain told her that the per-
"sen who had been sent to secure the money and
"effects of the deceas^d where he died had brought
"back a sum above one thousand dollars but
"under two but Cannot recollect the exact amount
"and further that Mrs Chamberlain informed
"this deponent that Mr Chamberlain had
"left some money in the house on his leaving
"home, previous to his decease which money she
"informed this deponent she was not use in his
"absence, that part of the said money was gold as
"she believes & further saith not
"Sworn to + and subscribed Abigail Flint
"before me this 28th June 1827
James Foster justice peace

„Also at the same time and place Emeline Flint
„who being of lawful age and duly sworn deposeth
„and saith sometime after the decease of Mr Cham-
„berlain & while this deponent remained in
„the family of Mrs Chamberlain with her pa-
„rents that she assisted Mrs in Counting several
„parcels of money she believes three parcels that
„the sum then Counted was thre thousand dol-
„lars & upwards as She believes, that she under-
„stood at the time that the above sum of two
„thousand dollars & upwards was money brought
„by Edmund Rutter from where Mr Chamberlain
„died & this deponent further saith that the
„above parcels were under Cover and labelled and
„further saith not —

„Sworn to & subscribed before
„me this 28th June 1827
James Foster jus. peace

Emmeline H Flint

„State of Ohio Haml. County = p

„ I James Foster a justice of the peace
„for said township and County do hereby Certify
„that the above and foregoing depositions were taken
„by me, on the time, and at the place named in
„the notice & dedimus inclosed & in the presence of
„the deffts Counsel = Given under my hand & seal
„this 29th june 1827 — J Foster Jus. peace
„Received my Costs in the above from plaintiff
„Counsell $2,50 J Foster —

„The State of Ohio
„Hamilton County } sct

„ I Daniel Gano Clerk of the Court
„of Common Pleas within and for the said County
„do hereby Certify, that James Foster before whom
„the foregoing depositions appear to have been taken
„is an acting justice of the peace, duly elected
„qualified and Commissioned, and full faith
„and Credit are due to all his acts as such — In testimo-
„ney whereof I have hereunto set my hand and the

L S

Bill of Exceptions Continued

"seal of said Court at Cincinnati this 28th day of
"June AD 1827 Danl. Gano Clk

"State of Ohio } ss
"Hamilton County }

"I George Turner president judge of
"the ninth Circuit, of the court of Common pleas
"for the state afsd. do certify that Daniel Gano Esqr.
"is clerk of our said Court, for the County afsd. and
"his certificate is in due form of law = Given under my
"hand seal at Cincinnatti this 29th of June 1827
Geo P. Turner.

"But the Court decided, that the said depositions
"were proper to go before the jury and refused to sustain
"the motion of the defendant, to which opinion
"of the Court the defendant excepts, and tenders this
"which he prays may be signed sealed and made
"part of the record which is done —
" John D. Cook L S

John Miller Governor of the State of Missouri who
11th day of Jany appeal granted
"sues for the use of the creditors of the es
"tate of Jason Chamberlain de Sd.
Versus
" Stephen Byrd Impleaded with
" Eliza Chamberlain, Edmund
" Rutter and Samuel Perr.
Debt =

"[illegible] The defendant.
"by his attorney comes and moves the Court to grant
"an appeal in this Case to the supreme Court.
"Whereupon the said defendant Stephen Byrd
"in open court swears that this application for an
"appeal is not made for the purpose vexation or
"delay, but because this affiant, feels agrieved by
"the decision of this court: It is therefore ordered by
"the Court that an appeal in this Case be granted
"When Come the said Stephen Byrd with
"John Prim and William G Byrd for his sureties
"who acknowledge to owe and be indebted to the plain
"tiff in the sum of Twelve hundred dollars

„to be levied and made of their respective Goods and
„Goods and Chattles, lands and tenements; to be void
„if the said Stephen Byrd appealant shall
„prosécute his appeal with effect, pay all the
„Costs that shall be adjudged against him and abide
„the the judgement of the Supreme Court—

Copy of agreement between parties

The following is a copy of the agreement filed between the parties aforesaid

„Colo. Bird has proposed to go into the Circuit
„Court, and enter his appearance without writ,
„to, such suits, as the Creditors, of Chamberlain,
„may institute, against him, for waste, on the
„administration bond; all Creditors may institute,
„suit and he will agree, with the Creditors to
„try one, to establish the amount of waste,
„and that judgement shall be entered up, against
„him for the waste in favor of each creditor, in
„proportion to the whole amount wasted & the
„parties are to permit Colo Bird to make use of
„any equitable defence, he may have, and all
„suits but one are to abide the event of the suit tried
„either party to have the same right
„for continuance as if writs were issued. I
„see no objection to this proposition and am
„willing on my part to agree to it so far as I am
„attorney for claimants=

James Russell for himself
and William Russell = J Ramey
for himself and as attorney for
Easton Gates Drope use of Bab
Cock for Armour & Juden an
Vanhorn and for Abner Gray

agreement Continued

"Each of all the creditors are to contribute their proportion of Costs accor-
"ding to the amount of their several Claims against
"Chamberlains Estate - J Ramey

Lynne Starling by P P Garrett his agent, G A Bird for his principal Simon Senr & for Robert Simpson survivor of Simpson & Quarles and for Henry Whittenburgh -

James Evans as attorney of Benjamin Barton and in behalf of David Patterson. -

John Cross for B A Jones in right of his wife Mari J Jones

Endorsement on back of agreement

On which said agreements an indorsement in the words following

"In the suit to be commenced according
"to the within agreement the plaintiff is not
"required in the declaration to state the names of
"the creditors to whose use this suit is brought
"nor any thing descriptive as to their claims or
"amounts due: The same may be shown to the Court
"without pleading so that the Court may appor-
"tion the amount recovered amongst said Creditors

J Ramey attry for Cross W & J Russell Lewis Dixon, Neale, Thomas, C Gates & the rest of the Creditors of Chamberlains estate, & R, E, Heacock -

Stephen Byrd defendant

I Henry Sanford Clerk of the said Circuit court Certify that the foregoing thirteen pages contain a full true and perfect transcript of the plaint aforesaid between the parties therein named as fully as the same appears of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said Court at office this 30th day of August A.D. 1830

S. H. Sanford Clerk
by his deputy.
Wm. C. Ramsey

Fee	$1.00
Copying	5 06¼
Certif & Seal	50
	$ 6, 56¼

161 (8)

16a 535 Sept 30

John Miller Governor of
The State of Missouri for
the use of the Creditors of
Jason Chamberlain decd
vs } Debt
Stephen Byrd impleaded
with Eliza Chamberlain
Edmund Rutter and
Samuel New

Filed ~~August~~ September 1st 1830
Peter A Garrett Clk
By his deputy
Sty. Sanford

John Miller Governor of the State of Missouri for the use of the creditors &c versus

Stephen Byrd unpleaded &c

In the Supreme Court - Appeal from the Circuit Court of Cape Girardeau County -

And now the said John Miller Governor &c - moves the Court to affirm the judgement of the Circuit Court in this case for the reasons (Sowit) "

" 1 The appeallant did not cause a complete transcript of the record and proceedings in said case to be filed with the Clerk of this Court ten days before the present term of the same as the law directs -

2 The Appeallant Byrd has not filed nor caused to be filed a transcript of the record and proceedings of said cause as the law directs with the Clerk of this Court

J Ranney for Appeallee

John Miller Governor
for the use of Creditors
Versus
Stephen Byrd impl^d

Motion of Plff

Filed Sept 6th 1830
B Bacon D Clerk

Byrd impladed with Chum Curtain and others
vs
Miller Governor for the use &c.

Writ of Error from the Cape Girardeau Circuit Court,

And now the said plaintiff in error comes, and says that in the record and proceedings of the Circuit Court aforsaid and also in the rendition of the Judgment of the said Circuit Court there is manifest error in this (to wit) That the Court gave Judgment for the defendant in error when in law and in fact the Judgment should have been for the plaintiff in in error. The plaintiff also assigns the following Cause

The Circuit Court erred in permitting the depositions of the Flints to go before the Jury.

2 They erred in permitting the Depositions of the Flints to be read

For these and other errors appearing on the face of the record the plaintiff in errors prays that the Judgment of the said Circuit Court may be reversed and held altogether for naught and that he may be restored to all things which he may have lost by the erroneous Judgment of the said Circuit Court &c

There is no error in the record and proceedings of said court
Scott & Watkins for plaintiffs in error
Ramey, Davis for Deft in error

Byrd impl^d &c
vs
Miller Governor &c

Errors.

Filed September 6th 1830
Benjm Bacon Clerk

John Miller Gov.. to the use of the creditors of Jason Chamberlain vs Stephen Byrd impleaded with Eliza Chamberlain, Edmund Rutter and Samuel Pew

Appeal from Cape Girardeau Circuit Court

This was an action of debt commenced on an administration bond in the Circuit Court against the defendant one of the securities of Eliza Chamberlain. Plea Nil debet. Verdict for the plaintiff and Judgment rendered thereon. To reverse this judgment this appeal is taken and it is assigned for error that the depositions of Timothy, Abigail & Emeline Flint were admitted as evidence. The testimony of these witnesses ~~witness~~ was that Eliza Chamberlain was seen in possession of money to the amount of about two thousand dollars part of which she said was left in the dwelling house with her by Jason Chamberlain a short time before his death ~~[illegible]~~ ~~to Chamberlain~~ ~~by him~~ and the rest was brought to her by a person sent to ascertain the circumstances of his death, and it was thought

that the money was found about the person of the deceased. The breach of the obligation assigned in the declaration is that the said Eliza hath not rendered a true and perfect inventory of all and singular the goods and chattels rights and credits of the said deceased, nor hath the said Eliza exhibited a just and true account and inventory of all and singular the goods & chattels rights and credits of said deceased which have come to her hands into the office of the circuit court for the county of Cape Girardeau &c

The evidence, it seems to the court, was properly admitted under this breach

The judgment of the circuit court is affirmed,

M. McGirk

George Tompkins

Judges

Governor unsd
vs ⅌ opinion
Stephen Byrd

556

Copied September 10th 1830
Benjmt Bacon D Clerk

Filed September 8th 1830
Benjmt Bacon D. Clerk

not to be printed
Tompkins

John Miller Governor of the State of Missouri use &c Appeallee
vers.
Stephen Byrd impleaded &c Appeallant

Appeal from Cape Girardeau Circuit Court

This originally was an action of debt commenced on an administration Bond in the Court below against the defendant one of the securities of Eliza Chamberlain under an agreement of the parties filed specefying the manner in which the suit was to be conducted on the last trial of the cause — Plea Nil Debet verdict for plaintiff Damages — $863-50 among other testimony + Plaintiff offered the depositions of Timothy, Abigal & Emeline Flint. The defendant objected to the same being read on the ground of the Incompetent and irrelevant matter alledged to be contained therein — The Court overruled the objection the depositions were read to which the defendant excepted and the Defendants bill of exceptions contains the only question for the determination of this Court which is

1 Is there any breach in the plaintiffs declaration to which the plaintiffs depositions will apply —

On the part of the Appeallee it is insisted that the testimony was competent as applying to the breaches following (Sawit)

1 That the said Eliza hath not rendered a true and perfect inventory of all and singular the goods and Chattels rights and credits of the said deceased — nor hath said Eliza exhibited a just and true amount and inventory of all and singular the goods and Chattels rights and credits of said deceased (which have come to her hands) into the office of the Circuit Court for the County of Cape Girardeau the County Court

nor Probate Court of said County —

2 That the said Elva hath not rendered a just and true amount of her said administration nor in any way accounted for the same —

3 That the said Elva hath privately collected large sums of money from different individuals and sources the credits of said estate amounting in all to a large sum (Viz) to the amount of two thousand dollars which sum so received the said Elva hath rendered no account of but hath privately applied the same to her own use leaving the creditors of said estate wholly unpaid —

4 That the said Jason Chamberlain at the time of his death was in possession one large sum of money about his person and another large sum of money in the dwelling house of the said Jason both of which sums of money amounting to a large amount (Viz) to the sum of thirty five hundred dollars, which said money the said Elva hath neither made an inventory of nor any way accounted for the same but hath wholly disposed of the same privately to her own use and hath wholly wasted and dissipated the same

---

Under the breach that no settlement had been made with the Court the testimony was competent and relevent to shew what the administratrix should have been charged with —

Under the 2d breach the testimony was relevent and competent for the same cause —

Under the 3d & 4 breaches the testimony was proper to be left to the jury to determine the amount of money received by the administratrix and wasted and whether sufficient or not was for the jury to determine Swift see decision of this Court Montgomery vs Farrar April term 1830

J Ranney for Appellee

John Miller Govr. & in
appeal~~lee~~
vs

Stephen Byrd impleaded &c
Appealant —

Brief as Appeallee on
motion to affirm
J Ranney for Appeallee

Governor of the State
use &c
at the suit of
Stephen Boyd impleaded v

On error from the
Circuit Court for
Cape Girardeau
County —

This was original action
of debt commenced in the Court below against the plaintiff in error
given for the faithful administration of Elsa Chamberlain as administratrix of the estate of Jason Chamberlain deceased — The breaches alledged were —

1 Personal property amounting to about $244-21 Cts appraised but not sold or accounted for but converted to her own use
2 That said Elsa did not render a true account inventory &c
3 Did not make settlement with the Court —
4 That said Elsa did not account for certain money of said deceased found on his person and in his house amounting to $3500 but secretly and privately kept the same and disposed thereof to own use —
5 Said Elsa did not account for or charge herself with a large amount of money received as such administratrix of the creditors of said estate amounting to $2000 but disposed thereof to her own use privately —

To which defendant pleaded Nil debet —

The case by the parties was submitted to the Court which found for the plaintiff and assessed the damage under the breaches alledged to $1503-19¾ and apportioned the same according to the agreement of parties amongst the creditors — On the trial of the cause the defendant offered to prove that after the death of Chamberlain the administratrix had proceeded to build a brick house on a town lot of the deceased that afterwards the estate having been declared insolvent a part of said lot including the same brick building sold for $775 and the money divided amongst the creditors of the said estate and that the part of said lot sold without said building was not worth more than $100 which testimony was offered to establish a credit in favor of the

defendant to be deducted from the wast established under the alledged breaches —

The Court rejected the evidence to which the defendant excepted and brought the case by writ of error to this Court

The only point before this Court is did the Court err in rejecting the offered testimony. and for the purpose of ascertaining that point it is necessary to inquire

1 Is there any implied assent of the creditors that Elsa administratrix should not account for the monies and funds of the estate and lay the same out in buildings and other purposes of her own —

2 From the nature of the trust reposed in her at law as administratrix is there any implied assent of those interested that the monies comeing to her hands as such adl &c — should be laid out in building and or other use save the payment of debts —

3 Does the article of the parties so change the case as to have Authorised the Circuit Court to have allowed the credit claimed —

On the first point the record shews the negative of the proposition but independant of that the administration was a trust reposed by law Madox Chancery 1 Vol 467 — 468 — 469 — 470 — and where law reposes a trust of the kind and markes out the discharge of duties can parties beneficialy to be interested dispense with the course of law pointed out for the discharge of such trust — and as for the prescribed course of law see Geyers digest page 43 — Sec. 7 — page 48 — Sec. 23 — & 26 — liable for debts as far as assets come to their hands 2 Selwin 679 — Bacon 2d Vol 416 — H 423 — 431 L 432 — 433 — 434 — 435 — Jacob law dictionary 2d Vol 511 Sec. 5 — 514 — 515 — personal estate applied to the payment of debts —

The law subjects the Executor to every suit to every suit the individual might have had against the testator Jacob 2d

Vol 525 - 523 and nothing can be debt against Executor that is not debt against testator Icob 523 bottom -
If Executors do any wast it is a devastabil and creditors or a subsequent administrator may sue Jacob 2d Vol 525. — On the second point the authorities cited on the first apply -

On the 3 point there is no difference between law and equity excepting this at law unless the administrator makes settlement gets his credits in the County Court for legal disbursements he can not get the allowance made in a suit on his bond - but in equity on a bill to account debts paid by an administrator rightfully according to the course pointed out by law will be allowed him because the payments were made in accordance with the trust reposed by law - and for the reason that Chancery looks through and reviews the administration within the pale of the law pointing out the duties of the trust - On a suit on bond the Court can go no farther in allowance than the County Court have determined payments made legaly it is presumed - but that is immaterial to the point now before the Court

All proceedings in Equity for relief must be founded upon contract the same as at law - differing only in the mode of 1st Proof 2 ~~Relief~~ Trial. 3 Relief Relief by compelling a specific performance of Executory agreements - For blank Equity page 4 - 27 - Black Com 3d Vol 437 - 438 - Equity can not supply assent of parties nor make a contract - For blank 1st Vol. 37 - 38 - 40 - 41 - 45 Black Com 3d Vol 435 - 436 - Another thing he who asks equity must do it - The person intrusted with a mans money by law without his agency or knowledge as to quantity who holds in an improper place secretly for the purpose of depauling the owner of the same comes with an ill grace to be discharged from the small amount that by chance is proved to

have been in his possession and lost by his own improper conduct and in a course to depend —
Equity will supply any defect made by mistake of parties where by the contract it is evidently an omission For blank 1st Val 37 - 40-41

On the doctrine of contracts depends every principal of law and equity such as improvements made on land without assent of the owner the mixing of goods by one man with another man without his assent in one case loses his labor and in the other his goods 2d Val Black Com 405 - 1 Vernon 217 - 2 Vernon 516
In this case the party secretly keeps the money without making known how much refuses to pay the creditors lays out some of the money on a building and after years have past property depreciated asks the Court to take the word of a witness as to the value of the property at the time of such depreciation without and with improvements made - when no individual can tell what the property would have sold for if sold when her duty required nor how many debts the money would have paid off had she honestly accounted for all she received - here is a credit and relief asked in equity by a person in consequence of a violation of her oath her trust and a fraud committed and has the modesty to ask the Court to decree that the creditors shall pay her a per centum on a ~~balance~~ part formed by proof in her possession as a pay for her services in having done the illegal acts mentioned

I Ranney Atty for plaintiff

Gov'r 42 forms
I Byrd unpleased
Nor
I Ranney Atty
for Gov'r under Ore

Filed Apr. 7 1825
C. S. Thomas
DCCK Scott