Burton, William; Admin Dameron, John VS Dameron, Willis M. 1853 Randolph Co/2nd Cir 196/4

30

Fayette November 19th 1853

Wm. E Dunscome Esq.

Dr Sir, I desire you to send a writ of Error to the clerk of the Circuit Court of Randolph County in a proceeding where William S. Burton Admr. de bonis non of the estate of John Dameron Decd. is plaintiff vs Willis M Dameron defendant.

Please send it soon or it will not be up at the Jany. Term of your court. Charge me with the issuing.

Yours truly
Jo. Davis

It is not a civil action under the Wells code, but was a proceeding in the County Court and an appeal. The parties stood below as they will stand in your court.

Davis

Wm S Burton

Admr of Ins

Lameron dec

vs } Precipe

Willis M Lameron

Filed Nov. 22 1853

Wm E Dunscomb

Clerk

Co. David.

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Second Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Randolph County in the Judicial Circuit aforesaid wherein William S Burton admr of John Dawson dec'd, was plaintiff and William M Dawson was defendant

in an action of manifest error hath intervened, to the great damage of the said plaintiff as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the twenty second day of November in the year of our Lord one thousand eight hundred and fifty three

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

State of Mississippi
County of Randolph

In obedience to the Command of the
within writ I have forwarded to the Clerk of the Supreme
Court of this State a true transcript of the record
of the suit therein mentioned.
Given under my hand this 12th day of Dec.
1853

John J. Allen Clerk of the
Randolph Circuit Court

William S. Burton Admr de bonis non of
John Dameron Decd } In the Randolph
vs } Circuit Court.
Willis M Dameron } Dept.

To Willis M Dameron

You are hereby notified that I have caused the above entitled cause to be taken to the Supreme Court of Missouri, by writ of error, which will commence its next Term on the second Monday in January next at the City of Jefferson.

Decr 5th 1853. William S. Burton
Admr de
By Reed & Davis his
attorneys.

I certify that I Executed the within Notice by Reading and Delivering a Copy of the Same to the within named Willis M. Dameron on the 8th Day of December 1853 in Randolph County Mo.

G W Dameron Sheriff R C

Sheriff fees 50

Wm S. Burton Adm.
vs
Willis M. Dameron
Notice of writ of Error.

State of Missouri }
County of Randolph } ss

The record and proceedings of a certain suit in the Circuit Court of said County wherein William S Burton administrator of the goods remaining unadministered of John Dameron dec'd for the use and benefit of Woods Christy & Co. R P Perry & Co Lutt & Watson. Heuskel & Hoskins & others Creditors of the said John Dameron dec'd are Plaintiff and Willis M Dameron Defendant

The following record & proceedings had in the County Court of said County was filed in said Court.

State of Missouri }
County of Randolph } ss

A record of certain proceedings had in the County Court of said County wherein William S Burton administrator of the goods remaining unadministered of John Dameron dec'd for the use and benefit of Woods Christy & Co. R P Perry & Co. Lutt & Watson Heuskel & Hoskins and other creditors of the said John Dameron dec'd are Plaintiff & Willis M Dameron is Defendant

In the County Court of said County on the 25th day of April 1853 The Plaintiff by his attorney filed the affidavit of Wm T Christy stating that he is interested in the estate of John Dameron dec'd & has good cause to believe and does believe that Willis M Dameron has concealed or embezzled goods chattles moneys books papers or evidences of debt of John Dameron dec'd On motion of the Plaintiff

Affidavit filed & Citation ordered

therefore by his attorney it is ordered that a Citation issue against said Defendant to answer at the next term of this Court the Charges Contained in said affidavit

The affidavit filed & referred to in the foregoing order is in the words & figures following

State of Missouri }
County of St Louis } ss

Affidavit

On the 18th day of April in the year of our Lord one thousand eight hundred and fifty three personally appeared before the undersigned Clerk of the County Court within & for the County and State aforesaid William J Christy who being duly sworn states on oath that he is interested in the estate of John Dameron deceased late of Randolph County Missouri and who died in California And the administrator de bonis non of whose estate is William S Burton

And the said William J Christy further states that he has good cause to believe and does believe that Willis M Dameron son of said John Dameron deceased has concealed or embezzled goods chattles money books, papers or evidences of debt of the said deceased John Dameron of the value of several thousand dollars

William J Christy

sworn to and subscribed }
before me the date first }
above written }

In testimony whereof I hereto set my hand and affix the seal of said Court at Office in St Louis

Louis F Lacy Clk

In obedience to the foregoing order of Court the following Citation was issued

State of Missouri
County of Randolph ss

Citation

The State of Missouri to the Sheriff of the County of Randolph greeting you are hereby Commanded to summon Willis M Dameron to appear before the County Court of said County at the Courthouse in Huntsville on the fourth monday in May next to answer the charge of having Concealed or embezzled goods Chattles money books papers or evidences of debt of John Dameron deceased as stated in the affidavit of Wm S Christy filed in Court by Wm S Burton administrator of the goods remaining unadministered of said John Dameron decd for the use and benefit of Wood Christy & Co R D Perry & Co Judd & Watson Heiskell & Hopkins & other creditors of decedent and have you then and there this writ

Witness John J Allen Clerk of said Court with the seal thereof affixed at Office this 26th day of April 1853

John J Allen Clk

Upon which Citation the Sheriff made return as

Sheriff's ret'n

follows " I Certify that I executed the within Citation by reading the same in the hearing of Willis M Dameron on the 9th day of May 1853 in Randolph County

G W Dameron Sheriff R C

Then on the 23rd day of May 1853 in said Court

Motion to resign &c

William S Burton administrator of John Dameron deceased made proof that he had published a notice of his intention to resign said administration according to law and

thereupon said Burton applied to the Court to resign & to be discharged from said administration and the Court refused to permit him to resign And Thomas B Reed filed the bond of himself Isaac G Wilcox & Geo Boniface to indemnify said adms and the said Burton filed his objections to said bond & forbidding the further use of his name in the case of a citation against Willis M Dameron which objections were overruled by the Court

The bond referred to in the foregoing order is in the words following " Know all men by these Bond of indemnity that we Thomas B Reed Isaac Wilcox and Geo Boniface hereby bind ourselves to hold Wm S Burton adm of the estate of John Dameron dec'd harmless & free from all costs which may be incurred in the suit now pending in the Randolph County Court in which said Burton for the use and benefit of John Dameron's creditors is Plaintiff & Willis M Dameron is Defendant

In testimony we have hereto set our hands & seals this 23 day of May 1853

Thos B Reed
I G Wilcox
Geo Boniface

The objections of Plaintiff are as follows
" Wm S Burton comes into Court and forbids the further use of his name in prosecuting the Citation against Willis M Dameron on a charge of having money goods Chattles & effects belonging to the estate of John Dameron dec'd in his hands he also objects to the bond of indemnity filed

Buckhart atty
for Wm S Burton "

Then on the same day (5) the Plaintiff filed a list of interrogatories and leave is given until the first day of June next for Defendant to answer and the cause is set for trial on the fourth monday in June next to which time this Cause is continued

The list of interrogatories is in the words and figures following "Wm S Benton admr of the estate of John Dameron dec'd for the use and benefit of the creditors of said estate Plaintiff

Against

Willis M Dameron Defendant

In the Randolph County Court May Dm A D 1853

Interrogatories

1st at the time of the service of the Citation in this Case had you in your possession or under your Control any money goods Chattles and evidences of debt of said deceased John Dameron if so state how much and also what evidences of debt you have or had at the service of the Citation aforesaid

2nd How much money goods Chattles &c were you worth when starting to California in the spring of 1850 and how much were you worth at your return to Missouri in 1851

4th How many men did your deceased father out fit to California in 1850

What amount of money was each of these men to pay for his outfit who has the obligation bond entered into by your deceased father John Dameron with these he outfitted as aforesaid and in whose name was said bond given and how much has been paid by these men to you or your father for the out fit aforesaid and how much still remain due and from whom

5th State how much money goods Chattles & evidences of debt did your father possess in

California at the time of his death in 1851

How much in gold or gold dust if any what Claims he had at the time of his death & what kind? and from whom owing what evidences of debt if any and on whom and in whose hands were those moneys goods and evidences of debt left at the death of your father in California as aforesaid

6th Did you not at your fathers death in California take his entire estate in California into your hands? If so how much ~~did~~ you Did you take any part of his estate into your hand? if so how much

7th who bought a check on page 8 Bacon of St Louis Missouri in favor of Mrs. Fancy Dawson of Huntsville for ten thousand dollars when said check was bought in California with whose money was it bought what became of said ten thousand dollars

8th Did you not sell a mining Claim belonging to your fathers estate in California to Wm O Malone Town of Huntsville If so state for how much you sold said Claim for and whether the money is paid or any part thereof did you not receive ~~five~~ hundred dollars from said Malone after his return to Missouri on account of the sale of said Claim which George A Mathis adm of of the estate of said decd Claimed as belonging to said estate

9th Since your return from California did you not with your fathers money pay the following debts due and owing by him, towit, one debt for three hundred dollars to a certain selversmith in St Louis Mo named Forbis one debt for ten

Salem Mass

hundred dollars to George W Dameron and a debt to Archibald Rutherford

10th Do you know how much money your father owed Caswell Wisdom at the time you & he went to California If so state how much

11th Did you pay Caswell Wisdom for the property you bought last fall in this County at Sheriffs sale if so state how much you paid him

12th Have you not had George H Burckhartt employed as your Counsel in anticipation of being sued by John Dameron's Creditors since the first day of March 1852

13th Did Wm D. Malone on his return from California pay you any money or has he paid you any since on account of property sold by him in California On account of money paid by those your father outfitted since your return to Missouri if so how much

14th Did you not in 1851 tell Thomas G Young of the house of Heiskill & Hoskins Philadelphia that your father's estate would pay all his debts or did you tell said Young that your father's estate would about pay all his debts

15th Did you not tell Thomas B Reed in his Office in February last that your fathers estate had now three thousand dollars in California Coming to it If so who has these evidences of debt and from whom are they due

16th Did you not tell Wesley Hallibuston on the Mississippi river between St Louis and Hannibal as you returned home that you had then in your possession four thousand dollars made by you & your father in California

17th Was not all the money you brought home with your from California justly belong in to your

fathers estate

The answers to the foregoing interrogatories filed in this suit are the words & figures, to wit.

Wm S Burton admr of John Dameron deco

vs On citation in Randolph County Court

Answer Willis M Dameron deft

The said Defendant for answer to the interrogatories of said Plaintiff states as follows "as to the first interrogatory defendant say he had not at the time citation was issued nor has he now any moneys goods chattles or effects or evidences of debt of John Dameron deco in his possession or under his Control except some obligations or which are in California

2nd The Defendant excepts to 2nd interrogatory & says he thinks he is not bound to answer any such question

To 4th interrogatory defendant says his deceased father outfitted 18 men at $300 per man the bonds are in the hands of Willis M Dameron Sen in California except what has been paid they were executed to John Dameron there was about 900 dollars paid to my father in work during his life time and there has been 136 paid since his death which was paid in California for his funeral expenses & doctors bill

The following are unpaid unless they have paid since I left California I Owen. Jacob Owen Joseph Jenola. Squire Prather. Willis Prather. James Prather. Thomas Dobbin. James Miller. & John Fletcher the above is all he knows of being paid & is all he knows of being due

As to 5th interrogatory Defendant states that besides the bonds spoken of in answer to the

SALEM MASS

4th interrogatory he supposes his father at the time of his death had about two thousand dollars in money he had also the tenth part of a mining Claim in the Randolph flat in California & the money & his entire estate was taken Charge of by A L Williams & B O Williams of California two partners of deceased in the Claims

As to 6th interrogatory Defendant says he did not take any part of the estate of his father into his hands except bonds above spoken of in answer to 4th interrogatory and they are now subject to the order of the creditors said bonds were in my trunk at my fathers death

As to 7th interrogatory Defendant says that A L Williams & B O Williams bought a check on Page & Bacon St Louis for two thousand dollars payable to Mrs Nancy Damron which they said in their letter to Nancy Damron was a present from them to her I do not know of my own personal knowledge whose money the check was bought with but I suppose it was bought with my fathers money my mother got the money for the Check & has had it under her control all the time

As to 8th interrogatory Defendant says he sold to Wm D Malone his interest in a mining Claim in California for 300 dollars which he paid to me in California this was a partnership Claim my father owning one tenth & myself one tenth & I was one of the partners & I sold all my right title and interest to said Malone which I had a right to do I never received five hundred dollars from Malone after his return from California I did not sell my fathers interest as I had no right to do so

As to 9th interrogatory the Defendant say he did

not pay with his father money any debts owing by his father since his return from California but since his return he paid to A L Forbes of St Louis with Defendants own money a note of 97 dollars owing by his father for a watch and other jewelry given by my father to me in the fall of 1849 before he went to California I paid a debt of about 200 dollars to G M Dameron guardian for the heirs of Thos Malone dec'd out of my own money by direction of my mother Mrs Nancy Dameron who refunded the money to me I also paid Archibal Rutherford a note for 100 dollars given by me for a horse & my father was security to the note as

As to 10 interrogatory Defendant say he does not know of his own knowledge how much his father owed C Nixdorf when he went to California I understood from my father that it was about 3000 dollars

As to 11th interrogatory Defendant states that he excepts to said interrogatory as it is irrelevant

As to 12 interrogatory Defendant states that he excepts to said interrogatory as irrelevant

As to 13th interrogatory Defendant says that Thos Malone paid him 136 dollars on his return from California which he had collected as a partnership debt of mine & my fathers from L Dooley it was one of the bonds reserved to pay funeral expenses one half was mine by right of my being a partner and the other was mine in lieu of money paid by me in California for my father

As to 14th interrogatory Defendant states that he did not tell Young what is alledged in interrogatory

As to 15th interrogatory Defendant states that he told Thomas B Reed about the same he told A young that is that There was between two and three thousand dollars in bonds in Calefornia the Defendant in answer to 4th interrogatory has stated where the Claims are

As to 16th interrogatory Defendant states that he does not recollect telling Wesley Halliburton any thing about it but he is satisfied he never told any one what is set forth in interrogatory

As to 17th interrogatory Defendant states that he did not bring any money home with him belonging to his fathers estate what Defendant brought home was justly his own made by his own labour & industry while in Calefornia & he is now endeavoring to use it to support himself & family & his brothers and sisters and has nothing in his hands belonging to his fathers estate all of which is respectfully submitted

Wm M Dameron

sworn to before me this 27th day of June 1853

John J Allin Cer

Judgment in County Court

Then on the County Court of said County on the 27th day of June 1853 This day came the Plaintiff aforesaid by his attorney and the Plaintiffs attorney filed objections to the Defendants answer which objection was sustained by the Court as to the 1st 4th 6th & 8th interrogatories and it is ordered that said Defendant answer over and that the Sheriff impannel a jury to try this Cause on tomorrow

The Defendants answer was amended in its place and is already copied

Then on said Court on the 28th day of June 1853

This day came the Parties by their attorney & thereupon came a jury of twelve. William Patrick

Wm S Christian. John McCarver Joseph Blackford. Lebian Jones. Eli Skinner. Perry Smothers. Jonathan Hunt. Christian Collins M H Rice. Wm C Tedford & George R Christian who being elected tried and sworn well and truly to try this cause returned the following verdict "We of the Jury find for the Defendant Jno. McCarver

It is, therefore Considered by the Court that the Defendant recover against the Plaintiff his cost expended in defense of this suit and the Plaintiff filed the affidavit of Thomas B Reed and prayed an appeal to the Randolph Circuit Court which was granted and the administrator filed a motion to refuse an appeal til a sufficient bond of indemnity is filed which motion was sustained by the Court and leave was given until the fourth monday in July to file such bond

And then on the 20th day of July 1853 the Plaintiff filed in the Clerks Office a bond of indemnity as follows

Bond of indemnity

Know all men by these presents that we Thomas B Reed and David R Denny hereby acknowledge ourselves indebted to Wm S Burton adm of the goods remaining unadministered of John Dameron dec'd in the sum of three hundred dollars for the true payment of which we bind ourselves The above bond on the following express conditions whereas a suit was commenced in the County Court of Randolph County Missouri in which said Burton as adm for the use and benefit of Christy & others and other creditors of said John Dameron dec'd was Plaintiff and Willis McDameron Deft and

in which Case an appeal was taken to the Circuit Court of Randolph County Missouri Now if the undersigned will pay all Costs that have accrued or that may accrue in the further prosecution of said suit so as to save said Burton as admr aforesaid free & harmless from all Cost that have been adjudged or may hereafter be adjudged against him in said suit and which said estate may be insufficient to pay then this bond to be void otherwise to be in full force

Thomas B Reed (seal)
David R Denny (seal)

The Plaintiffs exception to the Defendants orginal answer is as follows Plaintiff by his attorney moves the Court as follows Novmt.
1st To require Deft in his answer to first interrogatory to state whether at the time of the service of the Citation he had in his posession or under his Control any evidences of debt of John Dameron decs
2nd To require Deft in his answer to 4th interrogatory to state who placed the obligation bonds therein mentioned in the hands of Willis M Dameron Sen To require Deft to state to whom he gave these bonds when he Deft left for California whether he took a receipt thereof and whether he has now any such receipt whether any money was paid on said obligation bonds to John Dameron dec in his life time and that said Defendant be required to explain how it is that John Dameron decs outfitted 18 men at three Hundred dollars per man that only nine of these men are owing him now and only one thousand and thirty six dollars has been paid on said obligation bonds

3rd To require Deft to state the probable value of the mining Claim alluded to in answer to 5th interrogatory and if said mining Claim was sold what amount did it sell for

4th To require Deft to state who was the partner alluded to in the answer to the eighth interrogatory and whether Deft sold to Wm D Malone. John Cameron, interest in said mining Claim

5th To require Deft in answering to 13th interrogatory Deft to state from whom the partnership Debt therein alluded to was collected and the nature of that debt and whether the money was not collected from a man Defendants father outfitted

6th to require Deft to answer 14th interrogatory

The affidavitt of Thomas B Reed filed in this Cause is as follows

Thomas B Reed ally for Plaintiff makes oath that his application for an appeal is not taken for the purpose vexation or delay but because the affiant believes that the appellant is injured by the judgment of the Court

Thomas B Reed

subscribes & sworn to before me Clerk of the County Court of said County this 28th day of June 1853

John J Allin Clk

State of Missouri }
County of Randolph } ss

I John J Allin Clerk of the County Court of said County Certify that the foregoing is a complete transcript of the record & proceeding in the Cause therein set forth

In testimony whereof I have hereto subscribe my name with the seal of said Court affixed at office this 26th Oct 1853

John J Allin Clerk

Then in the Circuit Court held for the County aforesaid on the 16th day of November 1853

William S Burton administrator of John Dameron deco for the benefit of the creditors of said decedent " Plff

upon an appeal from the Randolph County Court

Against

Willis M Dameron Deft

Jury & Judgment

This day came the parties by their attorneys and thereupon came a jury, towit, John Alverson Mason McCormick. Wesley Vandike. William Dunn. Eulas Sidner James Dunn. David Waterfield. Archibald Crews. C B Stewart. C J Hardwick. Williamson Alverson & Cornelius Vaughan who being elected tried and sworn well and truly to try this cause upon their oath find for the Defendant It is therefore considered by the Court that the Defendant recover against the Plaintiff his cost expended in defense of this suit and that he have thereof execution

Then on another day of the same term, towit, on the 17th day of November 1853

The Plaintiff by his attorney filed a motion for a new trial which motion was overruled by the Court And the Plaintiff filed his bill of exceptions Which motion is in the words and figures following

William S Burton Admo de bonis non of John Dameron deco

motion for new trial

vs

Willis M Dameron

And the said Burton comes now and moves the Court here to set aside the verdict and to grant him a new trial in the cause for the reasons following towit,

1st Because the Court gave illegal and improper instructions to the jury for Defendant

2nd because the Court refused to give proper and legal instructions on motion of Plaintiff

3rd The Court of its own motion gave improper instructions in favor of Defendant

Davis & Reed attys for Burton

Bill of Exceptions

The bill of exceptions filed in this cause is as follows

William L Burton Admr &c

vs

Willis Mc Dameron

Be it remembered that upon the trial of this cause Plaintiff introduced as a witness Wm Gambel who testified that in the summer or fall of the year 1851 at a place called Randolph flat near Rough & Ready in California he heard a Conversation between Willis Mc Dameron Defendant and one M D Malone that Conversation was about three weeks after the death of John Dameron the father of Willis witness then gave evidence tending to show that at the time of the Conversation he had of his father money about the sum of three thousand dollars and that he intended to apply it to the support of his mother and the family in Missouri and it being admitted that Plaintiff was the admr de bonis non of John Dameron dec'd Plaintiff closed his evidence Defendant then gave evidence tending or conducing to show that at the time of the death of his father in California he and his father were in partnership in the adventure to California and also tending to show that the money and property of his father had been disposed of and was not in the possession of Willis Mc Dameron at the time the citation in this proceedings was served on him but that no part

thereof had come to the possession of the legal representatives of John Dameron deco and evidence was given tending to show that Deft never had the money of his father in his possession
And this being all the evidence in the cause Plaintiff moved the Court to instruct the jury as follows, to wit.

given "If the jury believe from the evidence that Willis Dameron after the death of his father concealed or embezzled any money or property of his father they ought to find their verdict for the plaintiff

given "That wrongfully detaining the money or property which belonged to John Dameron at the time of his death will make Willis liable in this proceeding

refused That using the money or property for his own use or disposing of it to another which belonged to the father at the time of his death makes Willis liable in this proceeding
And to the giving of the third instruction the Defendant objected and the Court sustained his objection and refused to let said instruction be read to the jury to which opinion of the Court Plaintiff excepts
Defendant then moved the Court to instruct the jury as follows
The Deft move the Court to instruct the jury
given 1st that unless the jury believe from the evidence that Deft has embezzled or concealed goods Chattles money books papers or evidences of debt belonging to the estate of John Dameron they will find for Deft
given 2nd That if the jury believe from the evidence that the property or money in the possession of Deft was either his own or partnership property of his & his fathers

they will find for Defendant

3d. If Willis Damron at the time of his fathers death got profession of money or property belonging to his father but before this proceeding was instituted against him disposed of the money or property and did not at that time have it in profession the jury must find for Deft

To the giving of the whole of which the Plaintiff objected but the Court overruled the objections and permitted each of said three instructions to be read to the jury to which opinion the Plaintiff also excepts And on the next day of the Court the Plaintiff moved the Court to set aside the verdict of the jury and grant him a new trial which motion is in the words & figures following (already copied) but upon the hearing of said motion the Court overruled the same and refused to grant a new trial to which opinion of the Court in overruling said motion the Plaintiff also excepts and now tenders this his bill of exceptions which is signed sealed and made a part of the record

Wm A Wall Esq

State of Missouri
County of Randolph } ss

I John J Allen Clerk of the Circuit Court of said County certify that the foregoing Eighteen pages contain a true & Complete transcript of the record and proceedings of the said therein mentioned

Given under my hand with the seal of said Court affixed at Office this 7th day of December 1853 John J Allen cc

Fee for this transcript $5.40
Clk & Seal .50
5.90

Wm S Burton admr of 17.
John Dameron deed &c/pe
16.
vs Record
Willis M Dameron

filed Dec. 16 1853
Wm E Dunscomb
Clerk

Writ issued ~~[illegible]~~

Randolph
2nd

16 to 31.

Plaintiff

William S Burton Admr of John Dameron

vs

Willis M. Dameron Deft.

And the said plaintiff comes now and says that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is error in this to wit.

1 The judgment was for Defendant in error whereas it should have been for the plaintiff.

2 The Court gave improper instructions on motion of defendant and in favor of defendant. and of its own pleasure without motion.

3 The Court refused proper and legal instructions asked by plaintiff

And for the above and other errors appearing in the record the plaintiff pray the Court to reverse and set aside the judgment aforesaid and hold the same for naught.

Davis atty. for

Plaintiff

Wm. S. Burton Admr.
vs Ex Error.
W. M. Dameron

filed Jany. 10 1854
Wm E Dunscomb
Clerk

Cameron's admr

vs

Cameron

The proceeding under the 9th and subsequent sections of the 2d Article of the administration act which is designed to compel the surrender of the effects of deceased persons to the Executor or administrator is an extraordinary remedy which is not to be employed in other cases and for other purposes than those which are clearly within the act. The person charged with concealing or embezzling the effects is to be cited before the County or probate Court examined on oath and compelled to answer. If he denies the right of the Executor or administrator to the property or effects in his possession the right is to be tried in a summary manner. If upon the examination or trial the person charged is convicted of unlawfully detaining the effects the Court may compel the delivery thereof by attachment. Revised Code 74; 75.

All other remedies for the recovery of the effects from the hands of the person detaining them, were open to the executor or administrator when this provision was made in the administration act and were not affected by the act allowing this remedy. It was intended in a summary manner without expense or delay to take from a person embezzling or concealing the effects of a deceased person the articles actually

in his possession and turn them over to the representative of the deceased. The process by which this is to be effected is to attach the person unlawfully detaining the effects and to confine him until they shall be delivered, and this is the only mode of rendering the proceeding successful.

It would seem to be quite obvious as well from the language as the apparent design of the act that this proceeding is not to be used where the person charged with the unlawfully detaining the effects has really no possession of or control over them at the time the complaint is made against him. In such case the attachment and imprisonment of his person cannot result in the delivery of the articles to the executor or administrator and the imprisonment if allowable at all is allowable for his whole life. At least it is easy to imagine a case in which a person has had in his possession property of a deceased person and has so parted with the possession that it is utterly impossible he should ever regain it and if in such case he is to be imprisoned until it is delivered he must be imprisoned for life."

In the present case it is not doubted that the defendant had parted with the possession of the property which belonged to the intestate before the commencement of the present proceeding and therefore he was not liable to be proceeded against under the administration act.

The judgment of the Circuit Court is with the concurrence of the other judges affirmed

H R Gamble

17

Dameron's admr
vs }
Dameron

Opinion
HRG

filed Jan. 25 1854
Wm E Dunscomb
Clerk

Supreme Court

January Term 1864

William S Burton Admr of
John Dameron decd
vs
Willis M Dameron

This is a proceeding against the defendant under the 9th 10 11 & 12th Sections of the act Concerning executors and Administrators charging the defendant with Concealing and embezzling goods Chattels money and effects belonging to the estate of John Dameron deceased.

One William T Christy as one of the Creditors of the intestate filed in the office of the Clerk of the Randolph County Court an affidavit charging the defendant with Concealing & embezzling monies goods chattels and effects belonging to the estate of intestate to a large Amount - upon which affidavit a Citation was ipued by the County Court against the defendant requiring him to appear and answer

Upon the appearance of the defendant interrogatories were filed against him - The defendant answered the interrogatories and denied the right of the administrator of the intestate to any of the money goods Chattels and effects then in his possession on which answer and denial an ipue was made, and a trial by Jury had in the County Court where the defendant obtained a Judgment - the plaintiff took an appeal to the Circuit Court where the case was again tried and the defend - ant again got Judgment to reverse which Judgment the plaintiff has brought the case to this Court by writ of error

The evidence in the Circuit Court as preserved in the bill of

exception presented three questions for the Consideration of the Jury; 1st were the intestate John Cameron in his life time, and at the time of his death, and the defendant partners in business in California where the embezzlement was alleged to have taken place, and did the defendant ever embezzle or Conceal any money or property of the estate of said and if so was any such money or property in his possession at the time he was served with the Citation in this case

At the close of the evidence the plaintiff asked the Court to give the Jury the following instructions

1st If the Jury believe from the evidence that Willis Cameron after the death of his Father Concealed or embezzled any money or property of his father. they ought to find their verdict for the plaintiff -

2nd That wrongfully detaining the money or property which belonged to John Cameron at the time of his death will make Willis liable in this proceeding -

3 That using the money or property for his own use or disposing of it to another which belonged to his Father at the time of his death makes Willis liable in this proceeding, the Court give the two first and refused the third one

The Court then give the following instructions for the defendant

1st That unless the Jury believe from the evidence that the defendant has embezzled or Concealed goods Chattels money books papers or evidences of debt belonging to the estate of John Cameron they will find for defendant

2nd That if the Jury believe from the evidence that the property, or Money in the posession of the defendant was either his own, or partnership property of his, and his Fathers they will find for the defendant

3d If Willis Dameron at the time of his Fathers death got posession of Money or property belonging to his Father - but before this proceeding was instituted against him disposed of the Money or property ~~as~~ and did not at that time have the same in his possession the Jury must find for the defendant

W. S. Burton
Admr of John Dameron
vs
Willis M. Dameron

Defendants Brief

Clark atty

Points & Authorities

The defendant insists that the Judgment of the Circuit Court is Correct and ought to be sustained by this Court

1st If the intestate and the defendant were partners in business in California at the death of the intestate, the defendant had a right as surviving partner to the posession and use of the partnership effects until the partnership business was wound up and was not subject to this kind of proceeding for any property or effects held by him as such surviving partner

2nd This being a proceeding to obtain the posession of property and effects belonging to the estate, the only inquiry authorized by the statute was whether the defendant at the Commencement of this proceding had in his posession, and unlawfully detained any property &c belonging to the estate — this is manifest from the provisions of the 12th Sec providing the remedy against the defendant in case of Conviction 12th Sec of Admrs act Digest 1845 page 75

3rd The use or disposition of the property of the deceased prior to the Commencement of this proceding ~~by the defendant~~ does not subject the defendant to any liabelity in this Summary mode — it may subject him to damages in an ordinary suit but Certainly does not subject him to this kind of proceeding — If the defendant had been found guilty of embezzling the only Judgment the Circuit Court could have given was, that he should deliver the same to the Admr — It is believed the 9. 10 11 & 12 Secs of the act Concerning Administrators at pages 74 & 75 Digest 1845 is very clear authority to sustain the Judgment of the Circuit Court —

Clark for Dept

W. L. Burton Admr
of J. Dameron
vs
Willis Dameron

Defendants Brief

Clark

William S. Burton Admr. of Jno. Dameron Decd.
as
Willis M. Dameron

This is a proceeding commenced in the ~~Circuit~~ County Court of Randolph County.

By virtue of the 9th Sec. of the second article of the Administration Law. Wm S Burton the Admr of John Dameron Decd caused the affidavit of Wm T. Christy of St Louis to be filed in said Court stating that the affiant was interested in said estate and that he had good reason to believe that Willis M. Dameron son of John Dameron who had died in California had concealed or embezzled goods, chattles, monies and effects belonging to John Dameron at the time of his death.

On the 26th of April 1853. the County Court issued a citation against Willis M Dameron who afterwards appeared and answered interrogatories propounded by the Admr, and upon a trial in that Court a verdict was found for Willis M. Dameron. Burton the Admr appealed to the Circuit Court. Where upon another trial a verdict was found for Willis Dameron, and after a motion to set the same aside and for a new trial was overruled by that Court. Burton the Admr of John Dameron Decd brought the cause to this Court by writ of Error.

Upon the trial in the Circuit Court the plaintiff proved by a Witness William Gambrel that in the Summer or Fall of the

year 1851 at a place in California called Randalph Flat near Rough & Ready he heard a conversation between the defendant and one Malone in which the defendant stated that his father John Dameron who had departed this life a few weeks before had in his possession in that country at the time of his death about three thousand dollars and that he the defendant intended to keep it and apply it to the support of his mother and the family in Missouri. Plaintiff also proved his administration and closed his evidence.

The defendant then gave evidence tending to show that he had none of the money and effects of his father in his hands at any time, and that before the citation was served upon him all said money and effects had passed out of his possession, if he ever had it, and he also gave evidence tending to prove that he and his father John Dameron Dec'd were in partnership in mining in California, and that being all the evidence offered in the cause. The plaintiff moved the Court to instruct the jury as follows

1 If the jury believe from the evidence that Willis Dameron after the death of his father concealed or embezzled any money or property of his father they ought to find their verdict for the plaintiff

2 That wrongfully detaining the money or property which belonged to John Dameron at the time of his death will make Willis

liable in this proceeding.

3 That using the money or property for his own use or disposing of it to others which belonged to the father at the time of his death makes Willis liable in this proceeding

These instructions being objected to, the Court refused to give the third but gave the first and second.

Defendant then moved the Court to instruct the jury as follows, to wit,

1 That unless the jury believe from the evidence that defendant has embezzled or concealed goods, chattles, money, books, papers or evidences of debt belonging to the estate of John Dameron they will find for Defft.

2 That if the jury believe from the evidence that the money or property in the possession of defendant was either his own, or partnership property of his and his fathers they will find for Defft.

3 If Willis Dameron at the time of his fathers death got possession of money or property belonging to his father, but before this proceeding was instituted against him disposed of the money or property and did not at that time have it in possession the jury must find for Defft.

To these instructions the plaintiff objected, but the Court overruled his objections and permitted them to be read to the jury.

A Points and authorities

The plaintiff insists that the expositions of the 9, 10, 11 and 12 Sec. of the 2 Article of the

law concerning the Administration of estates, as declared by the second and third instructions given for defendant is not the law of this state.

The term embezzle used in the statute is to have its usual signification "to appropriate" but the third instruction, interprets the statute to mean that if money or effects of a Decedent have been appropriated, that this remedy by citation will not apply.

It is believed that the legislature intended by this statute to give to the legal representatives of Deceased persons a summary remedy in all cases where intermeddlers were attempting to convert the effects of the deceased person to their own use - and the pretext on the part of defendant here that he was a partner of his father in the money or property does not exempt him from the remedy given by the statute but in as much as he secretes and conceals a part, and disposes of the balance to others it only shows the increased necessity for the application of the statute.

It is insisted that the words or terms "Conceal or embezzle" as used in the act under consideration should be construed to mean the same thing as the same words do in the statute relative to crimes and punishments - The special relation of clerk, agent, factor &c being necessary in the one case to constitute the criminal offence, and in the other those relations not existing it amounts only to a civil injury

See Rev. Statute 74. and 360, 15 Wendell 142 147.

Davis atty for
Plaintiff in error

Wm S. Burton Admr
vs
W. M. Dameron

Plaintiffs brief

Davis atty.

See Statute 74=360
361 & 362.

15 Wendell Rep. 147
147.