Virden, Peter
Yost, Frances
Orrick, John

vs Parks, Robert
(admnr of Green, James
& admnr de bonis non of
Green & Virden)

1856

St. Charles Co.

3rd Cir

358/17

578/35

Scott-
R

V&G partners on saw mill
G died & V undertook admnr of partnership
VW/Y&O as securities executed bond to MO
in amount $3400
County court of St Charles removed Virden & revoked his pwls
b/c non-resident

The State of Missouri, ss.

The State of Missouri, *To the Honorable the* Circuit Court in the Third Judicial Circuit *in said State, GREETING:*

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court held in and for the County of St. Charles

wherein Robert H. Parks, administrator of the Estate of James Green, who is also administrator de bonis non of the Partnership of Green & Virden was plaintiff, and Peter S. S. Virden, Francis Yosti and John Brick were defendants

in an action ~~of~~ on a penal bond manifest error hath intervened, to the great damage of said defendants as by their 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 in the City of Saint Louis, in the County of Saint Louis, in said State, on the third Monday in March 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 S. GLANVILLE, Clerk of our said Supreme Court, at office, in the City of Saint Louis, the second day of January in the year of our Lord one thousand eight hundred and fifty six.

Wm. S. Glanville,

CLERK.

$1.50 for this writ, paid by.

(24)

State of Missouri }
County of St. Charles } In obedience to the within and I herein annex a transcript of the record and proceedings in the cause therein mentioned

Given under my hand & seal of the Circuit Court of said County February 2nd 1856

Ben Emmons Jr Clerk
Cir Court St Chas Co

State of Missouri
County of St Charles } Be it remembered that heretofore to wit on the eleventh day of October in the year of our Lord Eighteen Hundred and fifty four a petition was filed in the office of the Clerk of the Circuit Court of St Charles County in the words and figures following, viz:

Robert A Parks administrator of the Estate of James Green Deceased who is also administrator de bonis non of the Partnership of Green & Virden Plaintiff against Peter S Virden Francis Yostie and John. Orrick Defendants

Action on Penal Bond In St Charles Circuit Court Missouri

Plaintiff States that on the 6th day of April 1853 letters of administration were granted to him on the Estate of James Green deceased in said County of St Charles, according to law a copy of which letters is here to the Court shown and refered to as Exhibit A of this Petition, and executed his bond as such administrator which was duly approved according to law a copy of which bond with the approval thereof is here to the Court shown and refered to as Exhibit B of this Petition, whereby it sufficiently appears that he was duly appointed and qualified and is the administrator of the Estate of the said James Green Deceased.

That prior to the death of said Green, the

said Green and the Defendant Virden entered into a contract of Copartnership and became Partners and as such Partners owned and possessed a Saw- Mill and other property,

That after the death of said Green, the Defendant Virden undertook the administration of the effects of said Partnership of Green & Virden and qualified as such administrator according to law and the Defendant Virden as principal and the Defendants Yoste and Orick as securities executed their bond to the State of Missouri dated on the Eleventh day of July Eighteen ~~Hundred~~ and fifty three and sealed with the respective seals of the Defendants in the sum of Three thousand four hundred dollars to the payment whereof well and truly to be made Defendants bond themselves their heirs, Executors and administrators, which said bond had and has thereunder written a Condition to the effect that if the Defendant Peter L. S. Virden Surviving Partner of the late firm of Green and Virden which firm of the said James Green and the said Peter L S Virden should use due diligence and fidelity in closing the affairs of the said late Copartnership apply the property thereof towards the payment of the partnership debts render an account on oath to the County Court of St Charles County whenever by it thereunto required of all the partnership

affairs including the property owned by the said late firm and the debts thereto as well as what may have been paid by the Survivor towards the partnership debts and what may still be due and owing therfor and pay over within two years unless a longer time be allowed by the County Court to the Executor or administrator the excess if any there be beyond satisfying the partnership debts then the above bond was to be void but otherwise was to remain in full force which said bond so signed, sealed and executed was duly approved according to law, a Copy whereof with the Condition thereunder written and the approval thereof is here to the Court shown and refered to as Exhibit B of this Petition,

That after the Execution and approval of the said bond signed and sealed as aforesaid by the Defendants, the said Virden took possession of the property and effects of the said Partnership of Green and Virden and sold the same towit the Saw Mill and its appurtenances belonging to said Partnership, for the sum of Sixteen hundred dollars,

That on the 5th day of April 1854 the Defendant Virden having removed from the State of Missouri the County Court of St Charles County aforesaid, revoke the said letters which had been granted to said Defendant Virden on

the said Partition of Green and Virden a Copy of the order of said Court revoking which letters is hereto the Court shown and refered to as Exhibit D of this Petition

That on the 28th day of September AD 1854 letters of administration de bonis non on said partnership of Green and Virden were granted to Plaintiff and on the 29th day of September 1854 Plaintiff filed his bond as such administrator which was duly approved by said County Court a Copy of which letters of administration so granted on said Partnership and of said bond with the approval thereof are here to the Court shown and referred to as Exhibits E and F of this Petition whereby it sufficiently appears that Plaintiff is entitled to sue in this action

That although the Defendant Virden as aforesaid sold the said Mill and its appertenances belonging to said Partnership of Green and Virden and recived therefor the said sum of Sixteen hundred dollars, Yet the Defendant Virden has not used due diligence and fidelity in Closing the affairs of said Partnership and has not applied the property thereof towards the payments of the debts of said Partnership and although the said County Court of St Charles County long since revoked the letters of administration granted on said Partnership to said Defendant

Virden yet he has not paid over to Plaintiff the said Partnership funds or property; and so Plaintiff says that the condition above recited written under and annexed to said Bond signed and sealed as aforesaid by the Defendants has been broken and Defendants have not kept the same and for a more particular specification of the breaches of the said condition of the said Bond, Plaintiff says that the Defendant Virden has received the sum of Sixteen hundred dollars belonging to the said Partnership of Green and Verden, but has not applied any part thereof towards the payment of the debts of the said Partnership and has not used due diligence and fidelity in closing the affairs of said Partnership and the debts of said Partnership are and remain unpaid and although said Virdens letters of administration on said Partnership have long since been revoked and Plaintiff has been appointed and qualified administrator de bonis non thereof yet Defendant Virden has not paid and deliver to Plaintiff the money effects and property belonging to the said Partnership of Green and Virden Wherefore Plaintiff says he is entitled to have and recover against Defendant the said sum of Sixteen hundred dollars and an action hath accrued to him for the same against Defendant for which said sum and for cost Plaintiff asks judgement against

~~1854~~	To Amt paid Glasmeyer Laying Stone work for Well	6 5-0
	" Boarding Same 5 days	1 5-0
	" Amt paid Jones for Lime	12 70
	" Amt paid S. Potter for Blacksmithing	26 47
	" Amt paid Bogue for Sundries as per bill	35 5-0
	" Amt paid Wright for brick work	6 00
	" Commission on $	$ 688 92

And afterwards on the third day of November 1855 the following further proceedings were had in said Court in said Cause viz

Robert H Pack administrator of the Estate of James Brown deceased who is also administrator de bonis non of the Partnership of Brown and Virden Plaintiff

v

Peter S. Virden Francis Foste and John Orrick Defendants

Penal Bond

Now at this day appears said plaintiff and said Virden Left and said Foste and Orrick still fail to appear and answer said petition and this cause being submitted to the Court without a jury (the parties waiving a trial by jury) the Court find the issues in this behalf for the said plaintiff and doth assess the damages sustained by said plaintiff by reason of the matters in the petition

1853				
March	14	To 1 man 4 horse team do &		
		1 days work	5 $	5 00
"	"	" 1 days work of 3 men &		
		4 Oxen	do $5 75	5 75
"	15	" 1 days work of 1 man		
		4 horse team and Wagon	do $5	5 00
"	"	" 1 days work of 3 men		
		4 Ox team	do $5 75	5 75
"	24	" 6 days work of 3 men &		
		4 Ox team	do $5,75	34 50
"	26	" 5 days work of 2 men and		
		4 Ox team	do $4,50	22 50
Feb		" Cash paid Clark Renfrow & Co		
		On account of Saw Mill		250 00
1853		" 1 pair timber wheels for Mill		50 00
and		" Amt paid Engineer for		
		3 days work at Mill		25 00
1854		" Boarding & Lodging Engineer		
		and furnishing him a horse to		
		ride to sprom his meals 3 week		15 00
		" Amount paid Stone Masons bill		
		for Laying foundation of Mill		15 00
		" Amt paid Batterson for		
		Carpenters work		6 50
		" Boarding and Lodging 2 Stone		
		Masons Sending dinner to Mill		
		for same for east 3 days		5 00

says that he believes the above answer and the matters therein as stated are true

P. L. S. Verden

Subscribed and sworn to before me Clerk of the Circuit Court St Charles County November 3, 1865

Ben Emmons Jr Clk
By Jno A Platt D C

And said Exhibit A referred to in said answer is in the words and figures following to wit

The late Firm of Green & Verden Consisting of James Green & Peter L. S. Verden

To Peter L S Verden Dr

1865				
Feb	24	To 10 days work of Self 4 men 1 Cart and at Saw mill		$60 00
"	28	" 3 days work of Self 2 men 1 Wagon & 4 hors team Do	$6.25	18.75
"	"	" 3 days work 1 man and 2 Yoke of Oxen Do	$3.75	11.25
March	3	" 3 days work of 3 men and 2 Yoke of Oxen Do	5.75	17.25
"	1	" 1 days work of Wagon and 4 horse team & driver Do	$5	5 00
"	10	" 4 days work of Wagon and 4 horse team & driver	$5	20 00
"	"	" 4 days work of 3 men and 4 Ox team	$5.75	23 00

part thereof towards the payment of the debts of said partnership as stated in said petition.

And for further answer to said petition defendants says that in the ordinary course of the business of said Co-partnership he rendered Vonoies Services in Labor of himself and hands and wagons & Teams furnished, Board of hands hired and Cash paid out for said Firm on Vonoies accounts &c All of which as well as other charges not refered to above will fully appear by a bill of items herewith filed Marked "A" Wherein said items are fully carried and the amount claimed and Charged agains said Copartnership for each amounting in all to the sum of Six hundred and Eighty eight dollars & 92 cents - For which amount said defendant claims a credit agains said Firm of Green & Virden

Said defendant therefore asks that said amount of $688.92 as set forth in said bill of items may be taken and allowed in off-set to the amount claimed by plaintiff in said petition against defendants and deducted therefrom And for such other relief as Justice and Equity may demand

Porter & King
Attys

Peter S S Virden defendant on his oath

with said Court touching said partnership affairs or neglected to obey the citation of the County Court

4 The petition does not show the facts constituting any failure in discharge of his duties under his bond to the prejudice of the Plff as admr de bonis non of Greens estate Nor does it show that two years have elapsed since said Greens death - so as to entitle Plff to recover for the benifit of said Greens Estate

King & Porter
for defendants

And said answer is in the following words and figures viz

Robert A Parks admr of the Estate of James Green dec'd and as admr de bonis non of the partnership of Green and Verdin Plaintiffs
against
Peter S Verdin Francis Gosti and John Orrick defendants

} Action on Penal Bonds in the St Charles Circuit Court Missouri

Peter S Verdin one of the defendants in the above cause for answer to plaintiffs petition

Says this is not true as alledged in said petition that he has not used due diligence and fidelity in closing the affairs of the late partnership of Green & Verdin. And defendant denies that he has failed to apply the property or any

attorney files his motion to strike out part of said answer, which motion being considered is sustained by the Court.

And said demurrer is in the following words and figures viz

Robert H Parks admr of the
Estate of James Green decd. Plff

vs

Peter D & Virden surviving partner
of Green & Virden Francis Gosté
and John Orrick Defts

The defendant demurs to the Plaintiffs petition because it does not contain facts sufficient to constitute a cause of action in this viz

1 It does not show any legal displacement or removal of the defendant said surviving partner from his administration of the partnership property nor facts sufficient to show Plaintiffs authority to receive said partnership effects or to sue for the same

2 The surviving partner Virden could not be removed for non residence at least not without notice to him & none such seems to have been given

3 The County Court has the exclusive jurisdiction to cite said surviving partner to account and adjudicate upon such account It does not appear from the declaration that he has failed to account

4 said Commissioners or referees acted in the premises without having been sworn to discharge their duties as such as the Statute requires should be done in such cases

5 The evidence actually produced before them said Commissioners was not reduced to writing as the law requires

King and Porter
Attorneys for Defts

And afterwards on the third day of November 1855 the following proceedings were had in said Court in said cause viz.

Robert H Parks administrator of the Estate of James Green deceased and administrator de bonis non of the Partnership of Green and Virden } Penal Bond

v

Peter L S Virden Francis Yost and John Omick } Now at this day appears said Plaintiff and said Peter L S Virden by his attorney. And the motion to set aside the report of Commissioners herein being heard is sustained And thereupon Defendants filed a demurer to said petition which demurer is overruled And on Motion leave is given Defendants to withdraw said demurer and answer said petition And thereupon said Peter L S Virden one of said defendants files his answer to said petition. And Plaintiff by his

and Frederick W Galzwieler appointed as referees or Commissioners in said Cause & that said matter be re-referred for the reasons following to wit

1 : The said referees did not allow a full settlement of the accounts of the said partnership of Green and Virden nor make a full statement of account touching said partnership so as to show the true balance against him Left-

2 : They refused to allow said Virden credit for or hear any testimony upon the payments & disbursements made by said Virden towards said partnership before said Greens death- the effects of which decision of the said referees was to deprive Left- of an allowance to the amount of $607.75- the items of which appear by the account herewith presented & which was before said Commissioners & allowed only $81.17 instead of $688.92 the true amount which should have been by said Commissioners allowed him Left-

3 : Said Commissioners made a rule & acted upon it to allow Left- only for payments & disbursements made after said Greens death by which rule & action of the said Commissioners said Left- is aggrieved & injured- as he protested at the time & excepted to said action-

3 . Said report does not shew what the action of said Commissioners was, what notice was given. What evidence was produced before them by either party (nor whether either party was present)

2 per cent 32, or = 113,17

Balance $1486,83

Dr To interest on the same to June 1. 1855 126,38

Amount $1613,21

We find the amount due by Defendants to Plaintiff on the first day of June A.D. 1855 to be Sixteen Hundred and thirteen 21/100 Dollars

Given under our hands September 15. 1855

Robert Miller } Justices of the County
Robert Baily } Court of St Charles
Fredk W Gatzweiler } Court Missouri

And afterwards in the Circuit Court of St Charles County on the 29th day of October 1855 the following proceedings were had in said cause viz

Robert H Park admr of James Green
v
Peter LS Virden } Petition on Penal Bond Motion to set aside Commissioners report filed

Which motion is in the following words and figures

Robert H Park admr of
the Estate of James Green dec
vs } Oct term 1855
Peter LS Virden surviving partner
of Green and Virden Defendant

The Defendant moves the Court to set aside the report of Messrs Robert Miller Robert Baily

not but makes default and fails to answer the petition of said Plaintiff And the Court not being advised as to the amount of damages sustained by Plaintiff orders that an inquiry thereof be had by the Justices of the County Court of St Charles County who are hereby appointed and authorized to ascertain said damages and report the same to the Court Cause Continued

And on the 15th day of September 1855 the report of said Justices was filed and is in the words and figures following viz

By consent of Jos H Alexander and Andrew King Attorneys in the above entitled cause, the said cause was referred to Robert Miller Robert Baily and Fredk W Galzmeier Justices of the County Court of St Charles County, for the purpose of ascertaining the amount due by Defendants to Plaintiff the undersigned on the 15th day of September 1855 proceeded to ascertain the said amount as follows

Peter L & Verdin

To the Partnership of Green & Verdin Dr

For amount for which the Mill was sold			$1600.00
Cr By amt pd Jacob Peter Voucher No 1			$35.50
"	do	" 2	26 47
"	Mrs Jung	" 3	12 70
"	C Glasmeyer	4	6 50
"	Commission allowed administering		

Witness Benjamin Emmons Jr
Clerk of said Circuit Court with
the seal of said Court hereto
affixed at office in the City of
St Charles the 11th day of Oc
tober Eighteen Hundred and
Fifty four

Ben Emmons Jr Clerk

And the Sheriff made return of said Summons in
the words and figures following viz

Served the within writ and annexed Petition on
the within named Defendants by reading the same
to each of them in St Charles County Mo, On
P S S Virden March the 25th 1855 and on
Francis Goste and John Orrick April the 18th 1855

John A Richey Sheriff
By S. H. Edwards Deputy

Sheriffs fee $3.00

And afterwards in the Circuit Court of St Charles
County on the 31st day of May 1855 the following
proceedings were had in said cause viz

Robert H Paris admr of James Green
deceased who is also admr de bonis non of
the Partnership of Green and Virden
vs
Peter S. S. Virden Francis Goste and
John Orrick Defendants

} Appeal from County Court

Now at this day
appears the said Plaintiffs and said Defendants Comes

Defendants

Jos A. Alexander
Attorney for Plaintiff

State of Missouri
County of St Charles } Robert H. Park. Plaintiff makes oath and says he believes the above Petition and the matters therein as stated are true
Sworn to before me this 11th } R. H. Parks
day of October 1854

Ben Emmons Jr
Clerk Circuit Court
St Charles Co

And thereupon the Clerk issued a summons in the words and figures following to wit.

The State of Missouri

To the Sheriff of St Charles County — Greeting

We command you to summons the Defendants Peter L.S. Virden, Francis Gosti and John Orrick to appear in the Circuit Court of St Charles County at the Court House, in the City and County of St Charles on the fourth Monday after the fourth Monday of April Eighteen hundred and fifty five and answer the annexed petition of Robert H Parks administrator of the Estate of James Green deceased who is also administrator de bonis non of the Partnership of Green & Virden. Plaintiff and have you then and there this writ

Virden yet he has not paid over to Plaintiff the said Partnership funds or property; and so Plaintiff says that the condition above recited written under and annexed to said Bond signed and sealed as aforesaid by the Defendants has been broken and Defendants have not kept the same and for a more particular specification of the breaches of the said condition of the said Bond, Plaintiff says that the Defendant Virden has received the sum of Sixteen hundred dollars belonging to the said Partnership of Green and Virden, but has not applied any part thereof towards the payment of the debts of the said Partnership and has not used due diligence and fidelity in closing the affairs of said Partnership and the debts of said Partnership are and remain unpaid and although said Virdens letters of administration on said Partnership have long since been revoked and Plaintiff has been appointed and qualified administrator de bonis non thereof yet Defendant Virden has not paid and deliver to Plaintiff the money effects and property belonging to the said Partnership of Green and Virden Wherefore Plaintiff says he is entitled to have and recover against Defendant the said sum of Sixteen hundred dollars and an action hath accrued to him for the same against Defendant for which said sum and for cost Plaintiff asks judgement against

Robert H Parks admr of the
Estate of James Green Plff
vs St Charles Circuit Court October Term 1858
Peter L S Virden surviving
partner of Green & Virden John
Orrick and Francis Yoste Defendants.

Be it remembered that this cause coming on to be tried the demurrer of the Defendant filed in the cause to Plaintiffs petition is by the Court overruled to which decision of the Court the Defendant excepts thereupon leave is given to withdraw said demurrer & answer said petition Plaintiff files his motion to strike out parts of said answer which motion is as follows

Robert H Parks admr &c
against
Peter L S Virden & others

Plaintiff comes and moves the Court to strike out all that part of Defendants answer which sets up as offsets to Plaintiffs demand the services performed by himself and hands, wagons and teams furnished, board of hands hired and Cash paid out for said firm, performed, furnished or paid prior to the death of James Green, one of the partners in the firm of Green & Virden

Jos H Alexander
Atty for Plaintiff

Which motion is by the Court sustained to which decision of the Court in sustaining said motion Defendants Except. The cause then coming on to be tried on the Petition & so much of the answer as is not stricken out the Court finds that the Defendant had received the sum of Sixteen hundred dollars on the sale of the partnership property of Green & Virden as the petition states and that said Deft Virden had paid out for said firm after said Greens death sums amounting with $32 all owed him for Commissions to the sum of One hundred & thirteen & 17/100 Dollars upon the admission of the Plaintiff in open Court Which was all the Evidence given in the cause. Whereupon the Court finds the defendants liable to the Plaintiff by reason of the premises above stated in the sum of Sixteen hundred and fifty one Dollars & 11 cents for which amount judgement is rendered in favor of the Plff against the Defendants the Defts on leave withdrawing the items of his account not allowed. And the Defendants tender this their bill of exceptions which is signed sealed & made a part of the record in the Cause

Carty Wells (Seal)

State of Missouri
County of St Charles } I. Pen. Emmons Jr Clerk of the
Circuit Court of St. Charles County Certify the foregoing
to be a full and true transcript of the record and proceed
ings in the above entitled Cause as the same remain of
record in my office. In Witness Whereof I hereunto
set my hand and affix the seal of said
Court this 22nd day of November 1853
Pen: Emmons Jr. Clk

(35) 6

March. T. 1856

Robert H. Parks admr of James Green, & admr de bonis non of the Partnership of Green & Virden

v.

Peter S. Virden sols Pfff. in Ent.

Filed 4th February 1856
W. S. Glanville Clk.

Paid — Clks fee $4.50
to Wm. S. Glanville Certif 50
for Benj. Emmons — $5.00
by P. S. Virden —

Robert H. Parks Admin- } In the St Charles
istrator of James Green, } Circuit Court.
& administrator de bonis non
of the partnership of Green
& Virden

vs

Peter L. S. Virden & others

To the above named plaintiff

Take notice that in the above entitled cause I have sued out a writ of Error from the judgment of the St Charles Circuit Court, which writ is returnable to the ensuing March Term of the Supreme Court of Missouri.

P. L. S. Virden
by his attorney
C. D. Drake

Served the within Notice on Robert H. Parks in St. Charles County Missouri, February the 15th 1856, by delivering to him a copy of the Same—

Shff fee. 50c paid by King

John A Richey Sheriff

By J. H. Edwards Deputy

Robert H. Parks
Notice

Filed 20th February 1856.
Wm. S. Glanville, Ck.

(30)

1

Error to St. Charles Circuit Court
Robert H. Parks, Administrator of James Green
vs.
Peter L. S. Virden, Francis Yosti
and John Orrick.

This was a suit brought to May term 1855 of St. Charles Circuit Court.

Petition states that on 6th of April 1853 letters of administration were granted the plaintiff, on the estate of James Green deceased.

That prior to death of Green, a partnership had existed between him and defendant Virden, in the sawmilling business and as such partners they owned a saw mill and its appurtenances, & other property.

That after the death of Green, the surviving partner Virden, one of the defendants undertook the administration of the partnership effects, and on July 11th 1853, gave bond with Francis Yosti and John Orrick, the other two defendants, as his securities conditioned that he would use due diligence and fidelity in closing the affairs of the partnership, apply the property thereof towards the payment of the partnership debts, render an account upon oath to the County Court, whenever by it thereto required, of all the partnership affairs &c, setting out fully the condition of the bond, which is such as required by Statute, see Revised Stat. 1845, Title. Administration Art. 1. Section 51.

Petition further states, that deft. took possession of property, and sold the mill and its appurtenances for $1600-

That on the 5th April 1854, deft. Virden having removed from the State of

2 Missouri, the County Court revoked his letters and on the 28th September 1854, letters on the said estate were granted to plaintiff who filed his bond as such Administrator which was approved.

That although defendant Virden had sold the mill of the partnership for $1600.- and received the proceeds, yet he had not used due diligence in closing the affairs of the partnership, had not applied the property towards paying the partnership debts, and although the County Court had long since revoked his letters, yet he had not paid over the effects to plaintiff, and had not applied any part of it towards paying the partnership debts, but left the same entirely unpaid, wherefore he asked judgment for the said sum of $1600-

Writ of summons issued on this petition, which being returned served on all the defendants, they made default,

And the Court not being advised as to the amount of damages, referred that question by consent of plaintiff & defendant to three individuals who are the same persons who fill the place of justices of the County Court.

These persons find an award fixing the damages at $1613. 21.

This award was on motion set aside, and one of the defendants, Virden, files a demurrer, raising the point, that he had not been legally dispossessed of his office of administrator of the partnership effects, : the Court decided against this demurrer, which is then withdrawn and an answer filed. This answer sets up

3 that the partnership concern of Green and Virden, was indebted to him, the defendant Virden, in the sum of $688.92, for services rendered the concern, and hands & teams furnished during the life of the deceased partner Green. This part of the answer was on motion stricken out, to which defendants excepted.

The Court then sitting as a jury finds the issues for plaintiff, & finds the facts to be that the defendants had received the sum of $1600, which he had not paid over, & adjudges him to pay it over with interest, allowing him as a credit the amounts paid by him for the concern since the death of Green, and his commissions on the $1600. and finding the ballance against him $1651.11, & gives judgment accordingly - The case is brought here by writ of error.

It appears from the foregoing case, that a judgment by default was rendered against all the defendants, who were regularly summoned, and made no defence. The only matter then remaining open was the quantum of damages, which the Court referred to referees, & on their report being set aside, ascertained for itself, neither party requiring a jury - No motion was ever made to set aside the judgment by default, & two of the defendants, Testi and Orrick, have not yet made any defence or appearance - It is true that one of the

defendants Virden filed a demurrer, but this was clearly irregular, while a judgment by default was standing in force. If this Court will however consider it as rightly presented, and entitled to be considered I will say that it was properly overruled. The demurrer denies the right of the County Court to remove a surviving partner who administers the effects of a partnership brought to a close by the death of one of the partners. The Statute on that subject although not in express terms, yet strongly by implication gives the power. It speaks of it, as of a case of administration, & says that he shall ~~give~~ bond, in such sum, and such security as is required in other cases of administration: It places him under the control of the County Court, as other administrators: and provides that if any administrator becomes a non-resident of the State, the County Court shall revoke his letters.

See Sections 50. 52. and 58. of 1st Article, Title Administration, pages 70. 71. 72. Rev. Stat. 1845.

It is clearly within the spirit & meaning of the law that neither this nor any other administrator of a deceased person's effects shall be a non-resident of the State - But it is useless to consider this matter further, for the demurrer was withdrawn and answer filed.

I will now consider the point presented by that part of the answer stricken out by the Court. This sought to set up his individual claim as one of the partners, as an offset —

against the demand made upon him to turn over the partnership effects. This he had no right to do. It is clear that an individual partner has no right to appropriate to himself any part of the partnership property or effects, until the affairs of the partnership are settled, and partnership debts paid, his interest in the concern is an interest in what remains after settling with and paying off creditors; The surviving partner certainly cannot make himself a preferred creditor, by retaining in his own hands, his claim against the partnership. The object of Parks in attempting to get possession of the partnership effects, was that he might be enabled to, first pay off partnership debts, and thus ascertain what the concern was really worth. Then the rights and claims of individual partners could be adjusted.

One partner cannot sue another until the affairs of the partnership are adjusted and settled,

Stothert vs. Knox, 5th Mo. page 112. See authorities therein cited

It follows that he cannot sue the representative of his partner, in case of his death; and cannot set up his own individual claim, as an offset against the demand of his deceased partners representative who seeks the possession of the partnership effects, for the purpose

a resident of the State, and subject to the control of the County Court: when he absents himself from the State, and thus the Court loses its control over him, it may be for their interest that the administration of the partnership affairs should be taken out of his hands.

Robert H. Parkes
Admr of James Green
Respondent

V

Peter L. S. Virden
Appellant

Error to St Charles
circuit Court

Respondents brief

Coulter for Respondent

Filed 17 March 1836
Wm G Glanville
Clk.

Peter L. S. Virden & others
vs
Robert H. Parker, Admr

In the Supreme Court.
March Term, 1886

Plaintiffs in Error comes & says that there is error in said record in this, to wit:

1. That the Judgment of the Court below should have been for the defendants, (plaintiffs in error here) and not for the plaintiff.

2. That the Court below erred in sustaining the motion made by plaintiff to strike out part of the answer filed by the defendant Virden.

3. That the Court did not give its decision in writing, as required by law where a cause is tried by the Court.

C. D Drake,
Atty for Pltffs in Error.

Defendant joins in error
Counsel for defendant

No 6.
Supreme Court
March Term, 1856.

Verden & others
v
Parks.

Assignment of Errors

C. D. Drake,
Atty.

Filed 17 March 1856.
Wm S. Glanville
Ck

(26)

Peter L. S. Virden
& others
vs
Robert H. Parks, Admr

In the Supreme
Court.

Plaintiff in Error moves the Court to reverse the judgment in this cause because this Court below did not give its decision in writing, as required by law when a cause is tried by the Court.

C. D. Drake
Atty for Pltffs in Error

P. L. S. Virden et al.

vs

Robt H. Parks admr

Motion to amend Judgment.

C. D. Drake,
Atty.

Filed 22nd March 1856.
Wm S. Glanville
Clk.

Robert H. Parks admr. of
Jas Green dec'd
vs
Peter L. S. Birden & his
sureties

} Error to the St
Charles Circuit
Court.

The defendant Birden & James Green dec'd were partners: Green died and the defendant Birden his partner gave the bond required by the Statute and retained the control of the partnership effects. Afterwards the County Court of St. Charles County removed Birden and revoked the powers granted to him because he became a non resident and appointed as he is termed in the proceedings ~~the plaintiff~~ Parks admr. de bonis non of the partnership effects, who brings this suit on the bond given by Birden as surviving partner alleging breaches of its several conditions. The ~~question~~ record raises the question, whether, a surviving partner, who gives the bond required by the Statute for the due management of the partnership effects, can for non residence or any other cause be removed by the probate Court in the same manner as an ordinary administrator?

The provision requiring the surviving partner to give bond for the use of due diligence in the management of the partnership effects, is a new one, in derogation of the rights of the surviving partner as they existed at common law. All interference with his rights must have a support in the Statute law, and we are restrained from going further in diminishing his control over his goods, than the words of the law fairly warrant.

It is to be borne in mind, that the survivor is the own-
er of one half of the effects. Where the surviving part-
ner fails to give bond & the admr. of the deceased
partner takes charge of the partnership effects
he cannot prosecute suits in his name as admr.
but he is compelled to use the name of the sur-
viving partner. When the survivor elects to take
the control & gives the bond required by ~~Statute~~
law, the powers to be exercised over him are
statutory. The bond is a pledge for the security of
that portion of the effects belonging to his deceased
partner's estate committed to his charge. The 52
sec. of the 1 Art. of the administration law en-
acts, that the County Court, shall have the same
authority to cite such survivor to account, & to ad-
judicate ~~upon~~ upon such account as in the case
of an ordinary admr. & the parties interested
shall have the like remedies by means of such
bond, for any misconduct or neglect of such
survivor, as may be had against administ-
rator". There is nothing here like a power of
removal. On the contrary from the language
of the statute it would seem, that the reme-
dy against the survivor is to be had by means
of the bond. It would be against all prince
ple, by implication to assume a power for to
take away the right of control which a man
has over his own property. There is no hard
ship in this conclusion. The sureties of the sur-
vivor, must be such as the law requires for
administrators: They will be residents of the
County, and if the survivor absents himself, his
bond and sureties will be accessible to all

who may suffer by reason of his neglect.

Judgment reversed the other judges concur

Wm Scott

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Parks

vs

Virden

Opinion

Filed 7 June 1856
Wm S Glanville
Clk

Peter L. S. Virden, Pltff in Error
vs
Robert A. Parks, Admr of James Green, Deft in Error

In the Supreme Court
March Term, 1856.

Error to St Charles Circuit Court.

Statement of the Case.

James Green, defendant's intestate, was, in his lifetime, a partner with plaintiff in error, in a saw-mill.

After his decease, letters of administration on his estate were granted to defendant in error, bearing date April 6. 1853.

On the 11th of July, 1853, plaintiff in error gave bond, as surviving partner of the firm, in pursuance of § 57 of Article I of the Act of 1845 respecting Executors and Administrators, & entered upon the management of the effects of the partnership, & sold the mill & its appurtenances for Sixteen hundred dollars.

On the 5th of April, 1854, the County Court of St Charles County, revoked the letters which had been granted to the plaintiff in error, as surviving partner, because he had ceased to be a resident of the State of Missouri; & on the 28th of September, 1854, granted letters de bonis non on the partnership effects to the defendant in error.

On the 11th of October, 1854, this suit was brought to recover the Sixteen hundred dollars received by Virden from the sale of the mill; and the breach assigned upon the

bond was in these words:- "That although the
"defendant Virden, as aforesaid, sold the said
"Mill & its appurtenances belonging to said
"partnership of Green & Virden, & received therefor
"the said sum of sixteen hundred dollars, yet
"the defendant Virden has not used due diligence
"and fidelity in closing the affairs of said
"partnership, and has not applied the property
"thereof towards the payment of the debts of said
"partnership; & although the said County Court
"of St Charles County long since revoked the
"letters of Administration granted on said
"partnership to said defendant Virden, yet
"he has not paid over to plaintiff the said
"partnership funds or property; & so plaintiff
"says that the condition above recited, written
"under & annexed to said bond signed & sealed
"as aforesaid by the defendants, has been broken,
"and defendants have not kept the same, &
"for a more particular specification of the
"breaches of the said condition of the said
"bond, plaintiff says that the defendant
"Virden has received the sum of Sixteen
"hundred dollars belonging to the said
"partnership of Green & Virden, but has not
"applied any part thereof towards the pay-
"ment of the debts of the said partnership,
"and has not used due diligence & fidelity
"in closing the affairs of said partnership,
"and the debts of said partnership are &
"remain unpaid; & although said Virden's
"letters of administration on said partner-
"ship have long since been revoked, and

"plaintiff has been appointed & qualified
"administrator de bonis non thereof, yet
"defendant Virden has not paid & delivered
"to plaintiff the money, effects, & property
"belonging to the said partnership of Green &
"Virden. Wherefore plaintiff says he is en-
"titled to have & recover against defendant
"the said sum of sixteen hundred dollars."

To this petition Virden answered, denying that he had not used due diligence and fidelity in closing the affairs of the partnership, and that he had failed to apply the property, or any part thereof, towards the payment of the debts of the partnership; and claiming a set off of $ 688.92, for ~~services rendered by him as accounting~~ moneys paid out by him ~~by~~ on account of the partnership, before and after Green's death, & for work & labor performed by him & others, after Green's death, about the partnership business.

The plaintiff below moved the Court to strike out all that part of defendants answer which sets up as offsetts to plaintiff's demand the services performed by himself and hands, wagons & teams furnished board of hands hired, & cash paid out for said firm, performed, furnished, or paid prior to the death of James Green. This motion was sustained by the Court.

The case was then tried by the Court, which found as follows:— "The
"Court finds that the defendant had
"received the sum of sixteen hundred dollars

"on the sale of the partnership property of "Green & Virden, as the petition states, & that "said defendant Virden had paid out for "said firm, after said Green's death, sums "amounting with $32 allowed him for com- "mission, to the sum of $113.17 upon the "admission of the plaintiff in open Court; "which was all the Evidence given in the "cause. Whereupon the Court finds the de- "fendants liable to the plaintiff by reason "of the premises above stated, in the sum of "$1651.11, for which amount judgment is "rendered in favor of plaintiff against the "defendants."

Brief of Plaintiff in Error.

The Court below erred in rendering judgment for plaintiff for the following reasons.

1. The defendant below has never ceased to be legally qualified for the "management" of the partnership effects. Having given bond therefor, as required by law, he was entitled to hold & manage those effects, as surviving partner.

2. The County Court of St Charles County had no legal authority to "revoke his letters of administration"; because no letters of administration were ever legally granted to him; and because, if there had been, there is no law giving that Court the power to make such a

revocation, on the ground of the surviving partner having became a non-resident of the State.

Such a power cannot properly be established by inference; which is the only way that the defendant in error seeks to establish it. If inference is to be resorted to, it is decidedly against the power; on the principle Expressio unius est exclusio alterius. The same law which regulates the obligations of surviving partners, regulates the powers, rights, duties, and obligations of Executors & administrators. It declares that the letters of an Executor or administrator shall be revoked if he cease to reside in the State; but it does not declare that if a surviving partner cease to reside there he shall be discharged from the management of the partnership Estate. Therefore the principle above cited applies.

But further:- there is a most essential difference between an administrator and a surviving partner. The former is the mere creature of the law, administering an estate for the benefit of all parties interested in it, but having, as administrator, no interest in it. A surviving partner is, by the general law, the actual proprietor of the partnership Effects; and he is required to give bond, simply to insure the application of those effects first, to the payment of the partnership debts, & secondly, to the payment of the

deceased partner's share of the concern to his legal representatives. He has no functions to perform, ~~in relation~~ under the orders of the County Court, in relation to the partnership effects. That Court has no right to allow demands against him, as surviving partner; to direct him to sell property; or otherwise to control him, except to cite him to account, & to adjudicate upon his account. If he fail to give bond as required by law, the partnership effects are taken out of his hands; but if he ~~do~~ give bond, he is entitled to hold them, wherever he may reside; his bond being considered as security for their faithful application, as required by its terms.

Hence, if the County Court granted letters of administration in this case to Virden, such letters were a mere nullity, not being authorized by law; & the assumed revocation of them was a nullity, for the law gave no power to make it.

3. The administrator of a deceased partner has no right of action against a surviving partner, who has given bond as required by law, ~~except~~ except in one of two cases; Either, first, to recover what is due ~~the estate~~ from the partnership to the decedent's Estate; or second, to recover moneys which he has been obliged to pay, as administrator, and

which the surviving partner had partnership effects sufficient to pay, and failed to pay. (See the condition of the bond, as prescribed in § 57 of the Administration Act.)

The petition in this case does not aver that any thing was due from Virden to his deceased partner's estate; but proceeds upon the mere naked ground that Virden had not used due diligence in closing the partnership affairs, & had not paid the partnership debts. This was no breach of the bond, so far as the Administrator was concerned:—the creditors of the firm were the only persons who cared due on the bond, on the ground of the non-payment by Virden of those debts; unless the Administrator had been compelled to pay debts, &c. which the survivor ought to have paid.

4. Even if any thing was due to the Administrator, from the settlement of the partnership affairs, he was not, by the terms of the bond, bound to pay it until the expiration of two years after the date of the bond. This suit having been brought in less than that time after the date of the bond, cannot be maintained.

5. In view of these positions, we look into the finding of the Court, and discover that the case was tried upon the petition, answer, (or what remained of it) and the admission, in open Court, by Virden, that he had received $1600 from the sale of the partnership Effects; and upon this ground, & no other the Court, after allowing him $113.17, finds for the plaintiff, & renders judgment against Virden for $1657.11.

This judgment necessarily assumes that the attempted displacement of the surviving partner, made by the County Court, was a legal act, & was effectual in displacing him:- and therefore the points above made in regard to that apply here. If these points are tenable, then the finding of the Court was erroneous.

By the finding of the Court, no breach of the bond was established. The Court seems to have proceeded upon the ground, that the action of the County Court entitled the administrator to recover from the survivor the entire fund received by him from the sale of the partnership effects; which is manifestly erroneous; for after the survivor had once given bond, if he were even legally displaced by the County Court, the administrator of the decedent could maintain no action against him, except

in the cases designated in the third point above made.

But whatever breach of the bond may have been committed by Virden, the finding of the Court should have distinctly defined it and declared it, as a fact found by it. If it does not do so, then this Court is bound to hold that no breach was proved: as, indeed, is manifestly the case; for the whole facts of the case are set forth in the Court's finding. That finding clearly establishes that no breach was proved.

But if it was proved, it should be set forth distinctly; else how can this judgment be pleaded in bar of any future action, by the administrator, or by a creditor, whose claim may have been the foundation of the present action, because, perhaps, it had been paid by the administrator.

On the foregoing grounds the reversal of this judgment is sought.

C. D. Drake,
Atty for Pltff in Error.

P. L. S. Virden

vs

Parks

Brief of Plff in Error

C. D. Drake,

Atty