BLYTHE, JAMES E, ADMIR OF
DENNY, GEORGE E. *

v

PRIMEAU, CHARLES

JUNE 1865

COUNTY OF ST. LOUIS
58214

OLD REVERSED AND REMANDED
659/10

INVOLVED:
PARTNERSHIP

* INDEXED UNDER DENNY, REPORTS, VOL. 35

State of Missouri } Be it Remembered that
County of St Louis } heretofore to wit on the thirteenth
day of September 1862 there was filed in the Office of the Clerk
of the St Louis Court of Common Pleas within and for the
County aforesaid a Petition which is in the words and figures
following to wit:

James E Blythe administrator of the Estate of George E Denny settling copartnership effects of firm of Capen & Denny Plaintiff	In the St Louis Court of Common Pleas
vs	November Term 1862
Charles Primeau Defendant	St Louis County, ss

Petition

Plaintiff States that he is the administrator of the Estate of George E. Denny formerly resident copartner of the firm of Capen & Denny, the said Capen having been a non resident of the State and both members of said firm being now deceased

That during the year 1860 and from the 23rd of February until the fifth day of December of that year defendant and one Pasquier were copartners trading and doing business under the name and Style of P Pasquier & Co that during said time the said firm of P Pasquier & Co purchased of said firm of Capen & Denny both now deceased goods, wares and merchandise to the value of Seven thousand

one hundred and forty nine 50/100 Dollars – a bill of the items of said goods, wares and Merchandise, with the times and prices, at which they were sold, together with the credits hereinafter named, being herewith filed Marked "A" and herein referred to

Plaintiff states that Defendant is entitled to a credit of Five thousand nine hundred and Six 70/100 but that the balance the sum of twelve hundred and forty three 80/100 Dollars, is now due and remains unpaid and plaintiff therefore asks judgment for said sum and interest thereon and his costs in this behalf expended

Knox & Smith
for Plaintiff

State of Missouri }
County of St Louis } ss

James E. Blyde the above named plaintiff being duly sworn on his oath says that he believes the foregoing petition and the matters as therein stated are true

James E. Blyde

Sworn to and subscribed
before me this 13th Sept. 1862

Leon J Papin Clk

Thereupon the following Summons issued to wit:

Summons

County of St Louis ss: The State of Missouri to the Sheriff of St Louis County Greeting; We command you to summon Charles Primeau to appear before the judge of our Court of Common Pleas, on the first day of the next term thereof to be held in the city of St Louis

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on the third monday of November 1862 then and there to answer to the complaint of James E. Blythe administrator of the Estate of George E. Denny settling copartnership effects of the firm of Capen & Denny, as set forth in the annexed petition; and have you then and there this writ.

Witness. Leon J. Papin. Clerk of our said Court, with the seal thereof hereto affixed, at office in the city of St Louis, this 13th day of September in the year of our Lord eighteen hundred and sixty two.

(L.S.) Leon J. Papin Clk.

To the foregoing Summons the Sheriff made the following return to wit:

Shffs Return — Executed this writ in the County of St Louis on the 13th day of September 1862 by delivering a copy of the writ and petition as furnished by the Clerk to Charles Primeau the within named defendant.

John H. Andrews Shff

On the 29th day of November 1862 the following Answer was filed to wit

Answer — The defendant for answer to plaintiffs petition states that as to whether Plaintiff is administrator of the Estate of George E. Denny formerly resident copartner of the firm of Capen & Denny he has not sufficient knowledge or information to form belief — This defendant has no knowledge or information sufficient to form belief as to whether the said George E. Denny was a partner of the firm of Capen & Denny as stated in the petition. Nor has this defendant sufficient knowledge and information to form belief whether the firm of Pasquier & Company purchased of the firm of Capen & Denny

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goods, wares and Merchandise of the value of Seven thousand one hundred and forty nine dollars and ninety Cents as stated in the petition. This defendant has no Knowledge or information sufficient to form belief whether the bill of items of said goods wares and merchandise claimed to have been sold to said Pasquier & Co. with the times and prices at which they were sold together with the credits therein filed with Plaintiffs petition is Correct or not and he Calls for strict proff ~~thereof~~ of the same

Defendant has no Knowledge or information sufficient to form belief whether the balance Claimed of Twelve hundred and forty three dollars and one Cent is due and remains unpaid to Plaintiff and he calls for strict proff thereof. — Defendant States that he never had any Knowledge of the business affairs of Pasquier & Co and asks that he may be discharged hence with Costs.

John. Wickham

Atty for Deft.

John Wickham attorney for defendant upon oath states that he believes the foregoing answer and the matters as therein stated to be true

John Wickham

Sworn & Subscribed before me

this 29 Nov. 1862. Leon J Papin Clk

And at the November Term 1863 the following further proceedings were had to wit.

Wednesday January 14th 1863

Trial and Non suit

Now on this day Came the parties by their attorneys and no jury being required they Submit this Cause to the

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Court and thereupon the trial of this cause progressed, and being finished, the plaintiff says he will not further prosecute his suit in this behalf, but takes a non suit with leave to move to set the same aside. Therefore it is considered by the Court that the plaintiff take nothing by his suit, but that the defendant go thereof without day and recover of said plaintiff its Costs and Charges herein expended and have execution therefor. Motion to set aside Nonsuit filed

Saturday January 24th 1863

Motion to set aside Nonsuit and grant New Trial over

The Court having heard and fully considered the plaintiffs motion to set aside the Non suit and grant him a new trial herein doth overrule the same

Monday January 26th 1863

Appeal allowed

The plaintiff files an affidavit for an appeal and on his motion an appeal is allowed him to the Supreme Court from the judgment rendered herein. Thereupon an appeal bond is filed with James E Blythe as principal and N King Smith and Richard Jenkins as securities, which bond is approved by the Court. Bill of exceptions filed

Which bill of Exceptions is in the words and figures to wit.

Bill of Exceptions

Be it remembered that at the trial of the above named cause the plaintiff established by proof ~~that~~ the facts that the defendant was indebted to the late firm of Capen & Denny as is alleged in plaintiffs petition and set forth in the account filed in the case That said Capen and said Denny were the sole members

of said firm, that said Denny lived and died in St Louis, when the business of the firm was carried on that said Capen lived in Boston Massachusetts and died there soon after the death of Denny in St Louis

Plaintiff also called a witness who stated that under the letters of administration offered in evidence plaintiff had charge of the assets of the firm of Capen & Denny acting under and by virtue of the letters of Administration granted to him

Plaintiff then read the letters of Administration granted to him as follows:

County of St Louis ss

The State of Missouri

To all persons to whom these Presents shall come, Greeting:

Letters. Admins

Know Ye, That whereas George E Denny late of the County of St Louis died intestate, as it is said, having at the time of his death, property in this State, which may be lost, destroyed or diminished in value if speedy care be not taken of the same, To the end, therefore, that the said property may be collected, preserved and disposed of according to law, we do hereby appoint James L Blythe administrator of all and singular the good and chattels rights and credits which were of said George E Denny at the time of his death, with full power and authority to secure and dispose of said property according to law and collect all moneys due said deceased and in general to do and perform all other acts and things which are or may hereafter may be required of him by law

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In testimony whereof I William F Ferguson Judge of the Probate Court in and for the County of St Louis hereto sign my name and affix the seal of said Court at office this twenty first day of December AD 1860

William F Ferguson

Judge of Probate

I William F Ferguson Judge of the Probate Court of the county aforesaid, certify that the preceding Letters of Administration are truly recorded in my office this twenty first day of ~~December~~ December 1860.

William F Ferguson

Judge of Probate

Counsel for defendant objected to the introduction of the letter on the ground that said letters gave Plaintiff no right to administer on the Copartnership Estate of Capen & Denny. The Court sustained the objection and plaintiff at the time excepted.

Plaintiff then took a non suit with leave to move to set the same aside and within four days from the taking of said non suit filed his Motion to set aside said Non Suit and grant a new trial as follows.

Motion for New Trial

And now comes the plaintiff and moves the Court to set aside the Non suit taken in the above named Cause and to grant a new trial for the following reasons to wit:

Because the Court erred in refusing to give judgment for the plaintiff on the evidence in the Cause.

Because the Court decided erroneously as to the right of plaintiff to maintain his action in this Cause.

8 Because the administrator of a resident Copartner the other Copartner being non resident his lifetime and deceased at the time letters were granted on the Estate of the resident partner has a right to maintain an action for debts due the Copartnership

Knox & Smith

for plaintiff

And the said motion coming on to be heard by the Court the same was overruled to which overruling the plaintiff at the time excepted and brings this his Bill of Exceptions and pray that the same may be spread and become a part of the record in this Cause which is accordingly done

Sam'l Rebed

Judge &c

The Affidavit for appeal and appeal Bond are in the words and figures to wit—

Affidavit for Appeal

James E Blythe being duly sworn on his oath says. That the appeal in the above named Cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment of the Court

Sworn to and subscribed before me this 26th Jan'y 1863. Jas E Blythe

Leon J Papin Clk

Appeal Bond

Know all men by these Presents that we James E Blythe as principal and A Knox Smith & Richard Jenkins as

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Securities are indebted to Charles Pumeau in the sum of One hundred dollars for the payment whereof we bind ourselves, our heirs executors & administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at St Louis this 26 January One thousand eight hundred and Sixty three.

The Condition of this obligation is such that Whereas James E. Blythe administrator of the Estate of George Denny has appealed from the judgment rendered against him and in favor of Charles Pumeau in the St Louis Court of Common Pleas for the Costs of Suit. Now if the said appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court and shall perform such judgment as shall be given by the Supreme Court or such as the Supreme Court may direct the St Louis Court of Common Pleas to give, and if the judgment of said Court or any part thereof be affirmed that he will comply with and perform the same so far as it may be affirmed and will pay all damages and Costs which may be awarded against him by the Supreme Court then this obligation is to be void otherwise to remain in full force

James J Blythe (Seal)
H. K. Smith (Seal)
Richard Jenkins (Seal)

over

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State of Missouri
County of St Louis } ss. I Leon J. Papin Clerk of the St Louis Court of Common Pleas within and for the County aforesaid Certify the above and foregoing to be a full true and complete Transcript of the record and proceedings in the above entitled Cause as fully as the same remain in my office.

In Witness Whereof I hereunto set my hand and affix the seal of said Court at office in the City of St Louis this 24 day of February 1863

Leon J. Papin
Clerk

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(10)

Spl June 7 1865

James E. Blythe

Administrator of George E Denny

Appellant

vs Transcript

Charles Primeau

Respondent

Appeal from St Louis
Court of Common Pleas

Filed February 28, 1863
A.W. Mead Clk

Knox & Smith
Attorney for Appellant
John Wickham
Attorney for Respondent

$2.75 paid by Knox & Smith
$10.00 " " " " " Mead Clk

Copy of Errors filed

1863 June 23d, revised and rewarded. Opinion filed
Dp 334

James E. Blythe, Administrator
Appellant,
vs
Charles Primeau
Respondent,

IN SUPREME COURT,
March TERM, 1863

AND now comes the said Appellant and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the defendant when it should have been rendered for the Plaintiff
10. That said Court overruled the motion for a new trial, made by Appellant

Knox & Smith
Atty for appellants

And now comes the Appellee and for joinder in error say, that there is no error in the record and proceedings of said Court of Common Pleas in said cause, as assigned by said Appellant

J. Peckham
Atty. for appellee

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James E. Blythe
Appellant
vs
Charles Primeau
Respondent

Appellants assignment
of errors —

Filed Sept. 24. 1863
A. W. McEad
Clk

Knox & Smith
for Appellants

James E. Blythe, Admr
vs
Charles Primeaut, Deft

Plaintiff submits that the Court below erred in excluding the letters of Administration on the estate of Dering. The Plaintiffs claim rested upon these letters, and without them, as evidence, no recovery could be had, and no further proof, as to the fact that no letters had been taken out on Capins estate, the fact that plaintiff had given the proper bond, and such other facts as might have been necessary to establish plaintiffs claim would have been of no avail -

The action of the Court below opens the whole question as to whether the administrator of the deceased co partner has a right to administer upon the Copartnership assets, where the surviving copartner does not give the bond required by law -

In this case, plaintiff proved that Capin was a non resident, he could therefore have no right to administer upon the assets of the firm, even had he lived, -

Rev. Statutes 1855. p. 121. and following, direct in what manner co-partnership estates shall be administered, when one of the partners dies

This law provides, that if one co-partner dies, "any surviving partner, resident of this state shall have the right to give bond as hereinafter required," and then he may take charge of the co-partnership estate

This law, limits such right to a resident partner. In the present case, Caperton was a non resident, and if living, he could have had no right to administer the co-partnership assets. Had letters of administration been taken out on the estate of Caperton, his administrator would have had no greater rights than Caperton would have had, had he been living.

The care and custody of the co-partnership estate, therefore devolved upon Blythe, Administrator of Caperton, as is provided in Sec 58 of Administration acts, Rev St. p. 123.

The only further proof to be made by plaintiff in the trial of this cause, was the production of the bond provided in Sec. 58. p. 123

which the injection of the letters made futile to produce in Court on the trial -

Plaintiff would further urge that if he cannot recover in this action, there is no way in which defendant can be made to pay the debt - There is no provision in our statute, or any general provision or principle of law, by which one person can administer, in one administration, upon the joint estate of ~~[illegible]~~ different copartners

The theory of our law is, that administration may be granted upon the estate of one deceased partner, with the right to the charge of the whole co-partnership assets, in case there is no surviving partner authorized to administer, or in case the surviving partner may administer but does not -

Knox & Smith
for Plaintiff

C

James E. Blythe
Admr.
vs
Charles Primeau

Plaintiffs Brief

Filed Nov 15. 1864
A.W. Mead
Clerk

Knox & Smith
for Plff

James E. Blythe, Administrator of the estate of George E. Denny Plaintiff
Against
Charles Primeau, Defendant

In the Supreme Court, on appeal from the St. Louis Court of Common Pleas

This is an action of debt — Plaintiff states that he is the administrator of the estate of George E. Denny, formerly resident copartner of the estate of Capen & Denny, the said Capen having been a non resident of this state, and both members of said firm being now deceased —

That during the year 1860 defendant and one Pasquier were copartners trading and doing business under the name of P. Pasquier & Co & that said firm purchased of Capen & Denny goods of the value of $7.149 90/100, on which the said Pasquier & Co are entitled to a credit of $5.906 89/— leaving a balance of $1243 01 due to Capen & Denny, for which judgment is asked —

Defendant answers setting forth that he has no knowledge or information as to whether Plaintiff is administrator as set forth, or whether Denny was the resident copartner, or whether Capen was non resident, and now deceased nor whether Pasquier & Co purchased the goods charged

on the trial of the cause the Plaintiff established by proof that the defendant was indebted to the late firm of Capen & Denny as charged in the petition. That said Capen & said Denny were the sole members of the firm of Capen & Denny, that said Denny lived and died in St. Louis where the business of the firm was carried on, that Capen lived in Boston, Mass & died there shortly after the death of Denny in St Louis

Plaintiff then proved that under the letters of administration on the estate of Denny, he had charge of the assets of the firm of Capen & Denny, acting under and by virtue of the letters granted to him -

Plaintiff then read the letters of administration granted to him by the St Louis Probate Court -

Counsel for defendant then ~~moved~~ objected to the introduction of the letters of administration, on the ground that they gave plaintiff no right to administer upon the co partnership estate of Capen & Denny which motion was sustained & the said letters excluded as evidence - to which Plaintiff then excepted

Plaintiff then took a non suit with leave to move to

sick the same aside, on the ground that the Court erred in excluding the letters of administration, which motion was overruled, to which plaintiff at the time excepted, and brings his appeal to this Court

Kuyk & Smith
for appellant

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James E. Blythe
Admr
vs
Charles Primeau

Plaintiffs statement

Filed Nov 15. 1864
A.W. Mead
Clk

Knox & Smith
for Plaintiffs

Missouri Supreme Court.

October Term. 1864.

James E. Blythe, Admr of the Estate of
George E Demmy, Appellant. No 118.

vs.

Charles Pumiau, Appellee.

Brief for Appellee.

The only question presented for discussion in this case is: Was the Plaintiff duly authorized to administer the copartnership effects of Capen & Demmy?

The letters of administration granted Plaintiff upon the estate of George E. Demmy, and offered in evidence did not per se confer such an authority upon him. Under the statute sec. 58 & 59, Art. 1, Title: Administration, pp. 123 & 4, Vol. I of Revised Statutes of 1855, it becmes necessary in case the surviving partner neglects or refuses to give bond within Thirty days after letters of administration have been granted on the estate of the deceased partner, for the administrator of such deceased partner to give further bond to the satisfaction of the Court, conditined that he will faithfully execute that trust before he is authorized to collect the debts and administer the effects of the firm. There was no attempt to show by the record that any such bond was given, or, in other words, that the copartnership estate and effects were legally placed in charge of Plaintiff. The law does not

contemplate an administrator de son tort in such case.

Administration cannot be proved in pais, not even by proving that a person acted as administrator, because he might act without authority.

Hay vs Bruere, 1 Halstead, 212.

The mere fact of the surviving partner being a non-resident and unable to qualify as surviving partner does not alter the effect of the statute, there being nothing in it to authorize the administrator of the deceased resident partner to administer the partnership effects otherwise than as above stated.

John Wickham
for Appellee

No. 48 54 C

Mo. Supreme Court.
October Term 1864.

James E. Blythe, Admr.
vs.
Charles Primeau.

Brief for Appellee.

Filed June 15, 65
J. A. Willis
Clk

In the Sup Court Mo.

James E Blythe admr &c

vs

Charles Primeau.

This is a suit on account brought by James E Blythe, administrator of the estate of George E Denny against Charles Primeau for goods wares and merchandise furnished to the firm of P Pasquier & Co. by the firm of Capen & Denny

It appeared in evidence that George E Denny one of the partners of the firm of Capen & Denny lived and died in St Louis; and that said Capen lived in Boston Massachusetts, and died there soon after the death of Denny in St Louis; that they were the sole members of the firm of Capen & Denny; that the defendant was, as one of the partners of P Pasquier & Co indebted to the late firm of Capen & Denny, as alleged in the petition

Plaintiff then proved by

a witness, that under letters of administration, which he proposed introducing in evidence, he had charge of the assets of the firm of Capen & Denny, acting under and by virtue of said letters.

Plaintiff then offered in evidence letters of administration granted him by the St Louis Probate Court authorizing him to administer on the effects of George E Denny, which were read subject to an objection by defendants counsel on the ground that said letters gave plaintiff no right to administer the Copartnership estate of Capen & Denny, the Court sustained the objection, and plaintiff duly excepted.

Plaintiff then took a non-suit with leave to move to set the same aside, which motion being made and overruled by the Court, he brings the cause here by appeal

The principal question presented for decision in this case is; Was the plaintiff duly authorized to administer the Copartnership effects of Caben & Denny.

By the Rev. Statutes 1853. p 121. and following, it is provided that if one Copartner die, "any surviving partner resident of this state shall have the right to give bond as hereinafter required" and then he may take charge of the Copartnership estate.

This law limits the right to a resident surviving partner. Here Caben was a non-resident and had he lived could not have administered on the Copartnership effects of the late firm of Caben & Denny.

When the surviving partner neglects or refuses to give the required bond within the time limited (thirty days) then it is the duty of the executor or administrator on the estate of such deceased part-

=ner, to forthwith take the whole partnership estate, goods and chattels, rights and credits, into his poss=ession; and he shall be auth=orized to use the name of the survivor in collecting the debts due the late firm if necessary: and shall, with the partnership property, pay the debts due the late firm &c

But before proceeding however, to administer upon such partnership property, he shall be requ=ired to give further bond, conditioned that he will faithfully execute that trust. Rev. Code §§ 58, 59 p 123, 124.

The Court below exclu=ded the ~~[illegible]~~ letters of administration, offered by the plaintiff, without giving him an opportunity of ~~giving~~ complying in evidence the further bond required

by statute. In this the Court committed error. It should have received in evidence the plaintiffs letters of administration, in order that he might be enabled to give in evidence, the further bond required by law. showing that he was legally entitled to take charge of and administer the partnership assets.

The judgment of the said Court will therefore be reversed and the cause remanded. Judge Loveland concurring herein.

Hagner

C

Bly the
vs
Primeau

Opinion of
the Court

Filed June 23rd, 1865.
Jno A Willis
Clk

Reversed & remanded.

Mo. Supreme Court.

James E. Blythe, Admr. of the Estate of George E. Denny, settling copartnership of firm of Capen & Denny
Appellant

vs.

Charles Primeau. Appellee.

Statement.

This is a suit on account brought by James E. Blythe, Administrator of the estate of George E. Denny against Charles Primeau for goods, wares and merchandise furnished to the firm of P. Pasquier & Co. by the firm of Capen & Denny. It appeared in evidence that George E. Denny one of the partners of the firm of Capen & Denny lived and died in St. Louis; and that said Capen lived in Boston, Massachusetts, and died there soon after the death of Denny in St. Louis; that they were the sole members of the firm of Capen & Denny; that the defendant was, as one of the partners of P. Pasquier & Co. indebted to the late firm of Capen & Denny, as alleged in the petition.

Plaintiff called a witness who stated that under the letters of administration about to be offered

in evidence, Plaintiff had charge of the assets of the firm of Capen and Denny acting under and by virtue of said letters. Plaintiff then offered in evidence letters of administration granted him by the St. Louis Probate Court authorizing him to administer the effects of George E. Denny, which were read subject to an objection by Defendant's counsel on the ground that said letters gave Plaintiff no right to administer the copartnership estate of Capen and Denny, the Court sustained the objection and Plaintiff duly excepted, and took a non-suit with leave to move to set same aside.

No. 118
Mo. Supreme Court.
October Term 1864.

James E. Blythe, Admr. etc.
vs.
Charles Primeau.

Statement for Appellee.