


No. 14199

Supreme Court of Illinois

Wilkinson

vs.

Stewart et al.

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Supreme Court of Illinois.

A B S T R A C T.

WILLIAM R. WILKINSON.

vs.

JOSIAH STEWART & JAMES FACKNEY

} APPEAL FROM WABASH.

1 This was a suit in Equity, by defendants below to enforce a Trust against Plaintiff.
The Bill states that Defendants (Stewart & Fackney) on the 13th May 1859 endorsed for accommodation only
a Bill of Exchange drawn by J. C. & D. N. Stanton on the Cashier of Bank at Vincennes, in favor of Defendant
for \$2060, payable three months after date at the Branch of the Bank of Indiana at Vincennes; that said Bill was
2 discounted at Mt. Vernon, Ind., and the proceeds applied to the use of the I. S. R. R. Co. That said Bill not be-
ing paid when due was protested for non-payment. That on the 25th October 1859, the said I. S. R. R. Co. to
3 protect the Defendants against their liability on said Bill and to provide for payment thereof, delivered to Plain-
tiff (Wilkinson) 150 Wabash county Bonds, amounting to \$15,000, which were accepted by him in trust for the
purpose of paying certain notes given by S. H. Martin, J. Fackney, J. Stewart, G. Williams, I. N. Jaquess and
others as makers or endorsers, viz: five notes for about \$4000, and then lying in the Mt. Vernon Bank; and three
others for about \$5000, negotiable at the Canal Bank at Evansville. That the said bill of Exchange was one of
the claims last aforesaid, and said Bonds were to be sold and disposed of as soon as possible for the payment of
said notes.

Wilkinson's receipt is as follows :

5 Received of the Board of Directors of the Illinois Southern Rail Road Company the following bonds of Wa-
bash county, viz: Nos. 201 to 350 both inclu-sive, making 150 bonds, each for one hundred dollars, which bonds
have been specially set apart by the said Company for the express purpose of paying certain notes given by S.
H. Martin, James Fackney, Josiah Stewart, George Williams, I. N. Jaquess and others as makers or endorsers, viz:
five notes for about \$4060 and now lying in Mount Vernon bank and three notes for about \$5000 and negotiable
at the Canal bank at Evansville, with interests, costs, &c., and which bonds have been placed in my hands as
Trustee for said makers and endorsers of said notes to sell and dispose of as soon as possible and apply the pro-
ceeds thereof in payment of said notes as aforesaid and account with the Treasurer of said Company for any sur-
plus which may remain in my hands; this receipt is given in duplicate. W. R. WILKINSON.
October 25th 1859.

4 The bill also charges that Plaintiff refused to execute the Trust, and had surrendered the bonds to the R. R. Co.
in violation of the trust, and the same had thereby been lost to Defendants. and they had been compelled to settle
and pay the said bill of exchange with interest, &c.

Wilkinson, Martin, Williams, Jaquess and the I. S. R. R. Co. are made defendants and a decree prayed against
Wilkinson to enforce the trust, or to pay said Stewart and Fackney and the other makers and endorsers of said
5 notes, the amount paid out by them on that account.

6 Wilkinson and Williams answer, and default as to the other defendants below:

8 The answer of Wilkinson admits that Stewart and Fackney endorsed the Bill for accommodation; admits he
received the \$15,000 of bonds and executed the receipt therefor; that the bonds were to secure said parties and to
be sold for that purpose. He denies that he refused to execute the trust, but that before he could sell the bonds
9 and apply the proceeds as first directed, the orders of said Company of the 15th and 16th of February 1860 were
made authorizing the sale of the bonds to pay interest on the County bonds, and exhibits copies of the orders as
follows:

11 1st. By order of 24 October 1859, at Mt. Carmel, \$15,000 of Wabash County Bonds, Nos. 201 to 350, were set
apart for the express purpose of paying off certain notes made by S. H. Martin, James Fackney, Josiah Stewart,
George Williams, J. N. Jaquess and others as makers or endorsers (five notes for \$4060 at Mt. Vernon and three
for \$5000 at Evansville) and that the President of the Company act for the said makers and endorsers as their
special agent and trustee, to sell said bonds and apply the proceeds thereof to said notes.

12 2nd. By order of 16th Feb'y 1860, at Carmi the President of said Company was authorized to pay to the Coun-
ty of Wabash \$8,000 falling due from said Company to said county, on March 20th 1860, as per contract, and
also to pay certain notes, one by Jaquess and Martin for about \$1000, and sundry other notes made by Martin,
Williams, Fackney, Stewart and others, for which purpose he was authorized to use the County Bonds, private
subscriptions, and Land bonds, as in the judgment of said President should seem best.

3d. By order subsequently made, the said Board of Directors declared, that whereas at a meeting of said Board
on the 15 and 16th February 1860, an order had been made authorizing the President to apply certain bonds, sub-
scriptions, &c. as specified in their order, and whereas doubts have arisen as to whether under said order the Pres-
ident had a right to apply certain bonds placed in his hands as special Trustee by order of 25th October 1859;
therefore it was resolved that the Bonds set apart by the order of 4th October 1859, "were intended to be includ-
ed in the assets to be applied to the payment of interest due the County of Wabash, and for other purposes so or-
dered to be applied by said President."

16 And by the amended answer he denies the payment of the Bills and calls for proof; also states that of the
\$15,000 county bonds received by him about \$9,000 were disposed of for the benefit of the county on account of
interest, and about \$6,000 for paying divers notes, on which pl'tff's below and others were liable.

18 The answer of Williams confesses the allegations of the Bill, and also the receipt of \$11,000 of Land bonds.
The cause was heard on Bill, Answers, Exhibits and oral testimony.

27 Peter Clark testified that he was Att'y of the R. R. Co.--in March 1860 a Trust Deed and 36 Land Bonds of \$1,000 each, were made out by him, Williams came up to Mt. Carmel to execute them as Secretary; it was at witness's room, Williams refused to execute the Bonds and Deed of Trust because he said they had used the \$15,000 of bonds placed in Wilkinson's hands for the protection of himself and friends and he refused to execute the papers unless he and his friends were secured.

After Wilkinson promised to give the eleven bonds he executed the papers.

Land Bonds had no market value, County bonds were worth 80 cents. Williams was Secretary and had custody of the papers. A Bond being introduced witness said that is one of the 36 Land Bonds.

28 I. N. Jaquess testified he was present when the orders of the I. S. R. R. Co., were made; the one appropriating the \$15,000 county bonds was made at Carmi; Fackney was present and objected to the arrangement, saying he had friends who would object, but he said unless the interest was paid on the bonds they would become of no value, and I think at last rather waived his objections. Was present when Williams refused at Mt. Carmel to execute the Deed of Trust and the bonds, because he said he had friends that were interested. He did not name them but I knew who they were.

Fackney was not a member of the Board on the day of February, 1860. The amount of interest due on County Bonds was about \$8,000. Don't know if it is yet paid, the Stantons were to have paid it.

32 J. C. Stanton testified that he received \$15,000 Wabash county bonds. Sent \$9,000 east to his brother. At first 33 hypothecated them at 40 cents. Gave a mortgage on property to raise the money, afterwards sold bonds, and paid about \$4,000 interest and \$1,000 debts. The notes paid at Evansville and the interest were paid with Wabash county bonds

Witness here presented one note of \$2,000 dated June 16th 1859, signed by J. Fackney and I. N. Jaquess, and four for \$500 each made by Fackney and S. H. Martin, dated June 16, 1859. Thinks they were paid shortly after due; gave an acceptance east; it was after the order at Carmi. Had a conversation with Fackney in his store at Carmi, he asked me why I did not pay the notes in Mt. Vernon, I replied the Company had furnished no money. He said they gave up the bonds for that purpose. Had a conversation with Williams in Mt. Carmel; told him that Wilk. proposed I should give a mortgage on the Stanton House, but Jaquess objected, as he wanted part of the bonds, and the arrangement was not made. In this conversation he (Williams) said the county bonds had 26 been given up but did not say by whom. Being re-called witness testified further: I paid the notes in Evansville Bank, in Decm'br 1859, and it was after the notes were paid that the conversations were had with Fackney and Williams, did not understand them to say they had relinquished their claim to the bonds given Wilkinson in trust for them.

By the contract they J. C. & D. N. Stanton were to pay the interest on the Wabash county bonds and the notes in the Evansville and Mt. Vernon banks, and for that purpose were to take the Wabash county bonds at their face. The bonds received from Wilkinson for the purpose were sent east to brother, whether they were used to pay interest and notes don't know as the business was managed by my brother; Wilkinson was east at same time and acted with my brother in the matter.

36 I. S. Johnson testified that Wilkinson had returned at January Term 4000 of coupons which was cancelled, and that afterwards over \$1000, perhaps \$3000 more had been returned for interest paid, but don't know by whom.

W. M. Gray testified he was present at meeting of Board in Carmi when the order was passed to pay interest with bonds in Wilkinson's hands. Fackney was present, was no longer a member of the Board and had no control over the matter, but said if the Board wished to use those bonds they ought to take up the note at Mt. Vernon; never gave consent, nor did Stewart ever consent so far as witness knew.

A. R. Shannon testified: he was one of the Trustees in Deed; came to Mt. Carmel March 1860, when the bonds and deed were to be executed, at Clark's room in Mansion House. Williams objected to execute them, because him and his friends had been treated badly, he said that the Company had disposed of the bonds which had been set apart for their security. Wilkinson made an appeal to him saying he was Secretary and ought to execute the papers. Williams still objected, and said they ought to have paid the note. Wilkinson proposed to give him eleven of the land bonds as security, and Williams then executed the papers as requested.

38 Copy of note mentioned in Bill:

"Exchange for \$2060.

Carmi, Illinois, May 13th 1859. Three months after date of this first of Exchange; second of same tenor and date unpaid, pay to the order of Josiah Stewart, James Fackney, and George Williams, two thousand and sixty dollars at the Branch of the Bank of the State of Indiana, at Vincennes, Ind., without any relief whatever from valuation and appraisement laws, for value received, and place same to account of your obedient servants,

To Cashier Bank Vincennes,
Vincennes, Ind.

Endorsed:

"Josiah Stewart, James Fackney, George Williams," also:

"This note was paid by S. H. Martin's acceptance endorsed by Josiah Stewart and George Williams dated June 13th, payable at Bank at Mt. Vernon \$2082 60-1000 at three months."

23 The Decree declares that the said Stewart and Fackney, and Williams paid the Bill of Exchange amounting \$2082 60-100, and orders that Wilkinson pay that amount to them.

ERRORS.

1st The Decree is contrary to law

2d. It is contrary to equity.

3d The Decree should have been in favor of Wilkinson for costs.

4th. The Decree is unsupported by evidence.

B R I E F :

The facts are in brief these : Stewart, Fackney, Williams, Martin, Jaquess and others were accommodation endorsers of the I. S. R. R. Co., of which Wilkinson was President, Williams Secretary, Clark Att'y, and J. C. & D. N. Stanton were Contractors. The Company had received and disposed of in part Wabash county Bonds, the interest on which by contract the Company was to pay, and by contract between the Company and the Stantons the latter were to pay.

On the 24th October 1859, to secure the endorsers against loss the Company placed in the hands of their President 150 Wabash county Bonds (\$15,000) to be applied to paying the notes and Bills on which they were liable.

For these Bonds Wilkinson receipted in his own name as trustee, &c.

Before these Bonds could be sold and applied as thus ordered, it became necessary to provide for the interest due the county on 20th March 1860, amounting to \$8,000, and to this end the Company made an order on the 16th February 1860, authorizing the President to use the \$15,000 of Bonds placed in his hands in trust for the endorsers. These bonds were accordingly delivered to J. C. Stanton and sent East to his brother, they were first hypothecated at 40 cents, and finally disposed of at about \$9,000 towards interest on the county bonds and about \$4,000 towards debts on which the endorsers were liable. Stanton paid the notes first by an acceptance East and used the Bonds on that account afterwards. When the order was made at Carmi to use the Bonds towards interest Fackney objected, but at last agreed that the interest should be paid and seemed to waive his objection.

After the Bonds had been used for interest, &c., and when Williams was called on as Secretary to execute the Deed of trust and Land Bonds he refused because the \$15,000 county bonds had been disposed of contrary to the trust, and until by a new agreement for security, he received eleven thousand dollars of Land Bonds which he still holds, and by which act we insist, he released Wilkinson from the trust, if one existed, so far at least as he, Williams, is concerned.

The Complainants below pretend they paid the Bill of Exchange at Mt. Vernon, and they produce it cancelled, but the endorsements on it show that it was paid by the acceptance of S. H. Martin at three months, endorsed by Stewart and G. Williams.

The Plaintiff now insists :

1st. That the order setting apart the \$15,000 county bonds, and his receipt therefor, did not create a Trust beyond the control of the R. R. Co., and when the order was subsequently changed, the said Plaintiff being all the time President of the Company, of which defendants all knew, he as its officer was bound to obey the orders of the Board of Directors, and was therefore not personally liable as a Trustee.

2nd. If it should be held however that a trust was created beyond the control of the R. R. Co. then it is further insisted that there is no sufficient proof that Fackney, Stewart and Williams paid the Bill. The production of the Bill by Stewart and Fackney on trial might furnish prima facie evidence that they had paid it, but certainly not that Williams had paid any part. Williams in his answer does not pretend to have paid it in whole or in part : besides the endorsements show that it was paid by the acceptance of Martin, endorsed by Williams and Stewart, thereby showing that Fackney had no share in the payment.

3d. If the proof of payment shall however be regarded as sufficient, then we insist that as to Fackney by his statement at the time of making the order of 16th of February 1859 for applying the Bonds towards interest that the interest should be paid, he thereby encouraged the making of said order and such application of the Bonds by Wilkinson and he cannot in equity now hold Wilkinson liable for violating the trust.

And that as to Williams, he by a new agreement with Wilkinson, President of the Company, discharged and released all claim on the Trust by the acceptance of the \$11,000 of Land Bonds, and he was therefore not entitled to any Decree in his favor.

³²
Dr R. Wilkinson

J. Howard et al

Appral from
Wabash

Ordered by

14199

Filed Nov 10. 1862.

W. Johnston Ck

A. Mitchell
for pay