

No. 14365

Supreme Court of Illinois

Williston

vs.

Fisher et al.

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 61

5

1865

Wheeler

D. Fisher

1865

Wheeler

Jameson & Morse, Printers, Chicago.

SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

EDWARD WILLISTON

vs.

DAVID FISHER and
MELINDA FISHER.

Error to Cook.

CHANCERY.

ERRORS ASSIGNED.

1st. The decree should have been for the complainant, according to prayer of bill.

2d. The Court erred in dismissing complainant's bill, because the allegations of the bill were not sustained by the evidence.

3d. The burthen of proof was on the defendants, and not on the complainants, and the Court should have required proof by defendants of the special matter of defence set up by the defendants.

4th. The Court should have decreed the payment by defendants to complainants, of the consideration expressed in the deeds, with a lien on the lands for the payment thereof.

BARKER & TULEY,

Attorneys for Plaintiff in Error.

POINTS OF PLAINTIFF IN ERROR.

1st. Inasmuch as the answer under oath is waived, the answers of defendant are "a mere pleading."

4 *Scammon*, p. 13.

4 *Gilman*, 420.

It is clear that the answers do not pretend that the consideration money expressed in the face of the deeds was ever paid, but set up a special consideration and a special defence *in no wise responsive* to bill.

When a defense not responsive to allegations of the bill is set up by answers, the burden of proof is upon the defendant of the facts by which he seeks to avoid complainant's rights and equities. *The answer* is in issue.

5 *Alabama*, p. 374, is a case in point.

19 *Illinois*, p. 344.

Hart vs. TenEyck, 2 *John. Cay.*, p. 62.

Defendant can not avail himself of any matter of defence not set up in his answer, even though it appear in evidence.

2 *Daniels' Chy.*, 2d Edition, p. 815.

In the absence of all proof that the consideration money expressed in the deeds has ever been paid, or that any consideration has been paid for the lands, a court of equity will hold that the sum expressed in the deeds was the consideration agreed upon, and that defendants are liable in equity for that sum.

See case of *Cone vs. Newkirk*, 24 *Ill.* 508.

61
Williston

VT

Fisher et al

Print of self in line

Filed April 22 1868

L. L. Lunn

clerk.

Barkley Tuley
for [unclear]

Abstract of judgment of errors

Jameson & Morse, Printers, 14 La Salle St., Chicago.

SUPREME COURT OF THE STATE OF ILLINOIS.

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EDWARD WILLISTON,

vs.

DAVID FISHER and
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} *Error to Cook.*
} *Chancery.*

ABSTRACT OF RECORD IN ABOVE CAUSE.

B I L L .

Rec. p. 1. That on or about the 29th October, A. D. 1859, complainant was seized, in fee simple, of the following described tract of land, commencing at the South East corner of lot number three (3) in the assessor's subdivision of the South West quarter of section thirty (30), in township forty-one (41), range fourteen East, of the third P. M., in the Town of Evanston, and running thence in a northerly direction, following the centre of the county road eight rods, thence due West forty (40) rods, thence South eight (8) rods, thence due East forty (40) rods to the centre of said county road and to the place of beginning, containing two (2) acres of land, be the same more or less. Also the South East quarter of the North West quarter of section twenty-five (25), in fractional township forty-one (41), of range thirteen (13), in the district of lands that were subject to sale in Chicago, Illinois, and being the same as described in the certificate of the General Land Office, numbered (28,342), and containing thirty-eight (38) acres and ninety-hundredths of an acre, more or less; both which tracts of land are situated in said County of Cook.

2 That complainant for 3 years preceding said month of October, and for several weeks thereafter, occupied orator's own house, about 10 miles from city of Chicago, on a piece of land adjoining the said two acres jointly with the defendants—no other persons residing with them.

3 That on said 29th of Oct. said Melinda represented to orator, that a friend of hers in the city of Chicago would let her have money sufficient to buy said two acres of land, and thereupon an agreement was made between said Melinda and orator, as to purchase of said land—that ora-

tor should sell said 2 acres to said Melinda for \$500, in cash, to be paid upon delivery of deed.

3 That said Melinda then and there stated and represented to orator, that she desired the deed in her own name, because she was afraid her said husband would spend or waste the property, if in her husband's name—as he had a place once, and had transferred the same to his mother, and could never get it back again; and that she also desired that her husband should not know who let her have the money; that she (said Melinda) had \$300 in gold in the house, of which her husband did not know, and with which she intended to build a house on said 2 acres; that she would go into Chicago, in a day or two, and get the money, and requested orator to get the deed ready for delivery.

4 That on same day, at said request, orator went to Evanston, about two miles off, and employed Geo. M. Huntoon to draw a deed for said two acres, and orator then and there signed and acknowledged the deed of the same before said Huntoon, who was a justice of the peace.

5 That orator took said deed (copy exhibit A—made a part of bill) home with him, and laid the same, enclosed in an envelope, upon a table in orator's private bed room.

6 That orator had the utmost confidence in said Melinda, who professed great friendship for your orator, and that she was the house-keeper at said house.

6 That, on the same day, orator, having been out of the house attending to some work, upon his return discovered that said deed had been taken from said table, and, upon orator asking said Melinda if she had taken it, she replied that she had; that she desired to take it to a lawyer in Chicago to see if it was all right, and that she would go into Chicago, in a day or two, and, if the deed was right, she would get the money and pay it over to your orator, and the deed would then be hers.

6 That, thereafter, your orator kept importuning said Melinda to go to Chicago to get said money, and that said Melinda, upon various pretences, kept neglecting so to do.

6 That, in about three weeks thereafter, orator procured a conveyance for said Melinda to enable her to come to Chicago to get said \$500, and said Melinda came to Chicago, and, upon her return, told orator that she had been unable to find the gentleman who was to let her have the money, but she would get the money next time.

7 That orator has since ascertained, that on said trip she filed

said deed for record in Recorder's Office of Cook County, and orator did not consent to said filing, neither did he know of the fact until the 27th February, 1860.

7 Orator several times urged said Melinda to go into Chicago and get said \$500, and that on the 11th day of January, 1860, she came, in company with orator, for the alleged purpose of obtaining the same, and, upon arriving in Chicago, left orator and went off for that alleged purpose; that orator was joined, upon his return from said city, by said Melinda and her said husband, and that, on her way home, orator did not demand said money, as the said husband was present, and said Melinda had desired that he said David should know nothing of the transaction.

8 That, upon arriving home, orator demanded the money of said Melinda, who thereupon stated to orator that she had obtained a check on Tinkham's bank in Chicago for \$2,500.00, and asked your orator if it was a good bank, your orator replied yes; and said Melinda thereupon said to orator, "that, if your orator would sell the 40 acres of land herein before mentioned (which was all the remaining land owned by orator), her friend would give two thousand dollars for it, and that her friend wanted the deed made to her, said Melinda."

8 Orator agreed thereupon to sell the said 40 acres for said sum of \$2,000.00, in cash; whereupon orator was requested by said Melinda to get the deed of the same ready for delivery, and stated to orator that, upon the first opportunity, your said orator, and said Melinda would draw the money on said check, and pay it over to orator.

9 On 13th January, 1860, orator proceeded to said town of Evanston, and had a deed for said 40 acres drawn by said Huntoon, and signed and acknowledged it (a copy attached to bill, marked, exhibited B), and returned home with it, and placed it in a box in orator's said bedroom, among other deeds and private papers of orator.

9
10 On the evening of same day, said Melinda, without the knowledge or consent of orator, took the said deed, and, upon your orator discovering the fact, and demanding it from her, she said: "You don't suppose I want to keep the deed—you don't think I want to cheat you out of your money!"

11 That, on said 27th day of February, orator for the first time became aware that said deed had been placed on record by said Melinda, or said David.

11 That, within a few days thereafter, said David commenced building upon said two acres, and thereupon your orator became alarmed

and suspicious of an intended fraud, and demanded said deeds, or the money, and said *defendants* refused to deliver said deeds, holding out promises for several days to go to Chicago, and draw the money on said check and deliver it over to orator.

- Defendants have often since refused to deliver said deed.
- Charges, *that said deeds were wholly without consideration, and were fraudulently, and against the will of orator, obtained by said defendants and put upon the record of said Cook County, and should, in justice and equity, be declared fraudulent and void.*
- Prays, that defendants may answer said bill—*oaths expressly waived.*
- Prays, that said deeds may, by decree of this Court, be declared fraudulent and void, as to the right and title of orator in and to said tracts of land; and that said defendants may be decreed to convey, by suitable and proper deeds or instruments of conveyance, the said above described tracts of land to your orator, his heirs and assigns, and, in default thereof, a commissioner may be appointed under the statute to convey the same.
- 16 Prays for an injunction against the defendants' selling, assigning, transferring, or conveying, said real estate; and
- 16 Prays for *such other or further relief* in premises, as the nature of case shall require, and as shall be agreeable to equity and good conscience.
- 18 *Exhibit A*—Is deed dated 29th Oct., 1859, from Edward Williston to Melinda Fisher—consideration \$500—conveys said two acres, with usual covenants of warranty, witnessed by Geo. M. Huntoon, and acknowledged before said Huntoon the said 29th October.
- 21 *Exhibit B*—Copy of deed from Edward Williston to said Melinda Fisher for said 40 acres—consideration \$2,000—usual covenants of warranty, date of deed and acknowledgment 13th January, 1860; witnessed and acknowledged before said Geo. M. Huntoon.
- Bill filed 29th February, A. D. 1860.
- 24 Writ of injunction issued 29th February, 1860.
- Injunction dissolved for insufficiency of jurat on the 9th April, 1860.
- 30 *Answer*
On 23d April, 1860, defendants filed a joint and several answer.

Record ~~to be~~ taken by
Williams by leave of Court

May 13 1843

No 66

ANSWERS.

Admits complainant was seized in fee of the lands as stated in bill—

30 Admits occupancy of house with defendant, but says, that, during parts of time, others lived with them.

31 Melinda, further answering, expressly *denies* that she represented to orator that a friend of hers in Chicago would let her have money to buy said two acres of land, and that she made any agreement as to said 2 acres with orator, as set forth in bill, *but avers the fact of said purchase of said 2 acres were as hereinafter stated, and for the price hereinafter set forth.*

32 *Denies*—That she expressly and explicitly denies that she stated, “that she desired the deed in her own name, because her said husband would spend or waste it, if in his name, and that she stated that said David had once a place of his own, and transferred it to his mother, and could not get it back again, or anything to that effect, as is alleged in the bill, and that she said she did not wish her husband to know who let her have the money, or that she had money, and that she stated she had \$300 in the house, or anything to that effect.

33 *Denies*—That on said 29th October, or at any time, she stated to orator that she would go into Chicago in a day or two, to get the money to pay for the land, and requested orator to get the deed ready on her return, as is in bill represented, or any words to that effect, *but avers that the facts are as hereinafter set forth.*

She *admits*—That complainant told her that he would get her a deed for said land upon the agreement hereinafter mentioned; and avers, that orator did make out, or cause to be made out, a certain deed for the premises therein described, and the same mentioned in said bill, and *delivered the same to her as hereinafter set forth.*

Denies—That orator (to her knowledge) did bring said deed in an envelope, and lay the same upon a table in orator’s bedroom, as alleged by orator.

34 Further answering, says: Knows nothing about said complainant, being absent from the house engaged in farm work, as alleged in bill; and

Denies—That orator came into the house and asked her for the deed, and that she replied that she had it and wished to bring the same to a lawyer in Chicago to see if it was right, and if so would get the money and pay for it, and that then the deed would be hers, or that she said anything to that effect.

■ Knows nothing of confidence reposed by orator in her, and

■ *Denies*—That orator importuned her to go to Chicago and
35 get the money for him on account of said land, or other account, and that she kept making any excuses or pretences for not doing so, as alleged by orator.

Admits—That at a subsequent time, or after said deed was given her, she came to Chicago, and believes that orator came with her, but

■ *Denies*—That she came to get said \$500, or under any such pretence, or that when she returned she told orator she did not see the gentleman of whom she expected the money, or that she said she would get the same next time she came to Chicago, or said anything to that effect.

■ *David further answering says*: Knows nothing of things
36 herein answered by Melinda, except from complainant and Melinda, and from their statements he is led to believe that charges in bill are false, except as to those admitted by said Melinda, and believes her answer to be true.

■ *Defendants further answering say*: That on 15th November, 1859, orator came to Chicago with defendants; orator went with David to recorder's office, and left said deed for two acres, himself, to be recorded, and

■ *Denies*—That orator did not know that the same was on record until
37 the said 27th February, and that orator demanded on that day the delivery of said deeds, as alleged in bill.

■ *Admits*—That Melinda came to Chicago about 10th January, 1860, and that said *David*, who was then on his way home, there joined her, but

Denies—That said Melinda came to Chicago to obtain money as alleged, and also that they desired the trade between Melinda and orator should be kept secret from said complainant; told the defendant David, that he had conveyed to said Melinda said property, and that complainant and defendants talked of building a house thereon as will hereinafter appear.

■ 37 *Said Melinda Denies*—That Orator upon returning home demanded said or any money of defendant, and that she told complainant that she had a check for \$2500 on Tinkham's Bank or for any sum—and that she asked complainant if the bank was good, or that complainant said that said bank was good, and that any conversation of the kind occurred be-

tween them, and that she stated that her friend wanted complainant to sell the 40 acres, and that said friend would give \$2,000 or anything to that effect, but avers *that the facts are as will hereafter appear.*

37 *8* Answering she *denies*—That she agreed to pay complainant \$2,000 in cash for said 40 acres as charged in said bill, or that she agreed to draw the money on the check as charged, and that anything was ever said by her and complainant about such or any other check.

38 Defendants *admit*—That complainant made out a deed for said Melinda for said 40 acres, but say they do not know of his placing it among his private papers, as alleged, but *aver* that when they first knew of its being ready for delivering, the said complainant came into room and passed it to Melinda, stating to her at the time that “there was her other deed;” and said Melinda

39 *Denies*—That she surreptitiously obtained said deed for said 40 acres as charged, or that she conversed with complainant, as is therein charged, about cheating him out of his money.

40 Defendants *deny*—That they caused said deed of 40 acres to be placed on record without complainant’s knowledge, and that complainant did not know of its record until the said 27th of February, but aver the fact to be, that on the 17th of January, 1860, complainant and defendants came to Chicago together and complainant himself handed said deed to recorder and asked the recorder to record the same and paid him therefor.

40 *Admit*—That David commenced making preparations to build, as charged, but deny that complainant then demanded said deeds or either of them, but aver that he, David, erected a small house on said 2 acres.

41 *Deny*—that anything was said to them or either of them about drawing a check and paying money to said complainant, as charged by orator, or in any other way.

41 *Deny*—That said deeds were ever demanded before commencement of suit, and that they refused to deliver them, and

41 *Deny*—expressly that they were obtained by said defendants fraudulently, or without consideration and against the will of complainant, or put upon the records of Cook county without his consent, but *expressly aver* that the *said deeds were delivered and recorded as above averred.*

41 *Further answering, say*—That said 2 acres, were worth \$100 per acre, and that two hundred dollars was the consideration agreed to be paid by defendants to complainant, and that the same was so paid by the defen-

42 dants to complainant, and paid in the following manner: The said defendants had been living in the house of complainant, working for him, boarding him and working land with him, and that on the 15th October, 1860, complainant settled and accounted with said David for said board, work and matters between them, and upon said accounting the said complainant was found to be indebted to said David in the sum of \$193 $\frac{25}{100}$, and that said account, by agreement of complainant and David, was to be allowed as so much payment on said two acres, leaving to be paid on said purchase \$6 $\frac{5}{100}$ which said David paid to complainant, six dollars in bank bills and seventy-five cents in silver, and thereupon complainant agreed to deed the said two acres to Melinda; and on 29th of October following, said complainant delivered said deed made to Melinda, by consent of all parties; that they then first knew that consideration exceeded said \$200, and complainant, when asked why he put it \$500, laughingly said it would make the defendants seem rich.

43 Defendants further answering say—That the said forty acres of land in said complainant's bill of complaint mentioned is worth from fifteen to twenty-five dollars per acre, but that the facts with reference to the purchase of the same are as follows: that during the time that said defendants had resided in the house of said complainant, said Defendant David Fisher had often been absent, sometimes being gone for three or four days, (he being a carpenter and joiner and working at his trade,) at other times as many weeks, and that in the spring of 1859 he started for Pike's Peak, and was absent about two months, and that he was again absent the first 44 of the winter thereafter about four weeks, supposing his wife Melinda was at home safely and true to her marriage vow, and not thinking that anything could be wrong on the part of the complainant, but that upon his return from Dupage county, where he had been working at his trade for one Thatcher, he thought he saw evidences of the infidelity of her, the said Melinda; that the said defendant David Fisher accused both parties of the same, and both complainant and defendant Melinda persistently denied the same, but that afterwards, said defendant David saw other circumstances corroborating his first impressions; that he again accused the said complainant of seducing the said Melinda, and the said complainant thereupon acknowledged the same to be true, and states that he had seduced her the said Melinda, but that he would make the best amends he could for so doing and that if the said defendant would settle the same, he would pay him well therefor; and the said defendants aver that the said matter was settled, and the said complainant agreed with the said defendants that for the wrong and injury which he had done them, he would give said defendants a deed of said forty acres of land; and the said David refused to receive the deed in his own name, but agreed that if he would deed the said premises aforesaid to the said Melinda, and in future behave himself properly, and commit no further act or acts of indecency with said defendant Melinda, that then the same should be settled, and thereupon in full settlement of said act of seduction of said defendant Melinda by

said complainant, said complainant caused to be made out, executed and delivered to said defendants said deed of said forty acres of land aforesaid.

• Answer filed 23d of April 1860. Referred to Master per stipulation.

DEPOSITIONS.

Complainant's.

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A. G. Wilder—Know complainant 15 or 20 years; fifteen in Cook county; defendant about three years; knows location of land; had conversation with David Fisher as to the lands mentioned, about the last of February, in front of Williston's house, in reference to two acres. David said it was paid for, was free and unincumbered, or words to that effect; as to 40 acres David said he did not pretend to know how it was paid for or anything about that—that he had never seen the deed until the Monday before, and he then took it and got it recorded; I then said to him, that if it was as Williston represented it to me, I would not give him ten cents for a title of that sort; he David said that it did not make any difference; that he David once owned a farm and got into a scrape and had deeded it away and could never get it back again; he did not say what he paid, but did say *that as long as the deed expressed the consideration it made no difference*; I said to Fisher that if Williston had received money he would have paid it to me, that Williston had asked me if I could use any.

My recollection is, but I am not positive, that *I told him that Melinda had the check*. I told Fisher that it was plain enough to me that Williston had not received any money or he would have paid it over to me; it was then he replied *about its making no difference about the consideration*, and having got into a scrape as above.

Fisher did not tell me what kind of scrape he got into, am not positive, but think he said he deeded his farm to his mother.

It was agreed that exhibits A. and B. should be used as originals.

53 GEORGE M. HUNTOON testifies:

56
That deeds were drawn by witness and acknowledged and executed by complainant in his presence, and that no one else was present; and that complainant took them off. In April 1859, as David was about to start to Pike's Peak, I made a bill of sale of David to Williston for some borrowed money. Proves that Fisher had no property.

■ Testifies to conversation with David—says: David told me, 59
 in November, 1859, that he had bought the 2 acres of Williston, and was
 going to build on it; sometime after that—in February, I think—David
 told me he expected to have a law suit with Williston; I asked him why
 he was going to have trouble; he said that Williston wanted to get the
 land back again, under the pretence that it had not been paid for; I asked
 him if he meant the part he had built on; he said yes, that and forty acres
 more on the prairie; I asked him how he was to pay for it, or when; I
 also asked him how much he was to pay for the part where they were
 building; *I think he told me five hundred dollars an acre for the two
 acres; I answered him that I thought it was a pretty good price, but he
 would be sure enough to pay for it, if he had time; he made no answer
 to that;* I then said: then you have paid for the land, and Williston is
 trying to get it back; he said, it's all settled and fixed, and that he had
 a deed; I then said: then you have paid for the land all straight, and
 got your deed? David said, it says paid full, and it's on record; he said
 every dollar had been paid for—that he went down to the city, a day or
 two before, particularly to see about that, and that *one of the best law-
 yers in the city told him it was all right;* I then made the remark, that
 I was not aware that he had made such a large trade; he then remarked
 that it was not his trade; that it was a trade his wife had made; and
 when I said: *that it was money or means your wife had?* he answered
yes; I then said to him: I don't see what chance Williston has to have
 any trouble with you, or how he is going to bring any law suit; he then
 said that Williston had not told him, but he was telling others what he
 60 was going to do, and that he expected every day when he would be
 brought up before the Court about it; the next remark I made was that
 I would be very sorry if you do have any trouble—that I did not know
 that Williston was that kind of a man, but that I knew very little about
 him; his answer was that he had trouble with everybody there.

I had a conversation with *Mrs. Fisher;* I went down to Mr. Fisher's
 house to see him; he was not at home. Mrs. Fisher mentioned the
 subject herself; she said that she expected Williston was going to make
 them trouble about that land; *that he had been at her to buy some land
 of him for over a year and a half;* that he had said a great deal about
 it, and that finally she thought it might be best to buy a little piece of
 him; that she had been running around a great deal, and had never
 had a home. That Williston *knew she had money,* and he seemed deter-
 mined to have it; he knew just how much she had; that he knew all
 about it, *knew her folks, and had been east with her;* and now that *she
 had bought the land, and he had got all the money that she had,* he now
 wanted to get it back because she would not pay him more; she said she
 supposed he was honest when he made the trade, and would act honora-

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 wanted to get it back because she would not pay him more; she said she
 supposed he was honest when he made the trade, and would act honora-

bly; that she was not well acquainted with the doing of such business, and she did not suppose he would act that way; that she had trusted everything to him about this transaction, and now he was trying either to get more money or have the deeds back, but that he should not have them; that if he was a mind to go to law to get them, he might, but that she should never give them up willingly. She then said: I don't know that the deeds are good that he has given me. She then went into the other room and brought out two deeds, and showed them to me; I looked at them, and said, these seem all right, and handed them back to her; *this was a few days after the conversation with Mr. Fisher*; I think it was in the early part of February. Praves that Fisher said, after he got back from Pike's Peak, he was clean down and had lost all he had.

DEFENDANT'S DEPOSITION.

64 DAVID HOUGH:

Had a conversation with Fisher some time in February about the 40 acres, at my own house. No one was present but my family.

65 Mr. Williston was speaking of purchasing the north half of my forty, and proposed to sell the north half and give half of the road across the remaining part west to his line, his east line, provided he would give the other half if he purchased. Well, he spoke and said it would suit him very well, so far as the road was concerned, but it would not suit Mr. Fisher so well. Why, says I, what interest has Mr. Fisher down there? Why, says he, I suppose it is generally known (or words to that effect) that he had the north forty of my eighty, or rather Mrs. Fisher. "I proposed to sell the north half of the forty for \$30 per acre, and Williston said he had the money, or that he knew where he could get it. Williston never spoke to me again about it.

68 MELISSA L. SHAKESPEARE.

68 Had a conversation, in February last, with Williston; I went to Williston's house to rent his farm; I asked him if it was all the land he had; he said, I have just given to this lady (pointing to Mrs. Fisher) a deed of the two acres, upon which they are going to build a house. When I spoke of the prairie land, he said he had but forty acres; he had just made Mrs. Fisher a deed of forty some time before; he said he could not rent me the remaining forty because some man (I don't recollect his name) had spoken to him about renting it, and in case he wanted 69 it, I could not have it; then in rehearsing it over again in the course of conversation, he said he had sold this two acres to her, and he likewise changed the mode of speaking of the prairie land; he said that he had just given her a deed of the prairie land. Heard Williston say Fisher was at work at his house, that Fisher and wife were going to live in.

77 PATRICK GOODWIN testifies:

78 Knows house where Fisher lives; I was there in February; saw Williston help carry some square timbers, to set up to the corners.

78 WILLIAM KYLE testifies:

79 Sometime in February there was a German came to Williston's house to rent ten acres of land from Williston; the German spoke to him about the ten acres; Williston told him "he did not own that 40 acres; that he might rent ten acres of her—it is Mrs. Fisher;" saw Williston assist some in erection of Fisher's house.

84 MARY DIDIER testifies:

85 She was at Williston's house in winter time; last winter "a man was there named Lawrence, wanted to rent grass of Williston, and Williston told me to tell him that it was Mrs. Fisher's land; then Mrs. Fisher asked Williston how much it was worth an acre, and Williston replied—That it was none of his business to put a price on her property."

91 JOHN N. DIDIER testifies as follows to conversations:

92 "That about the latter part of January, in my own house, my wife, me and Mr. Williston were present. I asked Mr. Williston if he had sold some land to Mr. Fisher, and he said that he had nothing to do with Fisher. I asked him if it was not to Fisher it must be then to Mrs. Fisher; but the answer he gave me I don't know for certain; at that present time nothing more was said about the land. About two months afterwards we had another conversation in the field somewhere. I don't know whether it was on his or my place; no one besides us was present; he said that woman, Mrs. Fisher, had tried to cheat him out of that property, and that they stole the deeds away from him, and other property, and he thought it was a block game got up long before the time the deeds were made out; the land referred to in these conversations were the 40 acres and the two acres in dispute in this suit; Fisher told me Williston let him have money to go to Pike's Peak." That two acres were worth \$100 per acre, and the forty, fifteen dollars per acre. Fisher is a laboring man, depending on his labor for his support.

94 paid \$40 per acre for 25 acres of ground this 20 acres
96 JOHN O'LEARY testifies:

97 Had a conversation with Williston middle of last winter; he told me he had sold the two-acres of land to Mrs. Fisher for \$500.

98 PETER MUNO testifies to conversation :

99 Williston told me he had sold 40 acres of prairie land and 2 acres on the ridge to Mrs. Fisher. I told him Fisher said he had bought two acres of land, and had paid \$500 for it ; Williston said he had sold it to Mrs. Fisher. I asked him how he got his pay ; he replied, you know if I sell something, I look out that I get my pay for it. Prove property of defendants, and that Fisher depended on his labor for his support.

101 GEO. M. HUNTOON testifies as follows :

102 "Sometime in the month of October last, Mr. Williston came to me and requested me to make him a deed of two acres of land, and inquired my price for so doing. I filled in the heading of the deed, and when I came to the consideration, I asked him what the consideration was to be. He said Mrs. Fisher had been talked about by the neighbors a good deal ; he paid no regard to what others said ; he had always found her to be a very nice woman. She had been as kind to him as a mother, and he don't know what he should have done if it had not been for her. She had had the care of all his papers, deeds and notes, and he had always told her he would make her a present—something to make her a home. I told him there must be a consideration in the deed ; he might put it one dollar, or a thousand. Well, says he, say five hundred dollars. I so put it in the deed, five hundred dollars. He requested of me particularly not to mention this for fear that Fisher would get hold of it ; he said Mrs. Fisher had some money, and she did not wish Fisher to know it, for fear he would spend all she had, if he knew she had any ; that is about all the conversation that was had at the making of the deed. He said me for the deed and took it away with him." That 2 acres are worth from \$75 to \$100 per acre, and the 40, from \$20 to \$30 per acre.

FOR COMPLAINANTS.

105 JOHN O'LEARY testified :

106 "Had a conversation with Mrs. Fisher a few days before the commencement of this suit. It was in my house at Evanston ; no one was present except Mrs. Fisher and I ; Mrs. Fisher came over to my house, and she wanted to know if I could lend her a dollar and a half ; she said she owed Mr. Williston one dollar and a half ; she said that that was all she owed him, and she wanted to settle up with him. She said she bought two acres of land and forty acres, at twenty-five hundred dollars, and she paid him ; that he knew where she got the money ; that her father died the fall previous, and that amount of money was coming to her as her part of the property ; and that Mr. Williston knew that she was to get

that much money. She said she did not know that Mr. Williston wanted any more than his pay. She said the land came to twenty-five hundred dollars, and she had paid him all up but a dollar and a half, and she wanted to borrow that of me. I refused to loan her the dollar and a half.

109 On the 28th day of December, 1860, the following decree was entered: "And now again comes the parties to this cause, the complainant by Barker & Tuley, his solicitors, and the defendants, by E. F. Runyon, their solicitor, and the cause now coming on for hearing on the bill, answer and replications, and the proofs filed herein; and being argued by counsel, and the Court, being fully advised in the premises, finds that the allegations of the said bill be dismissed at the costs of the said complainant, and it is considered that the said defendants do have and recover against the said complainant their costs and charges in this behalf to be taxed, and have execution therefor."

BARKER & TULEY, for petf. in error
~~Attorneys for Appellants.~~

Errors assigned

- 1st The decree should have been in favour of complainant to amount of the payment of bill
- 2nd The court erred in dismissing the complainant's bill because the allegations of the bill were not sustained by the evidence
- 3rd The burden of proof was on the defendants not on the complainant and the court should have required proof by defendants of the special matter of defense set up by the defendants
- 4th The court should have decreed the payment of defendants to complainants of the consideration expressed in the deeds with a lien on the lands for the payment thereof

Barker & Tuley for
petf in error

And the said defendant in error by
C. H. Runyon their solicitor say that there
are no errors in the ruling of said
court, and that the said rulings are
correct.

C. H. Runyon
Solicitor

61 465
5
Edward Williams

vs

David Fisher

Abstract

Filed Apr 17 1861

Richard
Clark

Jameson & Morse, Printers, Chicago.

SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

EDWARD WILLISTON }
vs. } *Error to Cook.*
DAVID FISHER and }
MELINDA FISHER. } CHANCERY.

ERRORS ASSIGNED.

1st. The decree should have been for the complainant, according to prayer of bill.

2d. The Court erred in dismissing complainant's bill, because the allegations of the bill were not sustained by the evidence.

3d. The burthen of proof was on the defendants, and not on the complainants, and the Court should have required proof by defendants of the special matter of defence set up by the defendants.

4th. The Court should have decreed the payment by defendants to complainants, of the consideration expressed in the deeds, with a lien on the lands for the payment thereof.

BARKER & TULEY,
Attorneys for Plaintiff in Error.

POINTS OF PLAINTIFF IN ERROR.

1st. Inasmuch as the answer under oath is waived, the answers of defendant are "a mere pleading."

4 *Scammon*, p. 13.

4 *Gilman*, 420.

It is clear that the answers do not pretend that the consideration money expressed in the face of the deeds was ever paid, but set up a special consideration and a special defence *in no wise responsive* to bill.

When a defense not responsive to allegations of the bill is set up by answers, the burden of proof is upon the defendant of the facts by which he seeks to avoid complainant's rights and equities. *The answer* is in issue.

5 *Alabama*, p. 374, is a case in point.

19 *Illino's*, p. 344.

Hart vs. TenEyck, 2 *John. Cay.*, p. 62.

Defendant can not avail himself of any matter of defence not set up in his answer, even though it appear in evidence.

2 *Daniels' Chy.*, 2d *Edition*, p. 815.

In the absence of all proof that the consideration money expressed in the deeds has ever been paid, or that any consideration has been paid for the lands, a court of equity will hold that the sum expressed in the deeds was the consideration agreed upon, and that defendants are liable in equity for that sum.

See case of *Cone vs. Newkirk*, 24 *Ill.* 508.

Milliston

127

Fisher et al

Points of Affliction

Filed April 20 1868

S. Siland

Clk.

Bartholmey

for pt

Chicago April 3rd 1861.

To the Clerk of the Supreme
Court. La Salle, Ills -

Dear Sir

Enclosed you will
find Prae. for writ of error in case
of Milliston vs Fisher Etal & \$10 for
costs - please send us the writ
by return mail otherwise we
cannot have it served in time
for the next term

Yours respectfully

Barker & Tuley

Pltffs Attys

STATE OF ILLINOIS, }

COUNTY OF COOK, }

ss.

Supreme COURT, of
the State of Illinois 3rd division
April Term, A. D. 1861.

Edward McCriston
vs.
David Fisher &
Melinda Fisher

Per Chancery

The Clerk of said Court will issue a ~~Summons~~ ^{writ of error} in the above cause, directed to the Sheriff of
Cook County, in a plea of
returnable at the April Term of said Court, A. D. 1861,
to the damage of the Plaintiff of _____ Dollars.

Barker & Tuley ^{appellants}
Plaintiffs Attorneys

To L. Leaud Esq., Clerk.
Chicago,

165 61 J

G. D. No.

Supreme Court of Illinois
2nd Division

April Term A. D. 1867.

Edward McLister

VS.

David Fisher
Etal

PRÆCIPE.

Filed this 5th day of
April 1867.
L. C. Clark Clerk.

Parke Luce
Plaintiffs Attorney