

12202

No. _____

Supreme Court of Illinois

Bryant

vs.

Sears, Jr., et al

71641  7

State of Illinois, Iroquois County, 3

Pleas before the Hon S. W. Randall Judge of the 11th Judicial Circuit of the State of Illinois at the term of the Circuit Court of said County begun and held at the Court house in Middleport on Wednesday the 25th of April AD 1855, the Judge not being here on yesterday Court was not called until to-day. Present Hon S. W. Randall presiding Judge of 11th Judicial Circuit, S. W. Bowen State Attorney, Asa B. Roff Sheriff of Iroquois County, Repe Bennett Clerk

John Sears Jr
and
Charles E. Smith
vs

Henry C. Bryant.

It is remembered that on the twenty fifth day of January in the year of our Lord One Thousand Eight hundred and fifty five, and in the vacation of the said Court, in the office of the Clerk thereof, the process which reads in the words and figures following to wit

State of Illinois 3
Iroquois County 3

Iroquois County Circuit Court
of the April term AD 1855.

John Sears Jr and
Charles E. Smith
assignees of James Fletcher
vs

Debt \$155. 97
Damages \$1000. 00

Henry C. Bryant

The Clerk of said Circuit Court will please issue a summons in the above entitled suit in favor of the said plaintiffs and against the said defendant in an action of debt. The said plaintiffs claim Six hundred and forty five Dollars, and Ninety seven Cents debt and the further sum of One Thousand Dollars Damages, which said summons the said plaintiffs pray may be issued as aforesaid and directed to the Sheriff of said County, and may be made returnable to the April term of said Court AD 1855, and in other respects according to the Statute in such case made and provided

James Fletcher

Attorney for said Plaintiffs

and thereupon a summons was issued and delivered to the Sheriff of the said County which reads in the words and figures following to wit.

State of Illinois }
 Iroquois County } p

The people of the State of Illinois to the Sheriff of
 said County Greeting.

We Command you that you summon Henry
 C. Bryant if to be found in your County, per-
 sonally to be and appear before the Circuit
 Court of said County on the first day of the
 next term thereof, to be holden at the Court house
 in the Town of Middleport on the 24th day of
 April next to answer John Sears Jr + Charles C.
 Smith assignees of James Fletcher in an action
 of debt in the sum of Six hundred + forty five
 + 97/100 dollars to the damage of them the said
 plaintiffs in the sum of One Thousand Dollars
 and have you then and there this writ



Witness Vesse Bennett Clerk of
 our said Court, and the Seal
 thereof, at Middleport, this 25th
 day of January AD 1855.

J. Bennett Clerk

And the said Sheriff returned the said sum-
 mond into the office of the said Clerk with
 an endorsement thereon, which reads in
 the words and figures following to wit:

Served this writ by reading the same to the
 within named H. C. Bryant Deft the 25th
 day of Jan 1855.

Service 50
 Fees 1 mile travel 5
 Returns $\frac{10}{65}$

A. B. Roff Shff

And afterwards to wit on the twenty fifth day of
 January in the year of our Lord One Thousand
 Eight hundred and fifty five there was filed
 in the office of the said Clerk, by the Plaintiffs
 Attorney, a declaration which reads in the
 words and figures following to wit

State of Illinois Iroquois County } p.

Iroquois County Circuit Court of the April
 term AD 1855.

Iroquois County to wit. John Sears Jr and Charles

G. Smith assignees of James Fletcher the plaintiffs
in this suit by James Fletcher their Attorney complain
of Henry C. Bryant the defendant in this suit, being
in custody &c of a plea that he owes to the said
John Deans Jr and Charles B. Smith the sum of
Twelve hundred and ninety one Dollars and ninety
four cents lawful money of the United States
which he owes to and unjustly detains from them
For that whereas the said Defendant heretofore
to wit on the Fourteenth day of February in the
year of our Lord One Thousand Eight hundred
and fifty four at Wagoner County aforesaid
by his certain writing obligatory sealed with his
seal and now shown to the Court here, the date
whereof is a certain day and year above named
to wit the day and year last aforesaid, acknowl-
edged himself to be held and firmly bound unto
James Fletcher or to his order in the sum of six
hundred and forty five dollars and ninety seven
cents for value received, part and parcel of
the said sum above demanded to be paid to
the said James Fletcher or his order. And the
said James Fletcher to whom or to whose order
the payment of the said sum of money in
the said writing obligatory specified was to be
made, after the making of the said writing
obligatory and before the said writing obligatory
became due according to the tenor and effect
of the said writing obligatory, and before the pay-
ment of the said sum of money therein specified
to wit on the Ninth day of June in the year of
our Lord One Thousand Eight hundred and
fifty four at Wagoner County aforesaid, duly
assigned the said writing obligatory by indorse-
ment on said writing obligatory under his hand
by which said indorsement he the said James
Fletcher then and there ordered and appointed
the said sum of money in the said writing ob-
ligatory specified to be paid to the ^{said} plaintiffs, and
did then and there absolutely transfer and vest
the property which he had in and to the said
writing obligatory in the said plaintiffs according
to the statute in such case made and provided
and the said James Fletcher then and there
delivered the said writing obligatory & assign
~~and~~ & indorsed as aforesaid to the said plaintiffs

(4)

by means whereof and by force of the Statute in such case made and provided the said defendant ~~then and there~~ became liable & bound to pay to the said plaintiffs the said sum of money in the said writing obligatory specified, according to the tenor and effect of the said writing obligatory. Yet the said defendant although often requested so to do, hath not as yet paid the said sum of six hundred and forty five Dollars, parcel of the said sum ^{abovesaid} demanded or any part thereof, to the said plaintiffs, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do.

And whereas, also the said defendant heretofore to wit on the fourteenth day of February A.D. 1854 at Vauquois County aforesaid, by his certain other writing obligatory sealed with his seal and now shown to the Court here, the date whereof is a certain day and year above named to wit the day and year last aforesaid acknowledged himself to be held and firmly bound unto one James Fletcher or to his order in the sum of six hundred and forty five Dollars and ninety seven cents, parcel of the said sum above demanded to be paid to the said James Fletcher or to his order and the said James Fletcher to whom or to whose order the payment of the said sum of money in the said writing obligatory specified was to be made, after the making of the said writing obligatory, and before the payment of the said sum of money in the said writing obligatory specified, and before the said writing obligatory became due according to the tenor and effect of the said writing obligatory to wit on the Ninth day of June A.D. 1854 for a valuable consideration at the County of Vauquois aforesaid assigned by indorsement on the said writing obligatory under his hand, and did then and there and thereby absolutely transfer and vest, the property thereof in the said plaintiffs, and the said James Fletcher then and after the said writing obligatory had been so assigned as aforesaid, ~~then~~ delivered the said writing obligatory to the said plaintiffs, by means whereof and by force of the Statute in such case made and provided, the said defendant ~~then and there~~ became bound to pay to the said plaintiffs the said sum of money in the said writing obligatory specified, according to the tenor

and effect of the said writing obligatory; yet the said defendant although often requested to do hath not as yet paid the said sum of ~~any~~ Six hundred and forty five Dollars, & ninety seven cents, or any part thereof parcel of the said sum above demanded to the said plaintiffs, but hath hitherto wholly neglected and refused, and still neglects & refuses to do, to the damage of the said plaintiffs One Thousand Dollars, and therefore they bring their suit

James Hetcher

Attorney for plaintiffs

The following is a copy of the writing obligatory on which the 1st Count in the above Declaration is based to wit

\$645.77

On or before the fifteenth day of November AD 1853 I promise to pay to James Hetcher or order the sum of Six hundred and forty five Dollars and ninety seven cents for value received; Witness my hand and seal this 14th day of February AD 1854

H. C. Bryant Seal

And the following is a copy of the assignment on the back of said writing obligatory in said first Count mentioned to wit:

"I James Hetcher do hereby assign the within note to John Sears Jr & C. G. Smith for value received June 9th 1854"

"James Hetcher"

The following is a copy of the writing obligatory in the said second Count in said Declaration aforesaid upon which the said suit instituted to wit

10
1545.97

On or before the fifteenth day of November
AD 1854 I promise to pay to James Hetcher or order
the sum of Six hundred and forty five Dollars
and ninety seven cents, for value received. Witness
my hand and seal this 11th day of February
AD 1854

N. C. Bryant. *Egaly*

And the following is the indorsement upon the
saide writing obligatory in the saide Court
mentioned to wit:

I James Hetcher do hereby assign the
within note to John Sears, Jr & C. B. Smith for
value rec^d. Done 9th 1854

James Hetcher

And afterwards to wit on the twenty seventh
day of April in the year of our Lord One
Thousand Eight hundred and fifty five
in open Court, and being the third day
of the saide term of the saide Court, the
saide defendant ^{comes and} files his several pleas
to the saide declaration, and afterward
to wit on the day and year last afore-
saide by leave of the saide Court, his
amendments of the saide pleas, which
read in the words and figures following
to wit.

State of Illinois, Iroquois County, ss
Iroquois Circuit Court, Spring term of 1855.

Nenny C. Bryant }
advs }
John Sears and }
Charles S. Smith } Attor.

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on which the
pleas were
written.

The said defendant comes and defends the
wrong and injury when &c. and says Action now
because he says that heretofore to wit on the
14th day of February A.D. 1854 the said defendant
purchased certain goods, wares and merchandize
of John Harwood and James Fletcher and also the
good will of the said James Fletcher and John
Harwood as druggists in the town of Middleport
in the County of Iroquois and State of Illinois
for the term of two years, and for and in consid-
eration that the said John Harwood and James
Fletcher would bind themselves not to sell any
drugs, nor keep a drug store, nor go into the
drug business in the said town of Middleport
for the said term of two years, and in consideration
that the said Harwood and Fletcher would assign
to the said defendant their agencies in and
to all the patent medicines which they had
placed in the hands of the said defendant
and in consideration that they would use their
influence and best exertions with the owner
or owners of said patent medicines in procuring
the said several owner or owners of said patent
medicines to make a transfer of the said
agencies of said patent medicines from them
the said Harwood and Fletcher to him the said
defendant, the said defendant paid to the
said Harwood and Fletcher the sum of Two
Hundred Dollars, and made and executed and
delivered to the said James Fletcher his two several
sealed notes, one for the sum of One hundred
Dollars and the other for the sum of Sixty hundred
and forty five dollars and ninety seven cents,
which said last mentioned notes is the same men-
tioned and described in the said plaintiffs decla-
ration, and in the several counts thereof, and the
said James Fletcher and John Harwood by the name
style and description of Harwood and Fletcher then
made executed and delivered to the said defen-
dant their agreement in writing (## Exhibit ##)
which reads in the words and figures, following

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to wit. "Article of Agreement made and entered into
this 16th day of February AD 1854 between Harwood
& Fletcher of the County of Wroquois and State of Illinois,
party of the first part and Henry B. Bryant of the
same County and State party of the second part.
Witnesseth that the said Harwood and Fletcher having
heretofore to wit on the 25th day of January AD 1854
sold to the said Bryant their stock of drugs in the
Town of Middleport in said County of Wroquois, do
now agree with the said Bryant that they will not
keep a drug store or go into the drug business in the
said town of Middleport for the term of two years
from this date, but it is expressly understood by
and between the parties hereto that this agreement
shall in no wise effect the said Harwood from
carrying on his business as a physician in dealing
out and selling medicines to his patients or other
persons calling upon him, or applying to him, or
to other persons in his office for such medicines, and
he the said Harwood shall and may deal out
and sell to any person or persons any medicines
whatever in his practice as a physician by prescription
or otherwise, that shall be necessary for the relief
of such person or persons in the opinion of the said
Harwood, and the said Harwood shall be entitled
to keep all the necessary medicines that he may
think proper for his practice and shall be entitled
to keep an office in said town for the purpose
of his practice, and to keep therein his said
medicines, and may therein make & deal out
his prescriptions and medicines aforesaid, the
said prohibition from keeping a drug store
is understood only to extend to the business
of a regular druggist, and the said Harwood
and Fletcher do further agree to and do hereby
assign their Agencies in and to all the patent
medicines which they have placed in the hands
of the said Bryant and do agree to use their
influence and best exertions with the owners
or owners of said patent medicines (## ##
amendment) to make a transfer of the Agen-
cies of said patent medicines from them
the said Harwood and Fletcher to him the
said Bryant

Harwood & Fletcher

Feb 16. 1854

And the said defendant says that said

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Fletcher and Harwood violated the said article of agreement in this, that within thirty days after he the said Bryant had purchased the ~~stock~~ goods, wares, and Merchandise and stock of drugs and good will for the term of two years from the said Harwood and Fletcher, they the said Harwood & Fletcher did wrongfully fraudulently and clandestinely go into the drug business in the said town of Middleport, and did barter and sell drugs and medicines in the said town in violation of said agreement, and did not use their influence and best exertions with the owners of the patent medicines they had placed in the hands of ~~the~~ said defendant in procuring the said owner or owners of said patent medicines to make a transfer of the Agencies of said patent medicines to him the said defendant from them the said Harwood and Fletcher but on the contrary fraudulently and wrongfully procured the Agencies thereof, to be transferred to one Martin Van Buren Harwood for their own use, and did ^{also} retain to themselves fraudulently and wrongfully the agencies of divers patent medicines with the intent to cheat and defraud the said defendant out of his just rights, by which the said defendant is greatly damaged, and hath sustained damage in the sum of One Thousand Dollars wherefore he says that the consideration of the said note mentioned and described in the said plaintiffs declaration and in the several counts thereof hath wholly failed, of which the said plaintiffs had notice at and before the assignment thereof to them the said plaintiffs & (Amendment) which he is ready to verify wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him &c

Pearson Daines & Bryant
for defendant

And for further and other plea in this behalf the said defendant says actio non because he says that the said writing obligatory mentioned and described in the said plaintiff

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declaration and in the several counts thereof, was executed and delivered to the said James Fletcher in consideration that the said James Fletcher and one John Harwood who were then and there druggists in the town of Middleport in the County and State aforesaid under the name style and description of Harwood and Fletcher had sold to this defendant a lot of drugs, and had agreed with this defendant that they the said Harwood and Fletcher would not sell any drugs nor follow the business of druggists in the said town of Middleport in the County and State aforesaid, for the term of two years and that they the said Harwood and Fletcher would assign and transfer to the said defendant the Agencies in and to all the patent medicines which they had placed in the hands of the said defendant, and would use their influence and best exertions with the owner or owners of said patent medicines, in procuring the said several owners of the said patent medicines to make a transfer of the Agencies of the said patent medicines from them the said Harwood and Fletcher to him the said defendant, and the said defendant avers that relying upon the agreement and undertaking of the said Harwood and Fletcher, and in consideration thereof, he paid to them, the sum of Two Hundred Dollars, and made and executed to the said James Fletcher his two several writings obligatory sealed with his seal and dated the Fourteenth day of February in the year One Thousand Eight hundred and fifty four, one for the sum of One hundred dollars and one for the sum of Six hundred and forty five Dollars and ninety seven cents, which said last mentioned writing obligatory, is the same mentioned and described in the said plaintiffs declaration and in the several counts thereof (## amendment) yet the said defendant says that the consideration of the said last mentioned writing obligatory has wholly failed in this, that the said Harwood and Fletcher have not kept their agreement, and undertaking with this defendant, and did not nor would use their influence and best exertions to procure the owners of said patent

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medicines to make a transfer of the agencies of the said patent medicines from them the said Harwood and Fletcher to the said defendant, but have wholly violated the said agreement, and undertaking, and did within thirty days after the execution of the said agreement and undertaking wrongfully and fraudulently engage and go into the drug business in the said town of Middleport, and did barter and sell drugs and medicines in the said town, in violation of said agreement and wrongfully and fraudulently the agencies of the said patent medicines to be transferred to one Martin Van Buren Harwood for their own use, and did also wrongfully and fraudulently retain to themselves, and to the said John Harwood for their use, the agencies of divers patent medicines with intent to cheat and defraud the said defendant out of his just rights, by which the said defendant has been and is greatly damaged and has sustained damage in the sum of One Thousand Dollars, and of which the said plaintiffs had notice at and before the assignment of the said writing obligatory to them (X) ^{amendment} which he is ready to verify wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action therefor against him &c

Pearson Doines & Bryant
for Defendant

And afterwards to wit on the twenty seventh day of April AD 1855, by leave of the said Court first had and obtained the said defendant filed his amendment to his said pleas which reads in the words and figures following to wit

"Amendment of first plea by leave of Court

At page 3 at the mark thus indicated ## insert the following "in procuring the said several owners of said patent medicines"

at page 2 at the mark thus indicated ## insert the following "which said notes and agreements were mutually delivered and exchanged at one and the same time by and between the parties thereto"

At page 5 at the mark thus indicated ## insert

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the following " which said notes and agreement were mutually delivered and exchanged at one and the same time by and between the said parties thereto, "

Pearson Joines & Bryant
for defendants

and afterwards, to wit on the day and year last aforesaid, came the plaintiffs by Paddock and Fletcher their Attorneys and the defendant comes by Bryant & Pearson & Joines & the plaintiffs ~~for~~ ^{demurred} ~~the~~ to the said defendants, pleas which reads in the words and figures following to wit

State of Illinois, Morgan, County, ss.

~~Circuit~~ ^{Circuit} Court April term 1855

Charles ~~Seas~~ ^{Henry} & ~~Charles~~ ^{Smith}
~~signers~~ ^{of James Fletcher}

Henry C. Bryant

And the said plaintiffs as to said plea of him the said defendant first above pleaded saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid action thereof against the said defendant and that they the said plaintiffs are not bound by law to answer the same, And this the said plaintiffs are ready to verify, And the said plaintiffs as to said plea of him the said defendant secondly above pleaded saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid action thereof against said defendant, and that they the said plaintiffs are not bound by law to answer the same and craves over of the Contract mentioned in said plea secondly above pleaded; And this the said plaintiffs are ready to verify, Wherefore by reason of the of said pleas in this behalf the said plaintiffs

may judgment and his damages by reason of
the not performing of said several promises in
said declaration mentioned to be adjudged
to him

Stetcher, Paddock, Whitman and
Bonfield for Plffs.

And the Court after hearing the opinion of Coun-
sel do order that demurrer be sustained and
grants leave to defendant to answer over
And again comes the defendant and files his
amended plea, which reads, in the words
and figures following to wit

State of Illinois, Inquois County ss

Inquois Circuit Court April term of 1855

John Day and }
Charles S. Smith } Debt

vs
Henry C. Bryant }

Amendment of pleas in the said cause filed
by leave of Court after demurred

Upon the fourth page at the place thus indica-
ted * add the following words,

" But the said plaintiffs well knowing the prem-
ises, but combining with the said John Har-
wood and James Stetcher to deprive the said
defendant of his just rights, and legal defence
took the said assignment in bad faith and
with a view to defeat this defendants remedy

Upon the fifth page at the place thus indicated
* add the following words,

" But the said plaintiffs well knowing the
premises but combining with the said John
Harwood and James Stetcher to deprive the
said defendant of his just rights, and
legal defences, took the said assignment
in bad faith, and with a view to defeat
this defendants remedy "

Pearson J. J. Bryant

Attorneys for defendant

to which amended plea the plaintiffs again
demur, (which demurrer reads, in the words
and figures following) to wit

State of Illinois, Vrognais County ss.

Vrognais Cir Court April term 1855

John Sears & Charles G. Smith
assignees of James Fletcher

Henry C. Bryant

And the said plaintiffs as to the said amended plea of the said defendant first & second above pleaded say that the same and the matters and things therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude the them the said plaintiffs from having or maintaining their aforesaid action thereof against the said defendant and that they the said plaintiffs are not bound by law to answer the same, and this the said plaintiffs are ready to verify wherefore by reason of the insufficiency of said pleas in this behalf the said plaintiffs pray judgment and their debt & damages in said declaration mentioned to be awarded adjudged to them.

Fletcher Paddock & Whitman
Attys for plffs.

which demurrer is sustained by the Court And the defendant abides by his pleas whereupon the plaintiffs move the Court for judgment on the demurrer herein. It is therefore ordered by the Court that plaintiffs have judgment on their demurrer and that the Clerk assess the damages which he reports at six hundred & forty five dollars and ninety seven cents debt and seventeen dollars and seventy five cents damages making in all the sum of six hundred and sixty three dollars and seventy two cents, whereupon it is ordered that plaintiffs have and recover of and from the defendant the said sum of six hundred and forty five dollars and ninety seven cents debt and seventeen dollars and seventy five cents damages, making in all the said sum of six hundred and sixty three dollars and seventy two cents, together with their costs and charges laid out and expended, And that they have execution therefor.

State of Illinois Iroquois County
Circuit Court of Iroquois County

I Jesse Bennett Clerk of the Circuit Court of the County of Iroquois and State of Illinois do hereby certify ^{manuscript} that the foregoing is a full true and complete of the records proceedings and judgment of the said Court in the said cause, wherein John Sears Jr and Charles G. Smith assignees of James Fletcher are plaintiffs and Henry C. Bryant is defendant.

In Testimony whereof I have hereunto set my hand and affixed the Seal of the said Court at Middleport in the County aforesaid this thirtieth day of April AD 1855. J. Bennett Clk

Clerks Fee 60 fol \$6.00
Certified Seal .35
\$ 6.35

The Plaintiff in error assigns the following errors in the proceedings and judgment of the said Circuit Court in the said cause viz

That the said Court rendered judgment against the said plaintiff in error upon the demurrer of the defendant in error to the said plaintiffs pleas, when by the law of the land the said Court should have rendered judgment upon the said demurrer in favor of the said plaintiff

John Peguison
G. B. Boister
J. R. M. Bryant

Attys for Plff in error

Let a supersedeas issue in the above case upon the
plaintiff in error filing a bond with the Clerk of the Supreme
Court in the penal sum of One thousand & five hundred
dollars conditioned as the law directs with George W.
Jenner as his surety, himself as principal.

May 16, 1832

J. D. Eaton
Ck. Just. Sup. Court Ill.

Filed May 3^d 1835.
A. A. Hancock Clk.

Henry C. Bryant
vs
Alfred Bond Jr. et al.
Deceit & injury

State of Illinois, ss.

In the Supreme Court of the State of
Illinois, in error to the Wagoner County Circuit
Court.

Henry C. Bryant

John Sears Jr and

Charles L. Smith

assignees of James Fletcher

Debt

This is an action of debt brought by the plaintiffs
below as assignees of James Fletcher against the de-
fendant upon a sealed note, for the sum of
five hundred and forty five dollars and ninety
seven cents, assigned by James Fletcher the original
payee to the plaintiffs before due. In the declara-
tion the defendant below pleaded two pleas, in
both of which he sets up the consideration of
the said note to be the purchase of a stock
of drugs &c from John Harwood and James Fletcher
under the name of Harwood and Fletcher, and
the agreement of the said Harwood and Fletcher
that they would not go into the drug business in
the Town of Middleport in said County for the term
of two years, and that they would use their
influence and best exertions to procure a transfer
of the Agencies for certain patent medicines from
them the said Harwood and Fletcher to the de-
fendant below. The pleas allege that the said
Harwood and Fletcher violated the said agree-
ment in this that they did go into the drug
business within thirty days after the execution
and delivery of the said agreement, and that
they did not use their influence and best
exertions to procure a transfer of the agencies
of the said patent medicines to the defendant
below, but on the contrary procured some of them
to be transferred to the said Martin Van Buren
Harwood for their own use, and that they
retained to themselves and to the said John
Harwood for their use, the agencies of divers
other patent medicines, that the defendant had
paid to them the said Harwood and Fletcher
the sum of two hundred dollars, and made
and executed to the said James Fletcher his two
several promissory notes, one for the sum of One
Hundred Dollars, and another being the same
upon which the said suit was brought, that the
consideration thereof had wholly failed, and
that the plaintiffs as assignees of the said note

had notice thereof at and before the assignments
thereof. See pages of the record, lines
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To these pleas the plaintiffs below demurred, In the
argument upon the demurrer, the plaintiffs below
urged various objections to the pleas.

They contended that no consideration was shown
upon the face of the agreement set out in hac
verba in the first of the defendants' pleas, and
according to its legal effect in the second of
the said defendants' pleas.

This objection has no foundation, either in law
or common sense.

It is a well settled principle that although a party
cannot set up another and different consideration
from that which is expressed in a written instru-
-ment, yet where there is no consideration express-
-ed the consideration of such instruments may
be shown by other evidence, or a consideration
consistent with the written instrument may be
also shown. Even in case of a deed where no consideration
was expressed, parol evidence of such consideration is admissible.
1st Vesey 128. 3^d Starkie's evidence, 1014, 1145. 4th Pickens 71.
The defendant alleged in his pleas that the
said note and agreement were consistent, the
one being the consideration of the other.

The plaintiffs also contended that the said notes
bore date two days before the date of the said
agreement.

This position was utterly indefensible for the de-
fendant had alleged in his pleas, that they
were mutually delivered and exchanged at
one and the same time.

It was a matter of no consequence whether the
note and agreement bore the same date or not
the delivery of either was essential to its binding
force, and it was perfectly competent for the
defendant to show that they were delivered at
one and the same time, that they were part
and parcels of the same contract, that each
was thus the consideration for the other.

The plaintiffs below further objected that the agree-
-ment itself was contrary to public policy and therefore
void, being a restraint upon trade.

There is no foundation for this objection for whilst it is well established as a principle, that contracts made to restrain an individual from engaging in a particular business for an indefinite time, and generally are contrary to public policy and therefore void, yet it is equally well established that contracts to restrain an individual from engaging in a particular business for a limited time, or at a place specified are not. In this case the contract was that the said Hanwood and Fletcher should ^{not} engage in the Drug business for the space of two years in the Town of Middleport in Ironquois County, Illinois.

The English and American Courts have furnished repeated decisions on this point.

See among numerous authorities Chitty on Contracts pages 519 to 521 inclusive

8th Massachusetts reports 223. 9th do 522. 3^d Pickering 188. 1st Pickering 443. 7th Cowen 307. 4th Pitt 486

The last objection urged by the plaintiffs below was that they being assignees of the notes before the same became due, could not be held to answer to the defendants defence. This was claimed under the Statute of the State of Illinois page 385-6 which after providing that the defendant when sued may plead an entire or partial failure of consideration, enacts the following proviso. That nothing in this section contained, shall be construed to affect or impair the right of any bona fide assignee or assignees, of any instrument made assignable by this Chapter when such assignment was made before such instrument became due. It is not every assignee who is protected by this proviso, a particular description of them is given and it is worthy of remark that the Statute confers no new right, but merely recognizes rights already existing, and protects those rights, from the operation of the law. Who are those persons, and what were their rights before the Statute.

The Statute designates them as bona fide assignees and whilst it provides that a total or partial failure of consideration may be pleaded by a defendant it exempts bona fide assignees from its operation. The term bona fide must therefore be understood as equivalent to "innocent purchaser" who becomes

possessed of any description of property without notice of any legal defence, or superior right, and there must be not merely a valuable consideration paid, but the party acquiring the right, must do so, without such notice. If any other construction be given to this proviso, it must inevitably operate as a shield to the grossest fraud, an individual utterly irresponsible may obtain the obligation of another without any consideration whatever, or a total failure of consideration may take place long before the obligation becomes due and payable, and by the assignment of it he compels the maker to pay the sum specified, to the assignee, although the assignee had full knowledge of all the facts in the case and may have taken the assignment with the especial view of defeating and destroying the legal remedy of the obligor.

Why is the distinction made in regard to assignees of instruments before they are due, and assignees of instruments after they are due, the only reason that can be assigned is, that the fact of a note being due when it is proposed to assign it, is sufficient to put the party upon enquiry in regard to the defences, that may be waged against it. X whilst the proposition to ~~put~~ assign the note before the same became due, would naturally lead to no such enquiry, but if the notice of a legal defence was brought home to such assignee or he was put upon enquiry, before the taking of such assignment, he would stand in precisely the same position. In the case of Woods vs Syner, 1st Scammon, he is called an "innocent assignee".

His position before the statute was that he could not be made to answer to a defence made to a note negotiable and assigned before due, of which he had no notice at the time of taking such assignment.

In the case of Mulford vs Shepard 1st Scammon page 583 this doctrine is fully recognized.

There the principal grounds of impeaching the judgment below, was that there was no evidence showing notice to the assignee of the failure or part failure of the consideration before the assignment.

The case of George D. Adams vs David Woolbridge 3^d Scammon p 255 takes the same view of what is to be understood by the term bona fide assignee.

See also *Conkling vs Underhill & Scammon* p 388

The defendant below in this case expressly charges that the plaintiffs had notice of the matters and things alleged in his pleas at and before the making of the said assignment. To substantiate this allegation he must prove it. If he had not alleged notice to the plaintiffs before the making of the assignment, the judgment of the Court below upon the demurrer would have been correct, the plaintiffs would in that case so far as shown by the pleas, would have been bona fide assignees, within the meaning of the Statute, but having alleged it, the position which they occupy in the controversy is entirely changed.

We have thus examined the cause as it stood upon the decision of the first demurrer; but after that decision the amendment filed by the defendant, and which was subjected to a second demurrer and a judgment for the plaintiffs upon that demurrer takes them completely out of the imaginary protection of the Statute, and places the error in the Court below beyond all doubt. The defendant below therefore prays a writ of error to the Circuit Court of Wagoner County, and that until his cause can be heard that a supersedeas may be awarded him, and that the Supreme Court will reverse the decision of the Circuit Court.

Pearson, Jones and
J.R.M. Bryant for Plaintiff
in error.

Henry C. Bryant
vs

John Sears, Jr
Charles G. Smith
assignees of James
Fletcher.

Error to the Oregon
County Circuit Court

Plaintiffs Brief

Filed May 16. 1855
L. Kelam Clk.

J. Pearson } Atty for
E. B. Joines } Plff in
J. R. M. Bryant } error

Know all men by these presents, that we Henry C. Bryant and George B. Joiner are held and firmly bound unto John Sears Jr and Charles G. Smith in the penal sum of One thousand Five hundred Dollars, to be paid to the said John Sears Jr and Charles G. Smith their executors administrators and assigns to which payment well and truly to be made we do bind ourselves, our heirs executors and administrators firmly by these presents sealed with our seal, and dated this 30th day of April AD 1855.

Whereas at the April term of 1855 of the Circuit Court of the County of Wagoner in the State of Illinois, the said John Sears Jr and Charles G. Smith by the consideration of the said Court recovered a judgment against the said Henry C. Bryant for the sum of six hundred and sixty three dollars and seventy two cents together with their costs and charges and whereas the said Henry C. Bryant is about to apply to one of the Judges of the Supreme Court for a writ of error, and a supersedeas, Now the condition of the above obligation is such that if the said Henry C. Bryant shall duly prosecute his said writ of error in case the same shall be granted him and pay and satisfy the said judgment and costs, interest and damages, in case the said judgment shall be affirmed, then this obligation to be void or else to be and remain in full force and virtue in law.

Sealed and delivered
in presence of us

H. C. Bryant *(Seal)*
George B. Joiner *(Seal)*

I, Asa B. Roff, Sheriff of the County of Troyes do
solemnly swear that I believe George B. Jouin,
the security on the within bond, to be worth at least
five thousand dollars over & above his debts -
his property consisting principally in real estate
in said County - ASB Roff

Subscribed & sworn to }
before me May 3^d 1885. }
L. Leland Clk.

This May 16. 1885
L. Leland Clk.

Byrant & Standish
Bond & justification

In the Supreme Court - State of Illinois

John Sears pr. & Charles G. Smith

ads.

~~in~~ Error

Henry C. Bryant

And hereupon afterwards, to wit: - at the
June Term of said Supreme Court A.D. 1855, the said John
Sears pr. & Charles G. Smith Defendants in error, by Mr Or-
good their Attorney, come here into Court & say that there is
no Error, either in the record & proceedings aforesaid, or in the
 rendition of the judgment aforesaid, and pray that the
justices of the said Supreme Court now here may proceed to
examine as well, the record & proceedings aforesaid, as the mat-
ter aforesaid, above assigned for error, that the judgment
aforesaid in form aforesaid given may be in all things af-
firmed, & their ~~charges~~ charges allowed & adjudged to them on

Mr Orgood Atty & of
Counsel for Defendants in
Error

Supreme Court

John Sears et. al
vs.

Henry C. Bryant

Heir in error

Wm. Osgood atty in
for depts in error

Filed July 3^d 1855.
S. Leland Clk.

Supreme Court - State of Illinois - In 3d. Division

John Sears, Jr. +
Charles G. Smith vs. in error
advs.

Error to Illinois County

Henry C. Bryant vs. in error

This is an action of debt brought by Plaintiffs below as assignees of James Fletcher on a sealed note for \$645.97, of date February 14th. 1854 + due on or before the 15th day of November 1854.

The declaration contains two counts in the usual form in debt, + shows the assignment of the note by Fletcher the payee to the Plaintiffs below - June 9th. 1854 (before due) for valuable consideration.

The defendant below, (Bryant) pleaded two pleas, in both of which he alleges a total failure of Consideration of the note declared on - and in both of said pleas he clearly shows there was not a failure of Consideration.

The Plaintiffs below demurred to defendant's pleas, which demurrer was sustained by the Court, + the defendant by leave of the Court, amended his pleas - The Plaintiffs then demurred to the amended pleas, + the Court sustained the demurrer to the amended pleas, + the defendant standing by his pleas + making no further defence, the Court rendered judgment for Plaintiffs + against the defendant for the amount of the note + interest in debt + damages in due form.

The Defendant below complains of the decision of the Court, in sustaining the Plaintiff's Demurrer to his Pleas & brings the case here for review - I believe there is no complaint of error in the form of the judgment, but that the Court erred in sustaining the Demurrer to the Pleas

The 1st. Plea alleges the Consideration of the note to have been a purchase by Bryant, the Defendant below, on the 14th day of Feb. 1852 of certain goods, wares & merchandise of John Harwood & James Fletcher, & the good will of said Harwood & Fletcher as Druggists in the Town of Middleport, in Ingham's County for two years - That said Harwood & Fletcher would bind themselves not to sell any drugs, nor keep a drug store, nor go into the drug business in said Town of Middleport for said term of two years - and in consideration that said Harwood & Fletcher would assign to said Defendant their agencies to all the patent Medicines, which they had placed in his hands - and that they would use their influence & best exertions with the owners of said patent Medicines to make a transfer of said agencies from the said Harwood & Fletcher to said Bryant

Said 1st plea also alleges that said Defendant Bryant paid to said Harwood & Fletcher \$200.00 & gave to said James Fletcher two sealed notes, one for \$100.00, & the other for \$645.97, & that said last note for \$645.97, is the same note described in

Plaintiff declaration in this suit -

Said 1st. Plea also alleges an agreement in writing to have been made by Harwood & Fletcher to said Bryant, which is set forth in habe verba, in said plea & bears date Feb. 16th. 1854 (two days after the date of the note declared on) & signed by "Harwood & Fletcher", as partners, (without seal).

Said agreement recites that on the 25th. day of January 1854 (Some twenty days before the date of the note declared on) said Harwood & Fletcher sold to said Bryant, their stock of drugs in the town of Middleport, and then without alleging or showing in any manner, any consideration therefor, states & shows that said Harwood & Fletcher "do now agree", that they will not keep a drug store, nor sell drugs for two years - in the town of Middleport - as alleged in said plea

Said 1st. Plea then alleges that said Harwood & Fletcher went into the drug business at Middleport within thirty days after Bryant purchased said goods, wares & merchandise & stock of drugs, goods will - that they did not use their influence to procure for Bryant the agencies for said patent medicines - but that they procured the transfer of said agencies to Martin Van Buren Harwood for their own use, & also retained to themselves the agencies of divers patent medicines - and therefore it is alleged in said plea

that the consideration of said note hath wholly failed,
of which the said Plaintiff, had notice at & before the assign-
ment thereof to them &c.

The 2d. Plea is in substance
like the first, giving the substance of the alleged agreement
in the 1st. ~~plea~~ plea, instead of reciting it, & containing
substantially the allegations of the 1st. plea in different
language, & does not purport to set up any other defence
than that contained in the 1st. plea

I have thus given a succinct statement
of the material allegations of the pleadings of the defend-
-ant below, that the Court may be able fully to compre-
-hend the defence set up, & judge of its sufficiency.

It will be recollected that this suit
was brought in the Court below upon a sealed note
which was assigned to Plaintiff, below, before it
became due, & upon valuable consideration — And
the question arises whether under our statute, the defence
attempted to be set up by Defendant below is available
See Rev. Laws, 1845 Page 285-6 — Sec. 10 — The Proviso thereof
See also 2d, Scam. Rep. P. 255, Adams vs. Woldbridge
Id. P. 288, Conkling vs. Underhill

If the Court, however should be of
the opinion that the defence attempted to be set up

is available in this case, & that sufficient is set forth in the pleas to let in the defence - Then the question arises as to the sufficiency of the pleas in other respects.

If the pleas are substantially defective the Demurrer was well taken & the decision of the Court below correct -

I believe it is a rule of law well settled that nothing is to be taken by intendment in favor of the pleader - The pleas in this case attempt to set up a total failure of the consideration of the note declared on - and set up an agreement from Harwood & Fletcher to Bryant & a violation of said agreement to show such failure -

The Court will observe on looking at said agreement, (as set out in the 1st. plea & as alleged in the 2d.) that it can cut no figure in this suit - It being made without consideration & is void - It is not under seal - It does not express or show any consideration upon its face - Nor is there any allegation in the pleas showing any consideration for the agreement.

And it being (at most) a simple agreement, & showing upon its face that no consideration was moving for making it, & no consideration therefor being alleged in the pleadings, it can be of no avail in this suit or elsewhere.

Without the agreement the defence set up must necessarily fail -

But again, the pleas attempt to set up a total failure of consideration of the note declared on, with notice to Plaintiff below, when they took the assignment of the note -

It is essential to a plea of this description - 1st. That the Pleader should set forth every distinct element entering into the transaction (composing the consideration)

And 2dly That the Pleader should then set out distinctly any a failure of each & all the parts of it - Else the plea would be bad as a plea of total failure -

See 15th. Ill. Rep. P. 182 -
Kinney vs. Limer - Also 15th. Id. - P. 85. Sullivan vs. Dollins - See also 13. U.S. Digest - Vol. 8. Annual Digest 1853 - P. 530 sec. 71 - referring to 15. Ala. 141 - Mead vs. Hughes - "A plea which sets out the consideration of the contract sued on, but does not aver wherein the consideration is insufficient is no answer to the declaration & a demurrer to it is properly sustained"

The Pleas in this case allege the consideration of the note declared on to have been a sale by Harwood & Fletcher to Bryant of divers

goods, wares & merchandize & drugs, as well as their good will & agreement, not to keep a drug store -

The Pleas nowhere disclose the value of the goods, wares, merchandize & drugs - Nor do the pleas allege, or in any manner attempt to show that the consideration (so far at least as such goods, wares & merchandize & drugs are concerned) has at all failed

Now in the absence of any allegation as to the value of the said goods, wares & merchandize & drugs - is not the presumption warranted that said goods, wares, merchandize & drugs formed the whole, (or at least the major part) of the consideration of said note?

Again said pleas allege that said Harwood & Fletcher agreed to assign to Bryant their agencies to the patent medicines which they had delivered to said Bryant, & the agreement set out in the pleadings, discloses that they did assign to said Bryant the said agencies

There being a total absence of any allegation in the pleas, of the failure of the consideration set out, - in each & all the parts of it, the pleas are bad & the demurrer was well taken, & it seems to me to be unnecessary to state further objection to the pleas.

The judgment should therefore be sustained with damages &c -

Wm Oxford Attorney &
of Counsel for Defendants in error

Supreme Court

John Sears Jr. +
Chas. B. Smith Sept in error
ad,

Wm. C. Bryant H. in error

Arch. Sept in error

STATE OF ILLINOIS,

Supreme Court,

ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the county of *Koyuoir* - Greeting:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the circuit court of *Koyuoir* — county, before the Judge there- of, between *John Sears Jr & Charles G. Smith*

plaintiffs, and *Henry C. Bryant*

defendant it is said manifest error hath intervened, to the injury of the aforesaid *defendant*

as we are informed by *his* complaint, and we being willing that error, should be corrected if any there be in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint, aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the county of La Salle, on the *2^d Monday in June* — next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law;

WITNESS,

the Hon.

~~SAMUEL H. TREAT~~

Chief Justice

of our said Court, and the Seal thereof, at Ottawa, this *3^d* day of *May*
in the Year of Our Lord One Thousand Eight Hundred and Fifty-*five*.

L. Leland

Clerk of the Supreme Court.

Henry C. Bryant
vs
John Sears Jr. et al.
Writ of car

Filed May 3. 1855.
L. Keland Clk.

This writ of car is made
a supersedeas as such
should be obeyed by all
concerned -
May 16. 1855. L. Keland Clk.

In the Supreme Court June term 1855.

Bryant v. Sears & Smith

appeal from Proquois -

Argument of appellant in reply -

The argument of appellees assumes that the purchase of the goods was alleged in the plea to be a part of the consideration of the note. An examination of the plea will show that the purchase of the goods is mentioned merely by way of recital or inducement - but the consideration of the note is alleged to be the agreement of Harwood & Fletcher not to go into the drug business &c -

The fact that the note & agreement do not bear the same date is immaterial where it is alleged, as it is in the plea, that they were delivered at the same time as - parts of the same transaction between the same parties - The delivery of either the note or agreement was essential to its execution -

On the question of the right to set up the defence against an assignee who is alleged to have taken the assignment with notice - I deem it unnecessary to address further authorities - the court having intimated that they were satisfied on that point.

The pleas do show a total failure of consideration - The consideration alleged is the making of the agreement & the assignment & transfer of the agencies for the patent medicines - & the pleas show a total failure of Harwood & Fletcher to comply with the agreement.

There is a consideration alleged for the making of the agreement - i.e.; the payl. of \$200. and the giving of the notes by Bryant.

The goods purchased constituted ^{no} ~~the~~ part of the consideration of the note. The purchase is recited - & the inevitable inference from the allegations of the pleas is that they were paid for - It is spoken of - but spoken of as a past transaction - The word "purchase" necessarily includes payment.

~~13 Penn State R. 242~~

The consideration of the agreement being entire - a failure to perform the agreement - works a total forfeiture of the consideration - or the right to recover it

13. Penn. State R. 242

W. H. Wallace

counsel for appellant.

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Bryant

as

Sears et al

argument of
appellant

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H. C. Bryant

vs

J. Sears Jr. et al.

1855

Costs taxed

12202