No. 12952

Supreme Court of Illinois

Winston

vs.

McFarland

71641

SUPREME COURT, OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

RUSSELL L. WINSTON, Appellant.

vs.

IRA MCFARLAND, Executor &c., of James McFarland deceased, (Appellee.)

APRIL TERM, A. D. 1859.

APPELLANT'S POINTS AND AUTHORITIES.

I. The Court erred in sustaining the Demurrer to Defendant's 2nd and 3rd pleas.

(1.) The 2nd plea sets forth, that the only consideration for the note of $3;000 sued on, was $1500; and the 3rd plea that it was ONLY $1515,59. The right to plead a want or failure of consideration to a speciality, is expressly given by statute. (See R. S. Title, negotiable instruments, § 10, D. B. Cook & Co's. Ed. p. 292.)

(2.) The special causes of Demurrer:—

(1.) That the indebtedness of $1500, would support a promise for $3,000.

(2.) That a partial want of consideration could not be shown, were not well taken; the statute is remedial and should be liberally construed.

(3.) Technically speaking, there is no such thing as inadequacy of consideration, set up in these pleas, but simply that the sole consideration of the note was an indebtedness on the part of the Defendant, of a sum much less than the amount of the note. This could be pleaded at common law, as between the parties to an instrument not under seal, (15 Ill., 263,) and our statute places sealed and unsealed instruments on the same footing, in this respect; neither the letter or spirit of the statute warrants the limited construction given to it by the Court below in this case, Chitty on Bills, p. 81, 2, 3, 4; (marginal)—Bayle on Bills, p. 531, 533—Barbour vs. Backhouse, Peake, ~~3 C~~ 61—Jones vs. Hibbard, 2 Starkie R. 304—Darnell vs. Williams—2 Starkie R. 166—12 Martin, 402.

(3.) The construction given to this statute by the Court below, would be in effect, a relaxation of the common law rule, in regard to impeaching a sealed instrument, and at the same time a restriction of the common law rule, in regard to the impeachment of the consideration of an unsealed instrument.

(4.) The 2nd and 3rd pleas each contained two distinct matters divisible in their nature, viz:—(1.) That the consideration was only $1500, and (2.) payment of the $1500, and the Demurrer extended to the whole plea and hence judgment should have been given for the Defendant on the Demurrer, if either part of the plea was good. 12 Wen., 169—11 East., 565—2 Wm. Bla. 910—11 John. 22—~~1 Chitty, pl. 103,~~ (~~marginal~~.)

1 Chitty plead, (marginal paging) 70 3

II. The Court erred in sustaining the Demurrer to the additional plea, filed by leave of the Court. (See Record p. 18, 20, abst. p. 1 and 2.

(1.) The facts stated in this plea, viz:—That the note and mortgage were given for $3,000, when the indebtedness was only $1500, to encumber the Defendant's property, and to hinder aud delay creditors &c.; and received by the payee for that purpose constituted a perfect defence.

The transaction was not only in violation of the statute, (Cook & Co's. Ed., p. 541, 2—old Ed. p. 258,) but punishable by statute, (R. S. 45, p. 178, Cook & Co's. Ed., p. 400, 1.)

9. Wheat 381
1 Penn 211
21. Wm 21
17. Vt 479
2 Scam 225-
3 " 07-157
1. Ham 256-385-
-481
appBarr 22

11. Wheat 25-8

2 Kent Com 466-8-& Cases there cited Marginal paging
3 Denio 226-21 Ot. 184. 1 Morris 70 14 Mass 322. 5 Johns 327
3 Wheat 202 4 Peters 210. 18 Ill 563. 20 Ill. 285.
15 Wend 402-5 Burr (Pa) 452

(2.) An executory contract founded upon a transaction in violation of the statute like this, cannot be enforced. 20 Wen., R. 24, same case—4 Hill, 424—9 Dana, 317—1 Farfield, 71. – 1 Ohio State R 262 + cases cited

(3.) An executory contract in violation of this statute, is illegal and void, at common law. Fenner's case 3, Co. 78—14 John. 498—Cowper 434—4 John. 536.

2 Bann & Ald 370. 5 Cotud 349 1 Ohio 262

(4.) The word "ONLY," as used in the statute prohibiting fraudulent conveyances, applies to executed contracts, and not to contracts which are still executory. The law will not lend its aid to enforce an executory contract which is illegal, at the instance of either party to the contract. 4 Hill, 427—9 Dana, 317—1 Farfield, 71.

(5.) The objection that the plea does not set out the facts in reference to the consideration of the note with sufficient certainty, is purely frivolous. The plea plainly states, that the Defendant was indebted to Plaintiff's testator, in the sum of $1500 ONLY, and that the note was given for $3,000, for an illegal purpose; and it is sufficient to show, that the purpose for which the note is executed, was an illegal one, without going into details, as in the case of a plea of failure of the consideration.

III. The Court erred in admitting the copy of the letters testamentary of Plaintiff. (Record p. 22, 24, abst. p. 3, and 4.

1. The Probate Judge, certifies that by the laws of the State of (Ohio,) the office of Clerk and Judge are combined in the same person—the laws of Ohio should have been proved and read in evidence, to have established that fact; the Judges certificate to that effect, was incompetent as evidence.

IV. The Court erred in excluding the evidence, offered by the witness, R. A. Winston, under the plea of NIL DEBET, as to the real consideration of the note and the purpose for which it was given. (Record p. 25, abst. p. 4.

(1.) Under the plea of NIL DEBET, the Defendant was entitled to show, HOW much, or that NOTHING was due, the Plaintiff having taken issue on that plea. 1 Chitty, pl. 517, 518, (marginal p.)—Gould, pl. 310, 311—2 Starkie's Ev., 265-6, (marginal p,)—7 Watts and S. 475—4 McCord, 380—5 Esp. R. 38—1 Chitty pl.

(2.) The facts offered to be proved by the witness, would have shown that the note was illegal and void, at common law, and ~~was~~ admissable under the plea of NIL DEBET, upon which the Plaintiff had taken issue. ~~5 Co. R. 510—2 Wils. 341, 345~~—2 Chitty, R. 334—~~2 Starkie's Ev. 35.~~

1 John 124 1 Bann & A. 87 - 2 Mo. 76, 193 - 4 Pitts 45-6-20 Ills 461

V. The evidence of the Witness, R. A. Winston, received without objection presented a question for the jury, to say, whether or not the real consideration for the note was more than $1500, therefore the instruction for the Plaintiff was clearly erroneous.

CHUMASERO & ELDREDGE.

200-183

Winston

v.

McFarland

Points of Appellant

Filed April 28. 1859

L. Leland

Clerk

Winston

vs

M. Farland =

Suggestions of Counsel for Appellee

Whether the facts set up in Appellants Additional plea be true or untrue ~~as they~~ One thing is certain That Appelle is not Chargeable with any participation in the transaction = Appellee has been guilty of no act with reference to the subject matter of this suit - That carries with it any moral turpitude. How is it with appellant - he admits by said plea an indebtedness = but seeks to avoid payment of the same in what manner. by proving to the court what he has substantially alleged in his said plea viz = That when he set his hand and seal to the writing obligatory upon which this action is brought = ~~That~~ he acted the part of a knave and scoundrel = That he committed a fraudulent and iniquitous act That he violated the Criminal laws of the State, for all which he claims to be released from his ~~obligation~~ said obligation, Now we apprehend that if the Court should agree with appellant in his conclusion - it will be because the court is compelled to such conclusion by ~~the~~ a stern and unbending rule of law, this court certainly cannot be moved by sympathy for appellant by such confessions, when made for the purpose of advancing his own interest and not for the ~~from~~ purposes of justice

To a novice like ourself there seems to be insurmountable objection to said Plea
1st The appellant sets up his own fraudulent and iniquitous acts as a defense

We know that upon the question presented by said plea there are conflicting decisions but if we recollect aright there is no case cited by appellant directly in point. Where dissenting opinions were not given In 20 Wend. Page 241 Chief Justice Nelson gives a dissenting Opinion = so in 4 Hill 424 Most of the cases cited by appellant do not bear upon facts and circumstances like those involved in this case. But entirely different. For instance A sells to B Lottery Tickets in violation of law the Court decide the consideration to be illegal and not recoverable =
What was the consideration of the note in which is the foundation of this action = appellant claims by said plea that it was fifteen hundred dollars only. Is there any pretence that the fifteen hundred dollars was an illegal consideration - none whatever. Then where is the illegality of the consideration in this case there must be a consideration in order for the Court to say that it is legal or illegal appellant in this case by his own showing gave a note for more than he was indebted for and for that purpose so far as the actual consideration goes there no illegality about it.

To a novice like ourself there seems to be insurmountable objection to said Plea
1st The appellant sets up his own fraudulent and iniquitous acts as a defense

We know that upon the question presented by said plea there are conflicting decisions but if we recollect aright there is no case cited by appellant directly in point. Where dissenting opinions were not given In 20 Wend. Page 241 Chief Justice Nelson gives a dissenting Opinion = so in 4 Hill 424 Most of the cases cited by appellant do not bear upon facts and circumstances like those involved in this case. But entirely different. For instance A sells to B Lottery Tickets in violation of law the Court decide the consideration to be illegal and not recoverable =
What was the consideration of the note in which is the foundation of this action = appellant claims by said plea that it was fifteen hundred dollars only. Is there any pretence that the fifteen hundred dollars was an illegal consideration - none whatever. Then where is the illegality of the consideration in this case there must be a consideration in order for the Court to say that it is legal or illegal appellant in this case by his own showing gave a note for more than he was indebted for and for that purpose so far as the actual consideration goes there no illegality about it.

If the Court will carefully examine the Record they will inevitably come to the conclusion that if the facts set up in said plea are true, the receipt offered in evidence by appellant was intended as an offset against that portion of the note for which appellant claims there was no consideration and that the balance of said note after deducting said receipt and the interest thereon still remains unpaid. And that we have obtained Judgement in debt and damages for the amount of said note and interest less the amount of said receipt and interest thereon from its date to date of Judgment.

We insist that said plea is good for other reasons stated in our brief.

As to the objection to the letters Testamentary produced in evidence we simply have to say that the certificate of the Clerk & Judge thereto are in due form the statement of the Judge that the office of Clerk & Judge were combined in one and the same person was unnecessary, and is surplusage we do not deem it necessary to make further suggestion but leave the Court to our brief and Authorities cited therein.

C B Blanchard
Counsel for appellee

200-103

Monadon
vs
M. Farland

Suggestion of appeals
Counsel

Filed May 11. 1859
L. Leland
Clerk

Winston
vs
McFarland } No 200.

In reply to the "Suggestions" filed on the part of the appellee, we desire only to add a word in regard to the statements assertions therein made - that the Receipt introduced in Evidence was sworn "as an offset against the [illegible] of the note per which appellant "claims there was no consideration "that the bal of said note after "deducting said receipt remains unpaid" & that Winston the Plff below received no more than was actually due him as per said note.

(1) The Court will notice, that the note was executed on the first day of August 1854 - for $1500.00 (See Record page 24 & 25.)

2. That the Receipt introduced in Evidence was Executed on the 14th day of November A.D. 1854 - for $515.54. (Record p 25.)

3. That the Witness R. A. Winston testified, that on the 24th of October 1854 he paid Wm McFarland, at the request of Defendant below $256.35, & on the 25th Oct. 54 the further sum of $44.00

and which payments were made, as stated by the M^c Farland & Winston, on the said indebtedness of $1500. and that M^c Farland made no other claim against the Defts. Except the said Sum of Fifteen hundred dollars.

Now if this ~~note~~ Receipt was given not for money actually paid on the note, but as an "offset" against that portion of it, which was without consideration, as Appellee contends, how is it that it was not given at the time the note was Executed. Instead of being given 3 1/2 months after. - and for the Sum of $1515.59 - instead of the Sum of $1500.00 which was all that Ever was due -

The inference to be drawn from this state of facts. is this. that in fact the Deft below was indebted in the Sum of $1500.00 only - & that two payments, having been received & paid in being made intermediate the execution of the note and the receipt for which no receipts were given, that the actual indebtedness of $1500.00 & the interest thereon was entirely extinguished at the time the receipt in question was Executed; & most probably by payments made at about

principals & when the actual
indebtedness was fully paid
with interest the receipt in question
was given. This is the view of the
Case we desired to present to the
Jury, and which we were precluded
from doing by the Exclusion
of the Evidence offered (see Record
pp 26 & 27.) ~~and by decision~~ as
to the real consideration of the
note & thereby the decision of
the Court below overruling our
pleas as to the Consideration.
The Deft was able to prove 2 payments
(for which no receipts were given) because
he was fortunate enough to have a
Witness who paid the money for
him, & was had the right to ask the
Jury to infer, that the balance
of the actual indebtedness & interest
had been paid from the Execution of
the receipt dated on the 16th
of November 1854. After the
the payments proved to have
been made a 3½ months after
the date of the note. Now we insist
that this inference is warranted
by the facts & that we should have
been permitted to have gone
to the Jury upon the question
of actual indebtedness - independent
of any question in regard to the
validity of the note. And we only
call the attention of your Honors

to these facts. for the purpose of upholding the assertion that which is without foundation in fact from any thing appearing upon the Record & as a mere gratuitous statement thrown in as a make-weight by the appellee to prejudice; if possible, the minds of the Court.

We do not suppose this Court will, nor do we desire to urge upon the consideration of the Court the determination of a question of fact which is strictly within the province of the Jury to determine - In the argument previously filed on the part of the appellant we have omitted entirely any allusion to this question as a question of fact - further than the fact is admitted by the appellee in the Court below by the Record - & shall not have occasion to it again but that the appellee attempts to point upon the consideration of the Court a question of fact - of which there is no proof - & in which we were precluded from introducing proof by the decisions of the Court below - all we ask is a determination of this case upon the legal

in regard to

questions presented by the
record. And whenever the questio
of payment can be properly
presented to the Jury we shall
be ~~able~~ willing to meet that issue

Chumasero & Eldredge
Attys for Appellants

200 – 103

Winston

vs

M. Garland

Reply to appellees
Arguments

Filed May 24. 1859

L. Leland
Clerk

State of Illinois---Supreme Court.

RUSSEL L. WINSTON, Appellant.
vs
IRA M. McEARLAND, Executor of James McFarland, deceased, Appellee. } April term A. D. 1859.

C. BLANCHARD, attorney for Appellee—BRIEF.

The Court properly sustained Plaintiff's demurrer to defendant' s2d and 3d pleas. Reasons:

1st. The note sued on being under seal, by common law, imports a consideration, and the defendant (Appellant,) (in the absence of fraud) would be bound by it, whether he received a consideration for it or not—

Chitty on contracts, ~~ed.~~ page 5. Pothier on contracts, vol. 1st, p. 354. Greenleaf's ev. 1st vol., section 19. Chitty's pl 1st vol., p. 362. Vroomans vs. Phelps, 2nd Johns 177. Vroomans vs. Phelps, 13th Johns 43. 2 Kent 593. 2 Wilson 347. 2 Fairf (Maine) 318. 2d Hall 423. 9 Cowen 307. 11 Wendell 106.—8 Mass. 200. 2 do 159. 1 Dev. N. C. 46. 1 Black (Ind) 172.. 1 Cowen 33. 9 Cowen 308.

But the Rule is changed by our statute. See Revised Statute, chapter 73, section 10—said Statute being in derrogation of the Common Law, must be strictly construed.

By said Statute, defendant (or appellant) could plead the want of a good or valuable consideration in the making of said note, or that since the making of said note the consideration has in whole or part failed; neither of which is shown by said 2nd and 3d pleas—said pleas show merely a partial want of consideration, which is not allowed by the common or Statute law.

Said 2nd and 3d pleas show that defendant [appellant] voluntarily executed said note without any wrong on the part of plaintiff [or appellee], therefore if said note is founded upon any consideration, good or valuable, though an inadequate consideration, defendant [appellant] is bound by the same—

Chitty on contracts ed. p 29. 5 Humph. (Tenn) 47. 2 Hill (N Y) 606.—2 Howard 426. 2 Harr & Gill 114. 2 Johns Ch R 23. 11 N H 9. 4 Black. (Ind) 57. 5 Bringham [N C] 236. 57 Eng C L 108. 3 McLean 232. 5 Pick 384. 17 S & R [Pa] 41. 1 Metcalf 95. 16 Lee 137.

2nd error not well assigned. Reasons—

1st. If the facts set forth in said plea, relative to the consideration of said note are true, and properly pleaded therein, they do not render said note void as between the parties. It is true, there are decisions in other states sustaining such a plea, but they are modern decissions, and innovations upon the old established rule; which was in the concise and forceable language of Lord Mansfield, as follows:

"A party cannot set up his own iniquity or fraudulent acts as a cause of action or as a defence." See—

Montefiori vs Montefiori 1st W Bl 364. Which also cites—authorities:—Potter vs Yal. College 8 Comm 52. Doe vs Roberts 4th Eng C L 546. Hawes vs Loaden Yelverton 196. 7 Johns 163. 4 Mass 357. 1 Blackf [Ind] 263.

In the case cited by Appellant found in

20th. In Wend—24—7 Chief Justice Nelson gives a dissenting opinion, and cites the following authorities.

Holmes vs Johnson—Cowper 343. 2 R S S 137. Cro. Jac. 271. 7 Johnes 167. 16 do 189. Yedo 196. 10 Cape 57. 6 do 19. 3 do 82. 13 Elizabeth, Chap 5. Hawes vs Loaden, Yelvertor 196. 3 Bacon Ab 313 314.—13 Vin 520. Shep Touchstone 67. 1 Taunton 381. 2 Bainwell & Adolph 376.—

Our Statute does not authorize any such defence as this plea sets up. Revised Statutes, Chap 73, Sec 10. Breese 234.

The 2nd section of the 44 chapter of our Revised Statute is substantially a re-enactment of the 13 Eliz. chap 5; and of 27 Eliz. chap 4., so for as they relate to the same subject matter, and said statutes makes all such contracts void only as to creditors and purchasers:

Hawes vs Loader, Yelverton 196. 16 Johns 189. I Root 194. Cowper 240, [case No. 432]. 2 Hill [S C] 488. 5 Brim 109. 7 Johns 161. 1 Black 262. 2 Wheaton 13.

Said plea admits that there was a meratorious consideration for the making of said note, viz: $1500. Now if the other $1500 was added into said note for the purpose of incumbering Deft's. property as stated in said plea, it does not effect or form a part of the real consideration, hence the invalid part may be rejected, and the remainder stand.

McAllen vs Churchill 1st Mo 483. Parish vs Stone 14 Pick 198.

But allowing that the sujeet matter of said additional plea constitutes a good defence, still said plea is objectionable. Reasons:

1st. The facts relative to the consideration of said note are not set out with the certainty required by law. 15 Ill 183.

Further, said plea sets up an unconsionable defence. Defendant seeks to shield himself behind his own iniquitous and fraudulent acts, and should be held to the strict rules of Pleading.

The execution of the note, simply, could not operate to defraud creditors, therefore it is avered in said plea that a mortgage on certain real estate was executed to secure the payment of said note, and upon trial under said plea, defendant would be bound to produce said mortgage in evidence. Now said mortgage ought to have been so particularly described in said plea, that it could have been identified by said plea when offered in evidence. 1 Chitty Pl. 235—

I think said plea should have alleged that defendant was the owner of the certain real estate referred to in said plea, and described the same.

Defendant in said plea speaks of forged and fraudulent drafts—if they were forged and fraudulent drafts, would not defendant be justified in protecting himself in the manner set forth in said plea?

Further, it is uncertian from said plea, whether said defendant would be liable upon said drafts or not.

3d error not well assigned.

The letters Testamentary, of James McFarland, deceased, were properly admitted in evidence.

Revised Statute [Treas &c] page 1132 section 2. 13 Ill 358.

4th. Error not well assigned. Reason:

1st. If the matters set up in the additional plea do not constitute a good defense then such matters are certainly not admissible in evidence under the plea of NIL DEBET.

2nd. Illegality of consideration must always be specially pleaded.

Saunder's Pl and Ev vol page 395–199. Clutterbuck vs Coffin 4 Sco N R 509. Fenwick vs Lacock 1 Q B 414. Danitree vs Hutchinson 10 M & W 85. 4 Will 4. Potts vs Sparrow 1 Bing [N C] 596. 1 Sco 578. Tidd Pr 324.

10 Ohio 297 = 33 Ky - Lo. Law 102

1st. Saund Pl &c Ev 588.

CHARLES BLANCHARD, Atty for Appellee.

200 – 103

Ponsloon

vs

Mc. Farland

Bond of Appeals

Filed May 11, 1864

L Deland

Clerk

Prepared

SUPREME COURT, OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

RUSSELL L. WINSTON, Appellant.

vs.

IRA MCFARLAND, Executor &c., of James McFarland deceased, (Appellee.)

APRIL TERM, A. D. 1859.

APPELLANT'S POINTS AND AUTHORITIES.

I. The Court erred in sustaining the Demurrer to Defendant's 2nd and 3rd pleas.

(1.) The 2nd plea sets forth, that the only consideration for the note of $3;000 sued on, was $1500; and the 3rd plea that it was ONLY $1515,59. The right to plead a want or failure of consideration to a speciality, is expressly given by statute. (See R. S. Title, negotiable instruments, § 10, D. B. Cook & Co's. Ed. p. 292.)

(2.) The special causes of Demurrer:—

(1.) That the indebtedness of $1500, would support a promise for $3,000.

(2.) That a partial want of consideration could not be shown, were not well taken; the statute is remedial and should be liberally construed.

(3.) Technically speaking, there is no such thing as inadequacy of consideration, set up in these pleas, but simply that the sole consideration of the note was an indebtedness on the part of the Defendant, of a sum much less than the amount of the note. This could be pleaded at common law, as between the parties to an instrument not under seal, (15 Ill., 263,) and our statute places sealed and unsealed instruments on the same footing, in this respect; neither the letter or spirit of the statute warrants the limited construction given to it by the Court below in this case, Chitty on Bills, p. 81, 2, 3, 4; (marginal)—Bayle on Bills, p. 531, 533—Barbour vs. Backhouse, Peake, R. 61—Jones vs. Hibbard, 2 Starkie R. 304—Darnell vs. Williams—2 Starkie R. 166—12 Martin, 402.

(3.) The construction given to this statute by the Court below, would be in effect, a relaxation of the common law rule, in regard to impeaching a sealed instrument, and at the same time a restriction of the common law rule, in regard to the impeachment of the consideration of an unsealed instrument.

The appellees Counsel has cited numerous authorities to show that at Common Law the consideration of a sealed instrument could not be impeached— a proposition which is not disputed— and that this Statute, being in derogation of the common law, ~~it~~ should be strictly Construed: This depends upon the fact as to whether ~~as to whether~~ the Statute directs any Common law rights affecting Property. or pleading

-libuty. or whitten on the other hand, it is a statute strictly remedial in its character & operation & intended to Enlarge a right which was before limited: if the former it is conceded that it must be construed strictly, but if the latter, it is respectively submitted that it is to receive a liberal construction.

9. Wheat 381-21. Pen 211-17. Dut 479
1 Penn. R 211-

In order to arrive at a correct construction of the Statute, we must look at the object of the Statute, & the class of cases it was intended to meet:

At Common law, a want or partial want of consideration, as Contra-distinguished from inadequacy of consideration, could be shown in defence to an action of debt or assumpsit upon simple contract while the consideration of a sealed instrument could not be thus impeached. This is a remedial Statute intended to relax the common law rule, so as to enable parties to avail themselves of meritorious defences in suits at law, which they otherwise could not. The author

- itis above cited, shew that the facts
 ith forth in the 2d & 3d pleas. might
 have been pleaded at common
 law, if this were an unsealed
 instrument, instead of a sealed
 instrument
Daniel vs Williams 2 Starkie R. 166

An action by payne vs acceptor
on a bill for £19. 12. 0. Deft proved
he had value per only £10. – that
he accepted the mat for the accom=
odation of Plff. Lord Ellenborough
held. that it was only a bill for £10,
Defendant having paid the £10. Plff
was nonsuited –
Jones v. Hibbard 2 Starkie 304

Bill for £415, accepted for
accomodation of Payne and
transfered by them to their Bankers
(Plffs) for value: Plffs then it to be
an accomodation bill, their demand
against payne was only £265. held
they could only recover that sum
Barbour vs Backhouse Peake R 61

Action on bill of Exch. Deft paid
part into Court. and it appeared
that there was no Consideration
for the residue. it was contended that
the bill being good for part was
good in toto. (the same thing contended

cofer by appellee) but Lord Kenyon, who otherwise, ordered was entered for deft. The defences made in the above cases are precisely the same as the defences made by the 20th plea in the case at bar as also Bayley on Bills & Chitty on Bills above cited & 4 Martin 402

Now if this Statute is to receive the construction contended for by the appellee & given by the Court below, these defences could not have been made if this suit had not been and is dealt: whereas, at Common law, it could have been made, as the cases cited clearly show. Was it the intention of the Legislature in passing this Statute which is declaring the Common law rule in regard to impeaching the Consideration of a Sealed instrument to restrict the rule as to impeaching the Consideration of an unsealed instrument? It is submitted that it was not: yet such is the necessary result of the construction given to this Statute by the Court below in the case at bar — for it

#"includes" Bonds bills and other instruments in writing"

This act, it is submitted, was intended to & does put sealed & unsealed instruments on the same footing: and further, it was not designed by the legislature in enacting this Statute, to in any way abridge or restrict the Common law rule, in regard to enquiries into the Consideration of an unsealed instrument, but the intention, manifestly, was to place both classes of instruments on the same footing with the exception that the Seal should imply a Consideration as formerly, but which inference might be overcome by Evidence, and the Consideration enquired into or impeached the same as in the case of an instrument not under seal.

This Statute, should be so construed as to give effect to the manifest intention of the legislature, which can be done consistently with the spirit, & not in Violation of the letter of the Statute: and it is submitted that the language of the Statute "if such note bond &c was made or entered into without any good or valuable

Consideration" it should be lawful to plead such want of Consideration or that the Consideration has wholly in in part failed" It does not necessarily limit the right to show nothing but an entire want of consideration: or if the language of the Statute is ambiguous, it being a remedial statute it should be liberally construed (when the purpose for which it was enacted is apparent) So as to give effect to the intention —

In doubtful cases, if by giving a literal Construction to a Statute it will lead to consequences which could not have been anticipated by the Legislature. the Court is bound to presume that the Legislature intended no such consequences, and give such a construction to the act as will promote the ends of justice —

Bryans vs Buckmaster
app to Bruce B. 22

17. Vert 479 — 21. Wen 211
1 Penn 211 9. Wheat 381
2 Penn 225 — 1. Wam 256. 385-481
3 do 37-157

(4.) The 2nd and 3rd pleas each contained two distinct matters divisible in their nature, viz:—(1.) That the consideration was only $1500, and (2.) payment of the $1500, and the Demurrer extended to the whole plea and hence judgment should have been given for the Defendant on the Demurrer, if either part of the plea was good. 12 Wen., 169—11 East., 565—2 Wm. Bla. 910—11 John. 22—1 Chitty, pl. 703, (marginal.)

Hence, even if the Court thought
held, that under the Statute, we
could not plead that the consider
ation of the note was only $1500,00
Certainly we had the right to plead
payment of $1500. or $1818.54.
And these pleas were divisible
& Contained the 2 propositions above
mentioned, and the the demurr
-er to the entire pleas sustained
to the entire pleas, which we
insist was erroneous. and that
Judgt should have been given
for the Defdt on the demurrer
The above authorities fully sustain
this position. & show that the
same principle applies in demur
-ring to a plea containing several
distinct & divisible matters. that
applies on demurring to a
Declaration containing several
Counts. If one of which is good,
Judgment should be given against
the party demurring

II. The Court erred in sustaining the Demurrer to the additional plea, filed by leave of the Court. (See Record p. 18, 20, abst. p. 1 and 2.

(1.) The facts stated in this plea, viz:—That the note and mortgage were given for $3,000, when the indebtedness was only $1500, to encumber the Defendant's property, and to hinder aud delay creditors &c.; and received by the payee for that purpose constituted a perfect defence.

The transaction was not only in violation of the statute, (Cook & Co's. Ed., p. 541, 2—old Ed. p. 258,) but punishable by statute, (R. S. 45, p. 178, Cook & Co's. Ed., p. 400, 1.)

(2.) An executory contract founded upon a transaction in violation of the statute like this, cannot be enforced. 20 Wen., R. 24, same case—4 Hill, 424—9 Dana, 317—1 Farfield, 71.

(3.) An executory contract in violation of this statute, is illegal and void, at common law. Fenner's case 3, Co. 78—14 John. 498—Cowper 434—4 John. 536.

(4.) The word "ONLY," as used in the statute prohibiting fraudulent conveyances, applies to executed contracts, and not to contracts which are still executory. The law will not lend its aid to enforce an executory contract which is illegal, at the instance of either party to the contract. 4 Hill, 427—9 Dana, 317—1 Farfield, 71.

It is respectfully submitted, that but one case cited by the Appellee ~~Appellees~~ to show that a party to a conveyance to defraud creditors cannot set up the statute, in defence of an action founded upon such illegal transaction, holds that it applies to the case of an Executory Contract, and that is the case of Findly vs Oxley 1. Blackford 262 — which is clearly overruled by the Supreme Court of N.Y. 20. Wen 24. (See also opinion of Walworth Chancellor 4. Hill 427). by the Supreme Court of Ohio. 1. Ohio State Reports 262 by the Sup. Court of Kentucky 9. Dana 31 by the Sup. Court of Maine 1. Fairfield 71 (10 Maine)

Judge Nelson in his dissenting opinion in 20. Ind. goes the whole length, & says the defence cannot be made at all whether the Contract is executed or executory — except by auditors — the Class of Cases in this have been very ably reviewed in the authorities above cited particularly by Chancellor Walworth in the case of 1 Ohio, & in Mellis vs Clark 4 Hill 426. and we confidently submit the opinion of Judge Nelson & the Case of Kirby vs Cosby & the other authorities cited by appellee. together with those cited by us. without further comment — But the Court will bear in mind that in addition to the Statute above referred to, the legislature of this State have expressly prohibited the making of contracts of this character under a penalty — see Statutes of 45. p. 178 — Cook & Bro Ed. 490 — To give effect to this contract would be contrary to the well established principle that a party cannot come into a Court of law or Equity and ask its aid in enforcing a contract

found suit upon a transaction in direct violation of a penal Statute This principle has been repeatedly recognized by this Court - see 18 Wheat 562. 20 Wheat 215 see also 1. Wheat 258 - 15 Peters 412

The information

In neither of the cases cited by the appellee (Nor in the cases cited on (under the head of Point II) his side) does it appear that there was such a penal statute brought to the attention of the Court as the one last referred to

The information, that the Appellant is taking advantage of his own wrong to the injury of the Appellee is as ridiculous as it is false in point of fact — Here is a note given for $3000. when the indebtedness as is alleged and as is admitted, was but $1500 - The Defendant below says I have paid the $1500. or rather $1515.54 which is admitted by the record — as well as proved on the trial — Now upon this state of facts, upon what principle of law or Equity can this information be founded? — true the purpose for which the note

was given for $ 3000. was to protect deft's property. and was a fraud upon his creditors & cannot be justified upon any principle of right. yet under the circumstances ~~under~~ which this note & mort. were given undoubtedly the deft believed himself considered himself under no moral obligation to pay the forged drafts mentioned in the pleas. in this he was ~~probably~~ undoubtedly wrong. but how does that justify the appellee, in insisting upon the collection of this note? How can he insist that he or his estate has been defrauded in the premises? ~~How~~ with what show of "injured innocence" can he come into court & talk about this being an "unconscionable" defence. when he is insisting upon having a judgt against the deft. for $1720.18. when the record & the facts show that the deft below is not indebted at all in point of fact? upon what principle of justice should the appellee be permitted in the face of the record to recover the sum of $1720.18

was given for $ 3000. was to protect deft's property. and was a fraud upon his creditors & cannot be justified upon any principle of right. yet under the circumstances ~~under~~ which this note & mort. were given undoubtedly the deft believed himself considered himself under no moral obligation to pay the forged drafts mentioned in the pleas. in this he was ~~probably~~ undoubtedly wrong. but how does that justify the appellee, in insisting upon the collection of this note? How can he insist that he or his estate has been defrauded in the premises? ~~How~~ with what show of "injured innocence" can he come into court & talk about this being an "unconscionable" defence. when he is insisting upon having a judgt against the deft. for $1720.18. when the record & the facts show that the deft below is not indebted at all in point of fact? upon what principle of justice should the appellee be permitted in the face of the record to recover the sum of $1720.18

(5.) The objection that the plea does not set out the facts in reference to the consideration of the note with sufficient certainty, is purely frivolous. The plea plainly states, that the Defendant was indebted to Plaintiff's testator, in the sum of $1500 ONLY, and that the note was given for $3,000, for an illegal purpose; and it is sufficient to show, that the purpose for which the note is executed, was an illegal one, without going into details, as in the case of a plea of failure of the consideration.

What is the material issue presented by this Plea? Simply this: that the Note & Mort. were given for an illegal purpose. — It is immaterial, whether the said Mort. was 20. 40. or 80 acres — whether the Drafts, to avoid the payment of which, the Note & Mort. were executed, were great or small — whether one or more — all these are matters of Evidence. All that is required is, that the illegal purpose for which the Note & Mort. were executed should be presented in a distinct issuable form — the fact that the Drafts were forged would not absolve the Deft from his liability as endorser. He thereby guaranteed the genuineness of the Drafts —

In the case of a plea of failure of consideration, the

(5.) The objection that the plea does not set out the facts in reference to the consideration of the note with sufficient certainty, is purely frivolous. The plea plainly states, that the Defendant was indebted to Plaintiff's testator, in the sum of $1500 ONLY, and that the note was given for $3,000, for an illegal purpose; and it is sufficient to show, that the purpose for which the note is executed, was an illegal one, without going into details, as in the case of a plea of failure of the consideration.

What is the material issue presented by this Plea? Simply this: that the Note & Mort. were given for an illegal purpose. — It is immaterial, whether the said Mort. was 20. 40. or 80 acres — whether the Drafts, to avoid the payment of which, the Note & Mort. were executed, were great or small — whether one or more — all these are matters of Evidence. All that is required is, that the illegal purpose for which the Note & Mort. were executed should be presented in a distinct issuable form — the fact that the Drafts were forged would not absolve the Deft from his liability as endorser. He thereby guaranteed the genuineness of the Drafts —

In the case of a plea of failure of consideration, the

It is entirely different; for the reason that the contracting party is affected by every fact showing a failure of consideration, because the extent to which the consideration has failed is a material inquiry. For under the plea of total failure Evidence of a partial failure is inadmissable & vice versa

But in this case, if the Contract is to any extent illegal the whole contract is infected with the illegality & therefore void in toto - 15 Wm 412 11 Wheat 258 6 Barr (Pa) 482 20 Lds. 215,

The cases last cited & the other cases cited under the 2d Point fully sustain this position & dispose of the points made by appellee - that although the Consideration be illegal in part it may be sustained to the extent that it is legal - The mere fact that there was an antecedent indebtedness of $1500. could not impart any validity to the ~~Contr~~ note - The plea plainly

It is entirely different; for the reason that the contracting party is affected by every fact showing a failure of consideration, because the extent to which the consideration has failed is a material inquiry. For under the plea of total failure Evidence of a partial failure is inadmissable & vice versa

But in this case, if the Contract is to any extent illegal the whole contract is infected with the illegality & therefore void in toto - 15 Wm 412 11 Wheat 258 6 Barr (Pa) 482 20 Lds. 215,

The cases last cited & the other cases cited under the 2d Point fully sustain this position & dispose of the points made by appellee - that although the Consideration be illegal in part it may be sustained to the extent that it is legal - The mere fact that there was an antecedent indebtedness of $1500. could not impart any validity to the ~~Contr~~ note - The plea plainly

States that the note was given for the £2000.00 for the sole purpose of protecting the Defts property from loss & sale under Writs which might be obtained against him on the Drafts mentioned & for that purpose was the said note & Mortgage so executed as aforesaid accepted by the said James M Farland"

If the Deft was in fact indebted to Pltff in the sum of £1500. (which in point of fact is not denied) he may sue for money due on account stated &c. when the question of payment can be directly presented to the Jury for trial, which is all the Defts desire - And it was not until after the 2d & 3d pleas were overruled, that the Deft asked & obtained leave to file the additional plea of illegality of consideration - as the last chance of protecting himself against the instruments which it sought to be obtained against him - and which unfortu-

States that the note was given for the £2000.00 for the sole purpose of protecting the Defts property from loss & sale under Writs which might be obtained against him on the Drafts mentioned & for that purpose was the said note & Mortgage so executed as aforesaid accepted by the said James M Farland"

If the Deft was in fact indebted to Pltff in the sum of £1500. (which in point of fact is not denied) he may sue for money due on account stated &c. when the question of payment can be directly presented to the Jury for trial, which is all the Defts desire - And it was not until after the 2d & 3d pleas were overruled, that the Deft asked & obtained leave to file the additional plea of illegality of consideration - as the last chance of protecting himself against the instruments which it sought to be obtained against him - and which unfortu-

notely were obtained against him, and to be relieved from which he confidently appeals to this Court.

III. The Court erred in admitting the copy of the letters testamentary of Plaintiff. (Record p. 22, 24, abst. p. 3, and 4.

1. The Probate Judge, certifies that by the laws of the State of (Ohio,) the office of Clerk and Judge are combined in the same person—the laws of Ohio should have been proved and read in evidence, to have established that fact; the Judges certificate to that effect, was incompetent as evidence.

7

IV. The Court erred in excluding the evidence, offered by the witness, R. A. Winston, under the plea of NIL DEBET, as to the real consideration of the note and the purpose for which it was given. (Record p. 25, abst. p. 4,

(1.) Under the plea of NIL DEBET, the Defendant was entitled to show, HOW much, or that NOTHING was due, the Plaintiff having taken issue on that plea. 1 Chitty, pl. 517, 518, (marginal p.)—Gould, pl. 310, 311—2 Starkie's Ev., 265-6, (marginal p,)—7 Watts and S. 75—4 McCord, 380—5 Esp. R. 78—1 Chitty pl.

The plea of nil debet in this action, strictly speaking, was not a good plea. & the Plff might have demurred, but, instead of demurring, he took issue upon the plea, hence, he had the right to show that the real consideration of the note was but $100,

Gould's pleading p. 310-311 "If nil debet is pleaded to debt on bond & Plff instead of demurring accepts the plea & joins in the issue, Deft is at liberty to prove any & every special matter of defence, which might be proved under the same plea in debt on simple contract— such as want of consideration, payment, usury, infancy &c — For the Deft by accepting the plea forces his demand solely on the Defts being indebted & thus waives the Estoppel, which the deed would have furnished against the Deft under the plea of non est factum —

In this case, the instrument sued on, is the foundation of the action & not the inducements - and the Plff having elected to take issue when the plea of nil debet was entitled to show the real consideration - he was entitled to show, first what rights have been shown in debt on simple contract -

" The plea of nil debet, in this case
" as in the instance of the general
" issue in assumpsit, puts the
" Plff on proof of the whole of
" the allegation in the declaration
Chitty Pl. 511 - marginal paging
want of consideration or illegality
of consideration could be given
in evidence under, the general plea in a similar action
nil debet in
debt on simple contract or ~~upon~~ upon instrument Chitty Pl. 511-512 -

1. Watts & Sargent 175
8 Esp. R 38
4. M & Cord 380 - 2 Book N.S. 212

Here (2.) The facts offered to be proved by the witness, would have shown that the note was illegal and void, at common law, and was admissable under the plea of NIL DEBET, upon which the Plaintiff had taken issue. ~~5 Co. R. 510~~ - 2 Wils. 341. 347 - 2 Chitty, R. 334 - 2 Starkie's Ev. 35.

The first offer, was to show by the witness that the real consideration for the note was but $1500. (2)

(2) That the consideration the transaction itself was illegal - the right to

V. The evidence of the Witness, R. A. Winston, received without objection presented a question for the jury, to say, whether or not the real consideration for the note was more than $1500, therefore the instruction for the Plaintiff was clearly erroneous.

CHUMASERO & ELDREDGE.

show the first. we think we have satisfactorally shown - and the contract being illegal void at Common law, (2 Ills 461) as well as by statute there was no indebtedness to sustain the action.

& this could be shown altho' nil debet in debt as well as under the general issue in assumpsit in Salty pl. above referred to & the following as well as under

2. Saund R 87
2 N. H. 193.
4 Peters 486
1 Johns 124

There are some points made on the record brief. besides those we have noticed - but it is only designed to call the attention of the Court in this connection to the more prominent points in this case and from which we think we have shown that the should be reversed.

Chumasero & Calhoun
of Counsel for appellants

No 200 — 103

Sup. Court
of the State of
Illinois

Russel L. Winston
appellant
vs
Ira M Ferland
Exr &c
appellee

Argument &c
pair of appellant

Filed May 4, 1859
L. Leland
Clk

Thurmans &
Eldredge
appellants atts

State of Illinois } Pleas before the Honorable
LaSalle County } ss Madison E. Hollister Circuit
Judge for the Fourth Judic-
-ial district for said State and the Presiding
Judge of the LaSalle County Circuit Court, at a
term of said Court commenced and held at the
Court House in Ottawa on the Second Monday
in the month of June, the same being the four-
-teenth day of June in the year of Our Lord
one thousand Eight hundred and fifty Eight,
and of the Independence of the United States
of America the Eighty Second

Present.

The Honorable, Madison E. Hollister Presiding Judge
John F. Nash Clerk
Washington Bushnell States Attorney
Eri L. Waterman Sheriff.

Be it remembered that on the 11th day of May
AD 1858 a praecipe was filed in the office of the
Clerk of the Circuit Court which was in the words and
figures following to wit:

"State of Illinois } Circuit Court Thereof
LaSalle County } June Term AD 1858

Ira M. McFarland Executor }
of the last will and testament }
of James McFarland, deceased, } Action of Debt
vs } $5000, 00.
Ruscle L. Winston }
Damages $5000,

The Clerk of said Court will please issue Summons
in above Entitled cause and Oblige

Yours &c
Ottawa May 18th 1858 Charles Blanchard
Atty for Pltff

Page 2

And also on the same day after the filing of said praecipe, a Summons was issued, in the words and figures following, to wit;

"State of Illinois } ss
LaSalle County } The People of the State of Illinois, To the Sheriff of said County, — Greeting;

We command you that you Summon Russell L. Winston if he shall be found in your County, personally to be and appear before the Circuit Court of said County, on the first day of the next term thereof, to be held at the Court House in Ottawa, in said County, on the 14th day of June next, to answer unto Wm M. McFarland Executor of the last will and testament of James M Farland dec'd. in a plea that he render unto him Three thousand dollars debt which he owes to and unjustly detains from him to the damage of said Plaintiff as he says, in the Sum of Five Thousand Dollars.

And have you then and there this writ, with an endorsement thereon in what manner you execute the same.

Witness John F. Nash, Clerk of our Seal Said Court, and the Seal thereof, at Ottawa this 11th day of May A.D. 1858.

J. F. Nash Clerk.

Which Summons was returned by the Sheriff of LaSalle County on the 5th day of June A.D. 1858, with the following Endorsement thereon: —

" Served by reading to the within named Russell L. Winston May 14th 1858.

Sr & Rt	60
16 Miles	80
	140

E. L. Waterman Shff."

And afterwards to wit: On the 25th day of May 1858 the Plaintiff filed his declaration herein, in the words and figures following to wit:

"State of Illinois } ss. Circuit Court thereof
LaSalle County } June Term 1858.

Ira M. McFarland, executor of the last will and testament of James McFarland, deceased Plaintiff in this suit by Charles Blanchard his attorney, complains of Russell L. Winston Defendant in this suit in a Plea of Debt.

1st Count For that whereas the said defendant, on to wit: the first day of August A. D. Eighteen hundred and fifty four at, to wit: the County of LaSalle aforesaid, by his certain writing obligatory commonly called a promissory note, Sealed with his seal and now here to the Court Shown, the date whereof is the day and year aforesaid, bound himself to pay to the said James McFarland, or his order, in his life time, the Sum of Three thousand dollars three years after the date thereof, which period has now Elapsed, whereby an action hath accrued to the plaintiff, as executor as aforesaid to demand and have of the said defendant, said Sum of money— yet the said defendant hath not paid, the said Sum of money or any part thereof though often requested so to do —

2nd " Count And whereas also the said defendant on, to wit: the first day of August A. D. Eighteen hundred and fifty four, at, to wit: the County of LaSalle aforesaid by his certain other writing obligatory commonly called a Promissory Note, Sealed with his Seal and now here to the Court Shown, the date whereof is the day and year aforesaid, bound himself by the name of R. L. Winston" to pay to the said James McFarland,

Page 4.

or his order, in his life time, the Sum of Three Thousand dollars, with annual interest of ten per cent per annum, three years after the date thereof, which period hath now Elapsed, whereon an action hath accrued to the Plaintiff as executor as aforesaid to demand and have of the said defendant said Sum of money — yet the said defendant hath not paid the said last mentioned sums of money or any part thereof though often requested so to do —

3rd Count

And whereas also the said defendant on, to wit: the first day of August A.D. Eighteen hundred and fifty four at, to wit the County of LaSalle aforesaid made his certain other promissory note in writing by the name of "R. L. Winston" sealed with his seal and now here to the Court shown, the date whereof is the day and year aforesaid, and delivered the same to the said James McFarland in his lifetime, and then and there agreed to pay said James McFarland, or his order, the Sum of Three Thousand dollars, three years after the date thereof with annual interest of ten per cent per annum which period hath now elapsed whereby an action hath accrued to the Plaintiff as executor as aforesaid, to demand and have of the said defendant said Sum of money — yet the said defendant hath not paid said last mentioned sum of money or any part thereof though often requested so to do —

4th Count

And whereas also the said defendant on, to wit: the first day of August A.D. Eighteen hundred and fifty four, at, to wit, the County of LaSalle aforesaid, made his certain promissory note in writing by the name of "R. L. Winston" sealed with his seal and now here to the Court shown, the date whereof

Page 5

is the day and year aforesaid and delivered the Same to the Said James M^c Farland, in his lifetime and then and there agreed to pay said James M^c Farland, or his order, the Sum of Three Thousand Dollars, three years after the date thereof which period hath now Elapsed; yet the Said defendant hath not paid Said last mentioned Sum of money or any part thereof though often requested So to do =

5th Count And whereas also the Said defendant on, to wit; the first day of April A.D. 1858. at, to wit; the County of La Salle aforesaid in the lifetime of the Said James M^c Farland was indebted to Said James M^c Farland in Three Thousand Dollars for goods Sold and delivered by the Said James M^c Farland to the defendant at his request — And in three thousand dollars for money then and there lent by the Said James M^c Farland to the defendant at his request — And in three thousand dollars for money found to be due from the defendant to the Said James M^c Farland on an account then and there Stated between them —

And the defendant afterwards to wit; On the day and year last aforesaid at the County aforesaid in consideration of the premises respectively agreed to pay the Said James M^c Farland the Said Several Sums of money on request — yet the defendant hath not paid the Said Sums above demanded, or any part thereof, Either to the Said James M^c Farland in his lifetime, or to the plaintiff as executor as aforesaid, Since the death of the Said James M^c Farland, To the damage of the plaintiff as Executor as aforesaid of Five Thousand dollars and therefore he brings this Suit.

And the Plaintiff brings into Court here Letters Testamentary of the said James McFarland deceased which were, after the decease of the said James McFarland to wit: On the Second day of September Eighteen hundred and fifty Six, granted in due form of law by the Probate Court of Knox County Ohio, whereby it appears to the court here that the Plaintiff is executor of the last Will and Testament of the said James McFarland, deceased, and hath the execution thereof &c

Charles Blanchard
Plffs Atty.

(Copy of note sued on)

$3000.

Three years after date I promise to pay James McFarland or his Order the sums of Three thousand dollars with annual interest of ten per cent per annum. Witness my hand and Seal this first day of August 1854.

(Sgnld) R. L. Winston Esq

Signed Sealed and delivered
in presence of R. A. Winston
(account)

R. L. Winston,

To James McFarland Dr.

To Goods &c	$3000
To Money Lent	$3000
To Bal of ac,	$3000

And afterwards, to wit: On Wednesday November 3d 1858, the same being one of the days of the November Term of said Court for said year, a rule in said cause was entered of record, in the words and figures following, to wit:

Page 7.

"Ira M. M.c Farland Executor of the last will and testment of James M.c Farland dec.d
vs
Russell L. Winston } Debt.

This day the plaintiff comes by Charles Blanchard his attorney, and on his motion the defendant is ruled to plead herein on or before the coming in of the Court next Monday Morning"

And afterwards to wit: On the 16th day November 1858, the defendant filed his demurrer to the plaintiffs declaration, in the words and figures following, to wit:

"Winston
ads
M.c Farland } And now comes the defendant by Chumasero & Eldridge his attorneys & defends &c when & says, that the 1. 2. 3. 4th and 5th Counts of said declaration are and Each of them is insufficient in law and that he is not bound to answer the same, and this he is ready to verify, wherefore he prays judgment &c

Chumasero & Eldridge
for deft.

And for cause of demurrer said defendt states and Shows the following causes.

1st That there is no allegation in the said Several 1. 2. 3 & 4th Counts or either of them, that said James M.c Farland is deceased except such as is derived by implication.

2 That the 1st 2. 3. & 4 Counts do not nor does Either of them Show that the note therein describ was made in the life time of the said James M.c Farland.

3d That there is no allegation, in either of said 1. 2. 3 & 4, that defendant promised said James M.c Farland in the life time of said Jas.

Page 8.

Mc Farland to pay him the money in said notes specified, The allegation being that he bound himself to pay to Mc Farland in his life $2000 3 years after date

4 There is no allegation in 5th Count that James Mc Farland is deceased.

5 That said Count is inconsistent, it alledging an indebtedness to James Mc Farland, alleging it to be in his life time & on the 1st day of April 1858 - and in also alledging that letters testamentary were of said James Mc Farland, ever issued to Plaintiff on the 2d day of September 1856. nearly two years before his supposed death.

6 That said declaration and Each and every Count thereof is uncertain, informal & insufficient

Chumasero & Eldridge.
Defts attys.

And afterwards, to wit; On Tuesday November 16th 1858, the same being one of the said days of the said November term of Court, another order was entered of record in said cause, being in the words and figures following, to wit:-

"Ira Mc Farland Executor of the last Will and Testament of James Mc Farland dec'd
vs
Russell L. Winston

Deft.

This day the Plaintiff comes by C. Blanchard his attorney and the defendant by Chumasero & Eldridge his attorneys and after hearing the arguments of Counsel the Court overrule the defendants demurrer to plaintiffs declaration

And afterwards, on the Same day last aforesaid, the defendant filed his Pleas in this cause, which are in the words & figures following, to wit: " State of Illinois, La Salle County Circuit Court. Russell L. Winston ads. Ira W. Farland Executor &c of James W. Farland deceased,

1 And now comes the said defendant Russell L. Winston by Chumasero & Eldridge his attys & defends &c when & says that he does not owe the said Several Sums of money in said Plaintiffs declaration above demanded or any or either of them or any part thereof in manner &c as the said Plaintiff as Executor &c hath above thereof complained against him, and of this he puts himself upon the country &c.

2 And for a further Plea in this behalf as to the said Several Sums of money in the first, second, third and fourth Counts in said declaration mentioned, Except as to the Sum of one thousand and five hundred dollars, part and parcel thereof, the said Defendant says actio non, because, he says that on the day of the date of the said note in said Counts Severally mentioned (said note in said Several Counts mentioned being one and the Same note) to wit; on the first day of August A.D. 1854, to wit; at Peru in the County aforesaid, this defendant was indebted to the said James M. Farland, now deceased, but then in full life, in the Sum of one thousand and five hundred dollars & in that Sum only, but that the said note in said Several Counts

mentioned was given for the Sum of three thousand dollars as in Said Several Counts is alleged, when in fact, and in truth, the Sole and only consideration therefor was the Said Sum of, to wit: One thousand five hundred dollars, and So the Said defendant says that as to the Said Sum of money in Said note in said Several Counts mentioned except as to the Said Sum of, to wit, One thousand five hundred dollars, there is no good and Sufficient consideration therefor; and as to the Said Sum of one thousand five hundred dollars the Said defendant says actio non also, because he Says that he fully paid and Satisfied the Said James Mc Farland deceased, therefor in his life time to wit on the fourteenth day of November A.D. 1854, all of which the Said Defendant is ready to verify, wherefore he prays judyment &c

3 And for a further plea in this behalf as to the Said Several Sums of money, in the first, Second, third and fourth counts in said declaration mentioned, Except as to the sum of to wit; One thousand five hundred and fifteen dollars & fifty nine cents, part and parcel thereof the Said Defendant Says, actio non. because he Says, that in the day of the date of the said note in said count Severally mentioned (Said note in said Several counts mentioned being one & the Same note) to wit; On the first day of August A.D. 1854, to wit at Peru in the County aforesaid this Defendant was indebted to the Said James Mc Farland now deceased, but then in full life in the Sum of, to wit, one thousand five hundred and fifteen dollars and fifty nine cents, and in that Sum only, but that Said note in Said Several Counts mentioned

was given for the Sum of three thousand Dollars as in said Several counts is alleged, when in fact and in truth the Sole and only consideration therefor was the said Sum of to wit; One thousand five hundred and fifteen dollars and fifty nine cents, and So the said defendant says that as to the said Sum of money in said note in said Several Counts mentioned, except as to the said Sum of to wit: One thousand five hundred and fifteen dollars and fifty nine cents, there is no good & sufficient consideration therefor; and as to the said Sum of, to wit: One thousand five hundred and fifteen dollars and fifty nine cents. the said defendant also says actio non because he says that he fully paid and satisfied the said James Mc Farland deceased therefor in his lifetime, to wit, on the fourteenth day of November A.D. 1854 to wit at Peru in the county aforesaid, all of which the said Defendant is ready to verify & wherefore he prays Judgment &c

4 And for a further plea in this behalf the said defendant says actio non because he says, that the said James Mc Farland deceased in his lifetime to wit, on the fourteenth day of November A.D. 1854, to wit, at Peru in the County aforesaid was indebted to the said Plaintiff in the Sum of five thousand dollars for So much money by said defendant before then lent & advanced to said James Mc Farland and at his request; and in the like Sum for &c So much Money by the said defendant before then paid ~~out~~ laid out and expended to and for the use of the said James Mc Farland & at his like request, and in a like Sum for So much money by the said James Mc Farland before then had & received to the Defendants use, but in

a like Sum for so much money then and there found due from said James M Farland to said ~~to said~~ defendant on an account then and there Stated between them, and the said James M^c Farland in Consideration of the promises then & there faithfully promised the said defendant well & duly to pay him the said Several Sums of money last mentioned on request, yet said Jams M^c Farland (though often requested &c did not during his life time (nor has the said Plff. Executor &c, since the decease of the said James M^c Farland) paid the same or any part thereof (which said Several sums of money exceed the said Sum in said declaration demanded & which ~~sums of money~~ said defendant hereby offers to Set off against any claim said Plaintiff as Executor &c may establish against him in this action) and this he is ready to verify Wherefore &c. J

5 And for a further Plea in this behalf to the fifth Count of said declaration the said Defendant says actio non, except as to the Sum of to wit; Sixteen hundred dollars part and parcel of said Sums of money in said County mentioned, because he says that he does not owe the same &c as the said Plaintiff as Executor &c has therein alleged & of this he puts himself upon the Country; and as to the said Sum of to wit; Fifteen hundred dollars above mentioned the said defendant says actio non also, because he says that he fully paid and satisfied the said James M^c Farland thereof during his life time to wit On the fourteenth day of November AD 1854 to wit, at Peru in the County aforesaid, this he is ready to verify, and wherefore he prays judgment &c.

Page 13.

6 And for a further plea in this behalf to the said fifth count of the said Plaintiffs declaration, the said Defendant says. Actio non, Except as to the sum of to wit, One thousand five hundred and fifteen dollars and fifty nine cents, part and parcel of the said Sums of money in said counts mentioned, because the said Defendant says he does not owe the same in manner &c as said as Executor &c has therein alleged and of which the defendant puts himself upon the Country &c! And as to the said Sum of to wit; One thousand five hundred and fifteen dollars and fifty nine cents above mentioned, the said Defendant says. Actio non because he says that he fully paid and satisfied the said James McFarland thereof during his life time to wit, on the fourteenth day of November AD1854, to wit, at Peru, in the County aforesaid, and this said Defendant is ready to verify wherefore he prays judgment &c

7 And for a further plea in this behalf the said Defendant says actio non, because he says, that the said Plaintiff never was Executor of the last will and testament of the said James McFarland deceased, nor ever administered any of the goods and chattels which were of the said James McFarland deceased, at the time of his death as Executor of the last will and testament of the said James McFarland deceased, in manner & form as the said Plaintiff hath above thereof in his said declaration in that behalf alleged, and this he is ready to verify, wherefore he prays Judgment &c

Chamasero & Eldridge
defts attys

Page 14 And afterwards to wit: on the 17th day of November 1858, the same being one of the days of the November Term of said Court for the year 1858 the Plaintiff filed his replication & demurrer to the defendants Plea, in the words and figures following to wit:

"State of Illinois }
LaSalle County } ss Circuit Court thereof,
November Term AD 1858

Wm. Frat McFarland Executor &c
of James McFarland deceased
vs
Russell L. Winston

1 Rep And the Plaintiff, Executor as aforesaid as to the plea of the said defendant by him first above pleaded and whereof he hath put himself upon the country doth the like,

1 Dem And the said Plaintiff as executor as aforesaid as to the said second plea of the said defendant by him above pleaded saith that the same and the matters & 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 him said plaintiff from having or maintaining his aforesaid action thereof against said defendant and that said Plaintiff is not bound by law to answer the same.

"For Special Cause of Demurrer"

Defendant pleads a partial failure of consideration, upon the note Sued on & a part thereof, when it appears upon the face of said Plea that the consideration of said note has not failed, nor any portion thereof, and that said plea is in other respects insufficient

Page 15.

2 Dem. And the Said Plaintiff as Executor aforesaid as to the said third plea of the Said defendant by him 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 Said Plaintiff from having or maintaining his aforesaid action thereof against Said defendant, and that Said Plaintiff is not bound by law to answer the Same.

For Special Cause of demurrer defendant Shows That defendant pleads the want of a good and Sufficient consideration for the giving of the note Sued on when in fact it appears upon the face of Said plea that there was Such consideration for said note = you cannot divide the note and say that there was a consideration for half and no consideration for the other half

2 Rep And the Said Plaintiff Executor as aforesaid, as to the fourth plea of the Said defendant by him above pleaded Says Praeludii now, because he Says that the Said James McC. Garland deceased was not in his life time indebted to the Said defendant, in manner and form as the Said defendant hath above in his Said plea alleged, and this Plaintiff prays may be inquired of by the Country.

3. Rep And the Said Plaintiff Executor aforesaid as to the fifth plea of the Said defendant by him above pleaded and whereof he hath put himself upon the Country doth the like

4 Rep And the Said Plaintiff Executor as aforesaid for a further replication to said fifth plea Says that the Said Plaintiff by reason of anything

Page 16 in that plea alleged, ought not to be barred of his said action thereof against the defendant, because he says that the defendant did not pay to said James Mc Farland deceased in his lifetime the sum of Fifteen hundred dollars as in the said plea alleged, and this Plaintiff prays may be inquired of by the Country.

5 R. And the said Plaintiff executor as aforesaid as to the Sixth Plea of the said defendant by him above pleaded and whereof he hath put himself upon the Country, doth the like.

6 Rep. And for a further replication to said Sixth Plea Plaintiff as executor as aforesaid says that by reason of anything in said plea alleged, said Plaintiff ought not to be barred of his said action thereof against said defendant, because he says that the defendant did not pay to said James Mc Farland in his life time, the said sum of One thousand five hundred and fifteen dollars and fifty nine cents, as in the said plea alleged, and this the Plaintiff prays may be inquired of by the Country,

7 Rep. And the said Plaintiff as executor as aforesaid as to the said Plea of the said defendant by him seventhly above pleaded says that said Plaintiff by reason of anything in said Plea alleged ought not to be barred from having or maintaining his aforesaid Action thereof against said defendant because he says that he said Plaintiff was at the time of the commencement of this suit, and from thence hitherto hath been and still is executor of the last will and testament of the said James Mc Farland deceased, and hath administered divers goods

& Chattels which were of the said James Mc Farland deceased, at the time of his death, as executor of the last will and testament of the said James Mc Farlands deceased to wit, of the County of LaSalle aforesaid. And this the said Plaintiff prays may be inquired of by the County.

Charles Blanchard
Plffs attorney "

And afterwards to wit; on Friday November the 9th 1858, the same being one of the days of the November Term of said Court, the following and further order was entered of record in said Cause being in the words and figures following, to wit:

" Wm. Mc Farland Executor of the last will and testament of James Mc Farland decd
113 vs Russell L. Winston } Debt.

This day the Plaintiff again comes by Charles Blanchard his attorney and the defendant by Chumasero & Eldridge his attorneys, and after hearing the arguments of counsel the Court sustain the Plaintiffs demurrer to the defendants Second and third plea, to which decision of the Court the defendant abides as to his Second plea and moves the Court for leave to amend his third plea, which motion is Sustained by the Court. "

And afterwards to wit, on the 23d day of November AD 1858 the defendant filed an additional Plea, in the words and figures following to wit: "

State of Illinois, LaSalle Co Circuit Court
November Term 1858. = Amended 3d Plea

Russell L. Winston
ads
Ira Mc Farland
Executor of James Mc Farland deceased.

And now comes the said defendant & for an additional plea in this behalf & says actio non &c, because he says that on the day of the date of the said Note or Instrument in writing in said 1st. 2d. & 4th counts in said declaration mentioned (said note in said several counts being one & the same note) to wit on the first day of August AD 1854, to wit, at Peru in the County aforesaid the said Defendant was then indebted to the said James Mc Farland then in full life, in the Sum of Fifteen hundred dollars and in that Sum only & the said note was given for the Sum of three thousand dollars as in said Counts respectively is alleged, and the said defendant then Executed & delivered to said Jas. Mc Farland a mortgage upon certain real Estate of the said Defendant in the County of Bureau in the State of Illinois, to secure the the said Sum of three thousand dollars in said note mentioned, that said Defendant was then apprehensive that he would be liable to suit upon certain supposed fraudulent & forged Drafts which said Defendant had before then Endorsed. & that his property would be subject to levy and sale upon executions issued upon Judgments, which might be obtained against him upon such supposed forged & fraudulent drafts so Endorsed by him as aforesaid and to create an apparent incumbrance upon his said property and to protect the same from levy & Sale upon such executions the said note & mortgage was

Page 19.

executed as aforesaid & for that purpose was the said note & mortgage so executed as aforesaid, accepted by said Jas Mc Farland & when in fact and in truth the only indebtedness from said Defendant to said Plaintiff was the said sum of to wit, Fifteen hundred dollars, and this the said defendant is ready to verify, wherefore said Defendant says said note was & is wholly void & wherefore he prays Judgment &c.

Summers & Eldridge
Defts Atty.

And afterwards to wit; on the same day, (Nov 23d 1858) the Plaintiff filed his demurrer to the Defendants "additional Plea", - in the words and figures following to wit:

"State of Illinois } Circuit Court thereof
La Salle County } November Term A.D. 1858.

Ira M. Mc Farland
Executor of James Mc Farland deceased
vs
Russell L. Winston

And now comes the said Plaintiff and says that the additional plea of the said defendant by him above pleaded and the matters therein contained are insufficient in law to bar or preclude Plaintiff from maintaining his aforesaid action against said defendant and that Plaintiff is not bound by law to answer the same, and for cause of demurrer, Plff. shows.-

1st That the facts set up in said plea if true do not render said note null & void.

2d That the facts relative to the consideration of said note are not set forth with sufficient

certainty, and that said plea is in other respects informal and insufficient.

C. Blanchard
Plffs atty

And afterwards to wit: on the said 25th day of November AD1858, the same being one of the days of the said November Term of said Court, the following further order was entered of record in this cause, in the words & figures following to wit:

Ira M. McFarland Executor of the last will & testament of James McFarland dec'd
vs
Russell L. Winston

Debt.

This day the defendant again comes by Chumasero & Eldridge his attorneys, and on their motion it is ordered by the Court that the order heretofore entered in this cause allowing the defendant to amend his third plea, be set aside, and that the defendant have leave to file an additional plea. The plaintiff now comes and files a demurrer to the defendants additional plea, which demurrer is sustained by the Court, to which decision of the Court in sustaining said demurrer the defendants counsel abide. Plaintiffs attorney now enters a Nolle Prosequi as to the common Counts in his declaration. Thereupon come the following persons of a Jury to wit: Thomas M. Mason, Robert Wade, C. T. Suttphen, J. E. Skinner, M. C. Clark, James Prescott, Charles Clark, James Turner, Jesse Gage, Bradford Field, Thomas J. Wade, and Alexander Munger, who are duly elected, tried and sworn to well and truly try the issues herein, according to the evidences, and after hearing the testimony

and arguments of counsel the Jury retire to consider their verdict, and after due deliberation thereon had, return into court the following verdict to wit: "We the Jury find the issues for the plaintiff, and that the defendant owes to and unjustly detains from the plaintiff Eleven hundred and Eighty four dollars and Six cents debt, to the damage of said plaintiff Five hundred and thirty six dollars and twelve cents."

The Defendants Counsel move the Court for a new trial, which motion is overruled by the Court.

It is therefore considered by the Court that the plaintiff have and recover of the defendant the Sum of Eleven hundred and Eighty four dollars and Six cents for his debt, and Five hundred and thirty Six dollars and twelve cents for his damages, both together being Seventeen hundred and twenty dollars and Eighteen cents, also his costs and Charges by him herein Expended, and that he have Execution therefor."

And afterwards to wit; on Tuesday the 30th of November 1858, the following final order was Entered of record in this cause - to wit:

"Wm M. M^c Farland Executor of the last Will and testament of
James M^c Farland dec^d
163 vs Debt
Russell L. Winston

This day the defendant again comes by Thomason & Eldridge his attorneys who pray an appeal herein to the Supreme Court, which motion is sustained by the Court upon con-

dition that the defendant files an appeal bond payable to the Plaintiff in the Penal Sum of three thousand five hundred dollars with Richard A. Winston as his Security. er

On the 23d day of November AD 1858 the defendant by his counsel filed herein his Bill of Exceptions in the words and figures following to wit: "

Ira A. McFarland Executor of James McFarland, deceased. vs Russell L. Winston

LaSalle County Circuit Court of the November Term AD 1858.

Be it remembered that this cause came on to be heard on the twenty third day of November AD 1858, before the Hon M. E. Hollister and a jury. - said day being one of the days of the said November Term of the said LaSalle County Circuit Court upon the issues made herein,

The plaintiff to maintain the issue on his part offered in Evidence a paper purporting to be a copy of Letters testamentary, tending to show the appointment of the said plaintiff as executor which are as follows: " The State of Ohio, - Knox County, ss:

To all whom these Presents Shall come, Greeting:

Whereas on the 2nd day of September in the year of Our Lord Eighteen Hundred and fifty six the last Will and testament of James McFarland, Deceased, was produced in the Probate Court, proved and admitted to record (a certified copy of said Will and proof thereof is hereto annexed

And the Said Deceased, having whilst living, and at the time of his death, goods, Chattels and credits within this State, by means whereof the proving and registering Said will, and the granting of administration of all and Singular the Said goods, Chattels and credits; And also the auditing, allowing and finally adjusting and discharging the accounts thereof doth appertain and belong to Said Court. Therefore the administration of all and Singular the goods Chattels and credits of the Said Deceased, and all things in any way concerning his Will is granted unto Ira M. McFarland Executor in Said Will named; who is hereby required well and faithfully to administer the Same, and to make exhibit to Said Court, a true account thereof, when thereunto required.

In testimony whereof, I. L. S. Davis Judge of Said Probate Court have hereunto Subscribed my name and affixed the Seal of Said Probate Court at Mount Vernon this 2nd day of September A.D. 1856.

Seal

J. S. Davis
Probate Judge.

The State of Ohio - }
Knox County - ss. } I. Joseph S. Davis Clerk of the Probate Court of the County of Knox in the State of Ohio, do certify the foregoing to be a true copy of the Letters Testamentary issued to Ira M. McFarland - the Executor of James McFarland deceased - That the Same is truly taken and copied from the records of the Probate Court within and for said County of Knox -

And the Said Deceased, having whilst living, and at the time of his death, goods, Chattels and credits within this State, by means whereof the proving and registering Said will, and the granting of administration of all and Singular the Said goods, Chattels and credits; And also the auditing, allowing and finally adjusting and discharging the accounts thereof doth appertain and belong to said Court. Therefore the administration of all and Singular the goods Chattels and credits of the Said Deceased, and all things in any way concerning his Will is granted unto Ira M. McFarland Executor in Said Will named; who is hereby required well and faithfully to administer the Same, and to make exhibit to said Court, a true account thereof, when thereunto required.

In testimony whereof, I. L. S. Davis Judge of Said Probate Court have hereunto Subscribed my name and affixed the Seal of said Probate Court at Mount Vernon this 2nd day of September A.D. 1886.

Seal

J. S. Davis
Probate Judge.

The State of Ohio - }
Knox County - ss. } I. Joseph S. Davis Clerk of the Probate Court of the County of Knox in the State of Ohio, do certify the foregoing to be a true copy of the Letters Testamentary issued to Ira M. McFarland - the Executor of James McFarland deceased - That the Same is truly taken and copied from the records of the Probate Court within and for said County of Knox -

In attestation whereof I hereto sign my name and annex the Seal of the said Court at Mt. Vernon this 5th day of February A.D. 1858

Seal

Joseph S. Davis
Clerk Probate Court.

The State of Ohio } I Joseph S. Davis Sole
Knox County, ss } Judge of the Court of Probate within and for the County of Knox in the State of Ohio, do certify that Joseph S. Davis whose name is signed to the foregoing certificate, is now and was at the time of signing the same, Clerk of the aforesaid court, and that his said certificate is in due form, and that such Letters Testamentary had been granted in pursuance of and agreeably to the Laws of the State of Ohio where such Letters Testamentary were granted. And I further certify that that the officers of Clerk and Judge, of said Probate Court, in said County of Knox and State of Ohio, are combined in the same person by the Laws of said State.

In witness whereof I have hereunto subscribed my name and affixed the Seal of said Court at Mt. Vernon in said County this 5th day of February A.D. 1858.

Seal

Joseph S. Davis.
Probate Judge - K.C.O.

To the introduction of which the said defendant objected, which objection was overruled by the Court, to which the defendant then and there excepted, and the said letters were then read in Evidence.

The plaintiff then read in Evidence the following, writing obligatory "$3000. Three years after date I promise to pay James

M^c Farland or his order the sum of three thousand dollars with annu interest of ten per cent per annum. Witness my hand and Seal this first day of August 1854
Signed, Sealed and delivered in presence of } R. L. Winston Seal
R. A. Winston

The Plaintiff here rested his case. The defendant then introduced, the following receipt after having proved the execution thereof by Henry V. Winston the Subscribing Witness, and read the same to the jury— " $1515.59. Received Peru LaSel county Illinois november fourteenth 1854 of Russell L. Winston, one thousand five hundred and fifteen dollars and fifty nine cents to apply on a certain note Secured by a Mortgage on 125 acres of land lying in Bureau County State of Illinois said note and Mortgage being given for the Sum of three thousand dollars, Witness my hand this day and year above written.
Witness present } James M^c Farland.
H. V. Winston "

The defendant then called Richard A. Winston, and offered to prove under the plea of nil debet by said witness the following facts.

1st That the only Consideration of the note offered in Evidence by plff was an indebtedness of $1500^{00} due to James M^c Farland Plaintiffs testator from the defendant that the note was given for $3000, and that the Sole and only consideration of said note of $3000^{00} was the said indebtedness of $1500.^{00}

2d " That the note of $3000^{00} was given under the following circumstances, The defendant

was indebted to said James Mc Farland plaintiffs testator in the Sum of $1500.00 only - and that defendant had indorsed certain drafts drawn by one Coates on one Hallenan which drafts purported to have been accepted by said Hallenan and defendant and said James Mc Farland in order to incumber the property of defendant agreed -

The said defendant to execute and the said Mc Farland to receive - a note for which the Sum of $3000, which was the same note sued on & introduced in Evi- -dence to be signed by said Winston defend- -ant and to secure the same to execute and deliver to said James Mc Farland a Mortgage upon his real Estate - which note and mortgage were executed by said defendant and deliv- -ed to said Mc Farland, the said note being the note sued and that the object of the Execution of said note and mortgage was to hinder delay and prevent the col- -lection of the drafts so endorsed by said defendant. To the introduction of which testimony the Plaintiff objected - which ob- -jection was sustained by the Court and the testimony excluded from the jury to which decision of the court, sustaining the said objection and excluding said testimony, said defendant then and there excepted.

The defendant then sworn by Said Winston that on the 24th day of October 1854 he the witness at the request of de- -fendant paid said James Mc Farland the Sum of $256,35. and on the 25th Oct of October 1854 the further Sum of $44.00 & some cents which payments were made

as Stated by said defendant & James M^c Far-
-land on the indebtedness of fifteen hundred
Dollars - that said indebtedness of fifteen hun-
-dred Dollars was Spoken of at the time of
Such payments and that said James M^c
-Farland made no other claim against
defendant except the said $1500.- This
was all the Evidence offered in the cause.

The Plaintiff then asked the Court to
instruct the jury as follows; "If the Jury
believe from the Evidence that defendant gave
to James M^c Farland deceased, his, defend-
ants note for $3000. payable three years after
the date thereof said note bearing date August
1st 1854 then the Jury will find for the Plain-
-tiff the amount of said note and interest
less the amount defendant has paid upon
said note." To the giving of which the
defendant then and there Excepted.

The Jury found a verdict in favor of
the plaintiff for the Sum of $1184.06, debt
and $536.12, damages. Whereupon the defend-
-ant moved the court for a new trial which
motion was overruled and judgment rendered
against defendant, by the — to which decision
of the Court the defendant Excepted, -
And prays that this his bill of Excepting
may be Signed and Sealed by the Court
which is done

M. C. Hollister [Seal]
Judge &c

And afterwards to wit: on the 30th day of
November 1858, the defendant files his
Appeal Bond, in the words and figures
following, to wit:

Page 28.

Know all Men by these presents that We Russell L. Winston and Richard A. Winston of LaSalle County Illinois are held and firmly bound unto Ira M. Mc Farland Executor &c of James Mc Farland deceased in the penal Sum of Thirty five hundred Dollars, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators Jointly and Severally firmly by these presents. Sealed with our Seals and dated this 30th day of November 1888.

The condition of the above obligation is such that whereas the said Ira M. Mc Farland Exr &c — did at the November term A.D. 1888 of the Circuit Court in & for the County of LaSalle in the State of Illinois recover a judgment against the said Russell L. Winston for the Sum of Eleven hundred & Eighty four 06/100 debt and Five hundred & thirty six 12/100 Dollars damages besides costs, from which said Judgment said Russell L. Winston has taken an appeal to the Supreme Court of the State of Illinois.

Now therefore if the said Russell L. Winston shall prosecute his appeal with effect and shall pay whatever judgment may be rendered by the Court on dismissal or trial of said Appeal then this obligation to be void otherwise to remain in force.

R. L. Winston (Seal)
R. A. Winston (Seal)

State of Illinois } I John F. Neathleath Clerk of
LaSalle County } the Circuit Court in and for
said County and State do
hereby certify that the above and foregoing
contains a true full perfect and complete
record in the above entitled cause as the
same appears of record and on file in
my office

In Testimony Whereof I have hereunto
set my hand and the seal of said
Court at Ottawa this 6th day of
January 1859

J. F. Neathleath

CIRCUIT COURT LA SALLE COUNTY

Supreme Court of the State of Illinois
Third Grand Division - April Term A.D. 1859

Russel S. Winston
(appellant)
vs
Jno McFarland Executor
&c of James McFarland
deceased - (appellee)

} assignments of Errors

And now comes the
said Russel S. Winston (appellant) by
Chumasero & Eldredge his attys and says
that in the record and proceedings
aforesaid, and in giving the Judgment
aforesaid, there is manifest Error
and assigns the following grounds
of Error, viz

1. The Court erred in sustaining the
Demurrer to the Defts 2d & 3d Pleas
2. The Court erred in admitting in Evidence
the Copy of the Letters testamentary of
Jas. McFarland deceased

3. The Court Erred in sustaining the demurrer to the "additional plea of the Defft filed by leave of the Court

4. The Court erred in Excluding the Evidence of the Witness R. A. Winston in regard to the consideration of the note introduced and the purpose for which it was given

5. The Court Erred in giving the Instruction asked for by the Pltff

6. The Court erred in overruling the Defts motion for a new Trial

7. The Judgment is against law & Evidence

Chumasero & Eldredge
attys for Appellant

And now comes said ~~Defendant in Error~~ Appellee by C Blanchard his attorney and says that in the proceedings and Judgment of said Court - herein of Record there is no such Error as said Appellant has Alleged wherefore

C Blanchard
Atty for Appellee

280 103

Russell L. Winston

vs

Ira M. McFarland

Executor &c.

Record.

Filed Apl. 19. 1884

L. Leland Clk.

Fees for record

$10.75