

No. 13307

Supreme Court of Illinois

Winston

vs.

^F
Mc~~A~~Farland, Executor

State of Illinois---Supreme Court.

RUSSEL L. WINSTON, Appellant.

VS

IRA M. McEARLAND, Executor of James McFarland, deceased, Appellee. } April
D. 1859. } term A.

C. BLANCHARD, attorney for Appellee—BRIEF.

The Court properly sustained Plaintiff's demurrer to defendant's 2d 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, 2d Johns 177. Vroomans vs. Phelps, 13th Johns 43. 2 Kent 593. 2 Wilson 347. 2 Fairf (Maine) 318. 2d Hall 433. 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 derogation 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. 37 Eng C L 108. 3 McLean 332. 5 Pick 384. 17 S & R [Pa] 41. 1 Metcalf 93. 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 decisions, and innovations upon the old established rule; which was in the concise and forcible 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 ²⁴Wend=Chief Justice Nelson gives a dissenting opinion, and cites the following authorities.

Holmes vs Johnson—Cowper 343. 2 R S S 137. Cro. Jac. 274. 7 Johns 167. 16 do 189. Yedo 196. 10 Cape 57. 6 do 19. 3 do 82. 13 Elizabeth; Chap 5. Hawes vs Loaden, Yelverton 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 far 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. 1 Root 194. Cowper 240, [case No. 432]. 2 Hill [S C] 488. 5 Brim 109. 7 Johns 161. 1 Black 232. -- 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.

(4.)

But allowing that the subject 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 unconscionable 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 averred 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 Chit Plod 235-

(5)

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 uncertain 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 [Treat &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 DEBIT*.

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

Saunders'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 M & W 397 = 33 Eng. C. Law 402

1st. Saunders Pl & Ev 588.

CHARLES BLANCHARD, Atty for Appellee.

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H. Weston
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M^{rs} Farland

Comes of appeal

Filed May 11. 1889
L. Leland
Clerk

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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.

APPEAL FROM THE LA SALLE COUNTY CIRCUIT COURT.

ABSTRACT OF THE RECORD.

RECORD.

This was an action of debt brought in the La Salle County Circuit Court, by Ira McFarland Executor &c., of James McFarland deceased, against Russell L. Winston (Appellant,) and tried at the Nov. Term of said Court, 1858, before Hon. M. E. Hollister Judge, and a jury, and a verdict had for the plaintiff for \$1,184 06 debt, and \$536 12 damages and judgment entered thereon. A motion for a new trial was made and overruled, and a bill of exceptions signed and sealed and an appeal taken by the Defendant in the court below to this court.

The declaration contains four counts upon a promissory note, and also the money counts, (a NOLLE PROSEQUI was entered as to the latter,) on the trial of the cause, the only evidence offered on the part of the Plaintiff, was the sealed note in question.

Page 3, 7.

The first four counts of the declaration are upon the note in question, and varying somewhat, but substantially in the usual form, and therefore are not given at length in this abstract.

Page 9.

The Defendant filed seven pleas as follows:

1st. NIL DEBIT.

Page 9.

2nd. "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 on the day of the date of the said note in the 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 McFarland, now deceased, but then in full life, in the sum of one thousand and five hundred dollars and in that sum only, but that the said note in the said several counts mentioned, was given for the sum of three thousand dollars as in said several counts is alledged, when in fact, and truth the sale 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 and five hundred dollars the said Defendant says ACTIO NON, also, because he says that he fully paid and satisfied the said James McFarland therefor in his lifetime, to wit: on the 14th day of November, A. D. 1854, all of which the said Defendant is ready to verify, wherefore he prays judgment &c."

Page 10.

3rd. Same as 2d plea, except it alleges the consideration of the note to be \$1,515 59.

Page 41.

4th. Set off.

- RECORD. 5th. NIL DEBET as to all except Fifteen hundred dollars, and payment
 Page 12. of the fifteen hundred dollars.
- Page 13. 6th. NIL DEBET as to all but \$1,515 59, and payment of the \$1,515 59.
- Page 13. 7th. NE Unques, Executor.
 The following Replications and Demurrers were filed, viz:
- Page 14. 1st. Similitir to 1st plea.
- Page 15. 2nd. Traverse of McFarland's indebtedness alledged in 4th plea.
- Page 15. 3rd. Similitir to 5th plea.
- Page 15. 4th. Denial of payment alledged in 5th plea.
- Page 16. 5th. Similitir to 6th plea.
- Page 16. 6th. That Defendant did not pay and satisfy James McFarland, &c., as
 in the 6th plea alledged, concluding to the country.
- Page 16. 7th. To 7th plea that Plaintiff is Executor &c., concluding to the country.
- Page 14. To the 2d PLEA, the Plaintiff filed the following Demurrer, viz:
 "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 and things therein contained, in manner &c., are not sufficient
 &c. &c."
- "For special cause of Demurrer; Defendant pleads a partial failure of
 consideration upon the note sued on or 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 the said plea is in other respects insufficient."
- Page 15. To the Defendant's 3rd PLEA the Plaintiff filed a general Demurrer [and
 also assigned the following special cause of Demurrer, viz:
 "That Defendant pleads the want of a good and valuable consideration for
 the giving of the note sued on, when 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."
- Page 17. The Demurrers were both sustained, the Defendant abided by the De-
 murrer to the 2nd plea, and asked leave to amend the 3rd plea.
- Afterwards the Defendant by leave of the Court filed the following addi-
 tional plea, viz:
- Page 18. "And now comes the said Defendant, and for an additional plea in this
 behalf, and says ACTIO NON, because, he says, that on the day of the date
 of the said note or instrument in writing in said 1st, 2nd, 3rd and 4th counts
 mentioned, (said note in said several counts 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, the said Defendant was then and there indebted to the
 said James McFarland, then in full life, in the sum of fifteen hundred dollars,
 and in that sum only, and the said note was given for the sum of three
 thousand dollars, as in said counts respectively is alledged, and the said
 Defendant then executed and delivered to the said James McFarland a
 mortgage upon certain Real Estate in the County of Bureau, in the State of
 Illinois, to secure the said sum of three thousand dollars in said note men-
 tioned; that said Defendant was then apprehensive that he would be liable
 to suit upon certain supposed fraudulent and forged drafts which said De-
 fendant had before then endorsed, and 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 and 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 and sale upon such
 executions, the said note and mortgage was executed as aforesaid, and for
 that purpose was the said note and mortgage so executed as aforesaid ac-
 cepted by the said James McFarland, when in fact and in truth, the only
 indebtedness from said Defendant to said James McFarland was the said

RECORD. sum of to wit: fifteen hundred dollars, and this the said Defendant is ready to verify, wherefore &c."

Page 19. To which plea the Plaintiff demurred:

1st. Generally—

2nd. That the facts set up in said plea if true, do not render said note null and void.

Page 20. 3rd. That the facts relative to the consideration of said note, are not set up with sufficient certainty and is in other respects informal and insufficient.

Page 20. Order allowing the additional plea to be filed—and sustaining Plaintiff's Demurrer to said additional plea—Trial and verdict.

Page 21. Motion for new trial, overruled.

On the 23rd day of November, 1858, the Defendant filed the following Bill of exceptions, viz:

Page 22. Be it remembered that this cause came in to be tried on the 23rd day of November, A. D. 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 La Salle County Circuit Court, upon the issues made therein. 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 is as follows:

THE STATE OF OHIO, KNOX COUNTY, ss: To all whom these presents shall come Greeting: Whereas, on the second 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 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 WITNESS whereof, I Joseph S. Davis, Judge of said Probate Court, have hereunto subscribed my name and affixed the seal of said Probate Court, at Mount Vernon in said County, this 2nd. day of September, A. D. 1856.

{ SEAL }

JOSEPH S. DAVIS,
PROBATE JUDGE,

STATE OF OHIO, } ss.
KNOX COUNTY,

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 McFarland the Executor of James McFarland deceased. That the same is truly taken and copied from the Record of the Probate Court, within and for the said County of Knox.

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

{ SEAL }

JOSEPH S. DAVIS,
Clerk Probate Court.

STATE OF OHIO, } ss.
KNOX COUNTY,

I, Joseph S. Davis, sole Judge of the Court of Probate, within and for

RECORD

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 the signing of 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 this State of Ohio, when such letters testamentary were granted. And I further certify 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 set my name and affixed the seal of said Court, at Mount Vernon in said County, this 5th day of February, A. D. 1858.

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SEAL
}

JOSEPH S. DAVIS, PROBATE JUDGE,
Knox County, Ohio.

Page 24.

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.

Page 25.

The Plaintiff then read in evidence the following writing obligatory. \$3,000. Three years after date, I PROMISE to pay James McFarland or his order, the sum of three thousand dollars with ANNUAL interest of ten per cent per annum.

WITNESS my hand and seal, this first day of August A. D. 1854.

{
SEAL
}

R. L. WINSTON.

Signed sealed and delivered in presence of 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.

Page 25.

"\$1515 57. Received Peru La Salle County Illinois, November 14th 1854, of Russel 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 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—James McFarland."

Witness present, H. V. Winston.

Page 25.

The Defendant then called Richard A. Winston, and offered to prove under the plea of NIL DEBIT by the witness, the following facts:

1st. That the only consideration of the note offered in evidence, by the Plaintiff was an indebtedness of \$1500, due to James McFarland Plaintiff's testator from the Defendant—that the note was given for \$3,000, and that the sole and only consideration of said note of \$3,000, was the said indebtedness of \$1500.

Page 25.

2nd. That the note of \$3,000, was given under the following circumstances:

The Defendant was indebted to James McFarland Plaintiff's testator, in the sum of \$1500, only, and that Defendant had endorsed certain drafts, drawn by one Coates on one Hallam, which drafts purported to have been accepted by said Hallam and Defendant, and Defendant and said James McFarland in order to incumber the property of said Defendant agreed—the said Defendant to execute, and the said McFarland to receive a note for the sum of \$3,000, which was the same note sued on and introduced in evidence, to be signed by said Winston (Defendant) and to secure the same to execute and deliver to said James McFarland, a mortgage upon his Real

RECORD Estate, which note and mortgage were executed by said Defendant, and delivered to said McFarland, 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 collection of the drafts so endorsed by said Defendant.

Page 26. To the introduction of which testimony the Plaintiff objected, which objection was sustained by the Court, and the testimony was excluded from the jury; to which decision of the Court sustaining the said objection and excluding said testimony, said Defendant then and there excepted.

Page 26. The Defendant then and there proved by said Winston, that on the 24th day of October 1854, he the witness at the request of the said Defendant paid said James McFarland, the sum of \$256 35, and on the 26th October 1854, the further sum of \$44 and some cents which payments were made as stated by said Defendant and James McFarland on the indebtedness of \$1500—that said indebtedness of \$1500, was spoken of at the time of such payment, and that said James McFarland made no other claim against Defendant, except the said \$1500. This was all the evidence offered in the cause.

Page 27. The Plaintiff then asked the Court to instruct the jury as follows:
 “If the jury believe from the evidence that Defendant gave to James McFarland deceased, his Defendants note for \$3,000, payable three years after the date thereof, said note bearing date August 1st 1854, then the jury will find for the Plaintiff the amount of said note and interest, also the amount Defendant has paid upon said note.”

To the giving of which the Defendant then and there excepted.

Page 27. The jury found a verdict in favor of the Plaintiff, for the sum of \$1184 06 debt, and \$536 12 damages, whereupon, the Defendant moved the Court for a New Trial, which motion was overruled, and judgement rendered against Defendant, &c. To which decision of the Court the Defendant excepted, and prays that his bill of exceptions may be signed, &c. which is done.

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}

M. E. HOLLISTER, JUDGE,

ASSIGNMENT OF ERRORS.

1st. The Court erred in sustaining the Demurrers to the Defendants 2nd and 3rd pleas. [See Record page 17.]

2nd. The Court erred, in sustaining the Demurrer, to the additional plea of the Defendant, filed by leave of the Court. [See Record, page 20.]

3rd. The Court erred in admitting in evidence, the copy of the letters testamentary of James McFarland, deceased. [See Record, page 22, 24.]

4th. The Court erred, in excluding the evidence of the witness R. A. Winston, in regard to the consideration of the note introduced by the Plaintiff, and the purpose for which it was given. [See Record, page 25.]

5th. The Court erred, in giving the instruction asked for by the Plaintiff. [See Record, page 27.]

6th. The Court erred in overruling the Defendants motion for a new trial. [See Record, page 27.]

7th. The judgment is against law and evidence.

CHUMASERO & ELDREDGE,
Attorneys for Appellant.

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M. Fairland

Abet

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Filed April 19, 1859

L. Belmont
Clerk

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