DICKSON *vs.* BURK.

A general plea of no consideration, to debt on a writing obligatory, is good on demurrer.

Though it is otherwise with pleas alleging an illegal, or failure of consideration: in such, the particular facts showing the consideration to have been illegal, or to have failed, must be stated.

Appeal from the circuit court of Benton county.

THIS was an action of debt by Burk against Dickson, upon a writing obligatory, determined in the circuit court of Benton county in May, 1845, before SNEED, judge.

The defendant craved oyer of the obligation, and filed the following plea: "And the said defendant comes and defends the wrong, &c., when, &c., and says *actio non*, because he says that said writing obligatory in said plaintiff's declaration set forth, was executed and made by him without any consideration whatever, to-wit: at the time when, &c., at, &c., and this he is ready to verify: wherefore, &c." The plea was verified by the affidavit of defendant, "that the facts set forth in the plea as of his own knowledge were true, and those detailed from information or relief, he believed to be true."

The plaintiff demurred to the plea upon the grounds that it was a general and not a special plea, and did not set up the facts showing how or why defendant executed the obligation without consideration.

The court sustained the demurrer, and, the defendant declining to amend or plead further, gave judgment for plaintiff, and defendant appealed.

D. WALKER, for the appellant.

In this case the only question the court are called on to decide, is, did the circuit court err in sustaining the demurrer? That the court did err the appellant thinks there can be no doubt. The con-

sideration of specialties could not be impeached at common law, but by our statute the consideration of all instruments may be impeached. *Rev. Stat. page* 629, *sec.* 74.

A plea that the writing sued on "was made and executed without any consideration whatever" is sufficient without detailing the facts and circumstances of its execution. 3 *Bibb* 264, *Ralston vs. Bullett.* 4 *Monroe* 531, *Rudd vs. Hanna.* 4 *Bibb* 67, *Boone vs. Shackleford.* 5 *Ark. R., Rankin vs. Badgett,* 345.

The rule of law is not controverted that generally the facts and circumstances only should be stated in pleading, and not deductions of law, as in pleading a *failure* of consideration. *First Marsh. Ky.* 602. 3 *J. J. Marsh.* 475, *Coyle vs. Fowler.* But the rule does not obtain in pleading a *want* of consideration as in this case, as the cases and authorities above cited abundantly prove.

E. H. ENGLISH, contra.

At common law want of consideration could not be pleaded to a bond. It may be done by our statute, however. *Rev. Stat. page* 629, *sec.* 74, 75. The language of the statute is, that "in any suit founded on any instrument or note in writing under seal of the person charged therewith, the defendant may, *by special plea,* impeach or go into the consideration of such writing in the same manner as if such writing had not been under seal." The next section clearly shows what the legislature meant by special plea. It provides that such pleas shall be supported by the affidavit of the defendant, &c., stating that the "*facts* set forth in such plea are true, as far as *detailed* as such from his own knowledge, and that he believes *them* to be true as far as *related* from the information of others." The statute clearly requires the defendant to set forth the particular facts upon which the plea is founded. In the plea here not a single fact is set up. It is a general plea, and is bad.

This court have clearly settled this question in the case of *Hynson et al. vs. Dunn,* 5 *Ark. R.* 395. In that case a general plea of fraud was decided bad by the court, and the language of the opinion, upon the statute above quoted fully and clearly embraces this

case. It is, therefore, needless to look beyond the statute and that decision for authorities on the point.

The case of *Rankin vs. Badgett,* 5 *Ark. R.* 345, cited by appellant's counsel, is not in point. There no question was raised as to the sufficiency of the plea—issue was taken upon it, and the case went to the Supreme Court on questions raised as to the instructions given and refused the jury.

A plea should set forth the matter of defence so certainly that the plaintiff may be properly apprised of the defence, and that he may successfully contest its truth, if in his power. 3 *Marsh.* 34

On the same principle, a plea in general terms that property was subject to an execution, is bad; it should state the facts which make it so liable, that the court may determine. *Harrison vs. Wilson,* 2 *Mar.* 550.

There can be no question but this is a general and not a special plea as required by the statute, and therefore bad. The cases cited from the Kentucky reports do not support the plea. And if they did, the peculiar language of our statute, and the decision under it, 5 *Ark. R.* 395, clearly show the plea to be bad.

JOHNSON C. J., delivered the opinion of the court.

The appellant contends that the circuit court erred in sustaining the appellee's demurrer to his plea of no consideration. The plea is in general terms, that the instrument sued upon was executed without any consideration whatever. The appellee, on his part, insists that the plea is wholly insufficient in law as there is an entire failure to set up any facts which would go to show a want of consideration. The 74th section of chapter 116, enacts that "in any suit founded on any instrument or note in writing under the seal of the person charged therewith, the defendant may by special plea, impeach or go into the consideration of such writing in the same manner as if such writing had not been sealed." The Kentucky statute, passed in 1801, is substantially, if not literally the same as the one referred to; and consequently adjudications upon the one are strictly applicable to the other. In the case of *Rudd vs Hanna,* 4 *Monroe* 531, the court say that "as early as 1814, in the case of

Ralston and Sebastian vs. Bullit, 3 *Bibb* 261, the plea of no consideration to an obligation was judged permissible under the statute authorizing the defendant, by special plea, to impeach or go into the consideration of such bond in the same manner as if said writing had not been sealed. That decision has been followed in many cases. It has become a rule of contracts, the known and long standing doctrine of pleading, so settled that we do not feel ourselves at liberty to overturn it.'' The same doctrine has been recognized and acted upon by the same court in a series of decisions. See *Boone vs. Shackleford,* 4 *Bibb.* 68. *Coleman vs. Harper,* 1 *Marsh.* 602. *Coyle's ex'rs vs. Fowler,* 3 *J. J. Marsh.* 473. If the plea, instead of denying any consideration whatever, had charged an illegal consideration, either because it was *malum in se* or *malum prohibitum,* as for future illicit cohabitation, gaming, or usury, it would have been necessary to aver the facts, so that the plaintiff might be notified of the specific ground of defence, and the court might be able to determine on the facts stated, whether the consideration was illegal or not; and consequently, whether the matter relied on in the defence, could bar the action. In such a case a defendant would not be allowed to plead generally that the consideration was vicious or illegal. This would be pleading a deduction of law, and not the matter of fact from which the conclusion of law may be drawn by the court. The statute authorizes specialties to be impeached by plea in the same manner as writings without seal were impeachable at common law. It, therefore, allows a plea denying that there was any consideration in fact, or a plea showing the consideration had failed. The rule laid down in the case of *Hynson et al. vs. Dunn,* 5 *Ark. R.* 395, cannot be considered as having any analogy to the case now before us. In that case the defendant interposed a general plea of fraud, and the court very correctly pronounced it bad, because the party, whose conduct is sought to be impeached, has an unquestionable right to be apprised of the facts which constitute the fraud; otherwise he might be taken by surprise on the trial. The plaintiff below in this case could not possibly be taken by surprise by the the plea, because he is presumed to know the consideration. The case is wholly different

where the defence is either fraud or failure of consideration, as the plaintiff cannot be presumed to know how the failure happened or in what the fraud consists; and it is, therefore, too uncertain to require from him a replication. A plea that the consideration had failed, without showing how, is not good. *Coleman vs. Harper,* 1 *Marsh.* 602. The reason assigned by the court is that the plea is too uncertain. This is one very good reason, but another as good and perhaps better, might be added to it, and that is, that whether the consideration had failed or not, must be determined by the law from facts; and it is, therefore, necessary that the facts should be stated by the plea. See *Harrison vs. Wilson,* 2 *Marsh.* 545. If the facts are set forth they may not amount to a failure of consideration, and if so, the court would decide that the plea is ineffectual.

We, therefore, think it clear, from the whole current of authorities, that the plea of the defendant below is sufficient in law, and that consequently the circuit court erred in sustaining the demurrer to it. For this reason we think that the judgment of the circuit court of Benton county herein rendered, ought to be reversed.

Judgment reversed.