GREER AS AD'R. ET AL. *vs.* GEORGE AS AD'X.

The note sued upon is *prima facie* evidence of consideration: and the affirmative is upon the party impeaching it for want of consideration.
The consideration of a note may be inquired into in a suit before a Justice without a special plea.
The filing of such plea does not shift the *onus* from the defendant to the plaintiff.

Writ of Error to Pulaski Circuit Court.

In November, 1845, Mary George, as administratrix of Martin George, deceased, sued Eucled L. Johnson, before a Justice of the Peace of Pulaski county, on a promissory note for sixty dollars, made by Johnson to Martin George, March 25, 1843, and due at two months.

Johnson filed a formal plea before the Justice as follows:

"And the said defendant, by attorney, comes and defends the wrong and injury when, &c., and says that the said plaintiff ought not to have or maintain her aforesaid action against him, because he says that the said promissory note was given and executed without any consideration whatever, and of this he puts himself upon the country, &c." The plea was verified by the affidavit of Johnson.

The Justice gave judgment against Johnson, and he appealed to the Circuit Court of Pulaski County, giving Joseph Fenno as security in the appeal.

At the appeal term, the death of Johnson was suggested, and David B. Greer, his administrator, made party.

At the November term, 1846, the cause was submitted to the court, sitting as a jury, and the court found for appellee, and rendered judgment against Greer as administrator, and Fenno, the security in the appeal, for the amount of the note, &c.

Pending the trial, the counsel of Greer took a bill of exceptions, from which it appears:

"On the trial, the appellee, to sustain her action, offered and read in evidence the note sued on, after having proven the signature thereto to be the proper hand-writing of Johnson. To the reading of which, as evidence of the demand of said appellee, the counsel of Greer objected, on the ground that the plea of Johnson of want of consideration, sworn to and filed before the Justice, put in issue the consideration of said note, and placed the burden of proof upon appellee; but the court permitted said note to be read as evidence of the appellee's demand, deciding that said plea, sworn to, did not shift the burden of proof from appellant, but that he was bound to prove his plea notwithstanding; to which decision the counsel of Greer excepted."

Greer and Fenno brought error.

HEMPSTEAD AND BERTRAND, for appellants. This was an action on a promissory note, for sixty dollars, to which the obligor pleaded that it was made *"without any consideration whatever,"* and verified the plea. *Rev. Stat. sec.* 75, *p.* 629, *sec.* 89, *p.* 504.

This general averment is sufficient—the plea good and the *onus probandi,* necessarily rests upon the obligee. The production of the

note proves nothing; and to require any proof from the obligor, as to a consideration, would be not merely absurd, but would effectually deprive the defendant of a defence which the law allows him to interpose, since it is impossible to establish a negative. It was, therefore, the bounden duty of the obligee to prove the particular consideration upon which this contract was founded. Where the defence is based upon a *failure* of consideration, the special facts and circumstances must be stated, because the effect of that plea is to admit that there was *once* a consideration. But in a defence like the present, which is a positive denial that there *ever* was any consideration, the rule is different. The former is affirmative matter to be averred and proved by the defendant, while the latter is a traverse or denial which necessarily casts the burden of proof upon the opposite party. These distinctions are expressly recognized in the case of *Dickson* v. *Burke,* 1 *Eng. R.* 412, which is decisive of the present question, and on the authority of that case we ask for the reversal of this judgment. *Rudd* v. *Hanna,* 4 *Monroe* 531. *Ralston* v. *Bullit,* 3 *Bibb* 261.

CUMMINS, *contra:* Contended that the plea of Johnson filed before the Justice, was affirmative, and the burthen of proof to show want of consideration was upon him. On this point, he cited *Gage* v. *Melton,* 1 *Ark. R.* 224. *Rankin* v. *Badgett,* 5 *Ark. R.* 345. *Cross & Bizzell* v. *Bank of the State, ib.* 531. 2 *Stark. Ev.* 279. He argued that inasmuch as no formal pleading was necessary before the Justice, and the Statute permitted defendant to offer parol proof to impeach the consideration of the note, he could not shift the burthen of proof upon the plaintiff by putting in a formal plea, &c., citing *Rev. Stat. chap.* 87, *s.* 89.

OLDHAM, J. The question presented by the record in this case, was decided by this court, in the case of *Rankin* v. *Badgett,* 5 *Ark. Rep.* 345. It was there held that the defendant was bound to show that "the bond was procured by fraud, or was given without consideration." The note is *prima facie* evidence of consideration, notwithstanding the plea impeaching it upon that ground, and it devolves upon the defendant to repel that presumption by proof.

This was a suit instituted before a Justice of the Peace. The consideration of the note could have been enquired into without any plea. The filing of the plea did not shift the *onus* from the defendant to the plaintiff.

The question was not involved in the case of *Dickson* v. *Burke,* 1 *Eng. R.* 412. The question in that case, was whether a plea denying any consideration was a good plea. It was held by the court that it was; but nothing was said in reference to the proof upon such a plea, or upon whom the *onus* devolved. We are of opinion that there is no error in the judgment of the Circuit Court, and accordingly affirm the same.