

## FERGUSON ET AL. VS. MCCAIN.

A plea that the consideration of the note sued on was an improvement on, and right to land, represented as swamp land belonging to the State, the owner of which improvement would be entitled to a pre-emption; and that the land was not swamp land, is not good as a plea of failure of consideration.

*Appeal from Pulaski Circuit Court.*

Hon. JOHN J. CLENDENIN, Circuit Judge.

BERTRAND, for the appellants.

WILLIAMS & MARTIN, for appellee.

Mr. Justice FAIRCHILD delivered the opinion of the court.

McCain brought an action upon two bonds against Ferguson and another person. As a defense to one of the bonds, Ferguson pleaded that it was given in consideration of the settlement and improvement of McCain, upon the north-east quarter of section twenty-three, in township three, north of range fourteen west, and for his right to the land; that McCain represented to Ferguson that the land was swamp land belonging to the State, by which McCain, or any owner of his settlement or improvement, would be entitled to a pre-emption of the land, upon making the proper proof under the laws of the State, whereby Ferguson was induced to purchase the settlement and improvement; that the land was not swamp land, but railroad land, being included in the grant of lands for constructing the Cairo and Fulton railroad.

Although the plea avers that the consideration for the bond

was McCain's right to the land, as well as his settlement and improvement thereon, it also shows that McCain had no title to the land, that his only interest was the privilege of becoming its owner by purchase from the State. All that was sold to Ferguson was McCain's improvement. The plea does not show but that Ferguson obtained, and keeps possession of all that he bought, although he may be disappointed in his expectation of acquiring title to the land by purchase from the State. If McCain had known that the land was railroad land, and had falsely represented it to be swamp land, and had thereby induced Ferguson to buy it, the plea would have presented another case. No fraudulent representation of McCain is alleged; for all we know by the plea, he believed the land on which he had settled was swamp land. Whether it was so or not, was a matter about which Ferguson might have had as correct information as McCain. The means of knowledge were accessible to both, or to one as much as the other.

The plea is not good as a plea of failure of consideration of the bond in the first count of the declaration, and the circuit court rightly sustained the demurrer of McCain, quashed the plea and rendered judgment against Ferguson and his co-defendant for the amount of the bond.