Schnell v. Nell

17 Ind. 29 (1861)

Perkins, J.

Action by *J. B. Nell* against *Zacharias Schnell,* upon the following instrument:

This agreement, entered into this 13th day of *February,* 1856, between *Zach. Schnell,* of *Indianapolis, Marion* county, State of *Indiana,* as party of the first part, and *J. B. Nell,* of the same place, *Wendelin Lorenz,* of *Stilesville, Hendricks* county, State of *Indiana,* and *Donata Lorenz,* of *Frickinger, Grand Duchy of Baden, Germany,* as parties of the second part, witnesseth: The said *Zacharias Schnell* agrees as follows: whereas his wife, *Theresa Schnell,* now deceased, has made a last will and testament, in which, among other provisions, it was ordained that every one of the above named second parties, should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said *Theresa Schnell,* deceased, in her own name, at the time of her death, and all property held by *Zacharias* and *Theresa Schnell* jointly, therefore reverts to her husband; and whereas the said *Theresa Schnell* has also been a dutiful and loving wife to the said *Zach. Schnell,* and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said *Zach, Schnell,* agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said *J. B. Nell;* $200 to the said *Wendelin Lorenz;* and $200 to the said *Donata Lorenz,* in the following installments, viz., $200 in one year from the date of these presents; $200 in two years, and $200 in three years; to be divided between the parties in equal portions of $66 2/3 each year, or as they may agree, till each one has received his full sum of $200.

And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money [one cent], and to deliver up to said *Schnell,* and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said *Theresa Schnell,* deceased.

In witness whereof, the said parties have, on this 13th day of *February,* 1856, set hereunto their hands and seals.

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered. . . .

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, *Theresa,* at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, &c. . . .

The Court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. . . .

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against *Zacharias Schnell.* It specifies . . . distinct considerations for his promise to pay $600:

1. A promise, on the part of the plaintiffs, to pay him one cent.

2. The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property. . . .

The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so.

As the will and testament of *Schnell's* wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. . . . The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for *Schnell's* promise, on two grounds:

1. They are past considerations.

2. The fact that *Schnell* loved his wife, and that she had been industrious, constituted no consideration for his promise to pay *J. B. Nell,* and the *Lorenzes,* a sum of money. . . . Nor is the fact that *Schnell* now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See *Stevenson v. Druley,* 4 Ind. 519.

*Per Curiam.*

The judgment is reversed, with costs. Cause remanded &c.