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NOTRE DAME LAW REPORTER ASSOCIATION
Notre Dame, Indiana.

SUPREME COURT OF NOTRE DAME

GREEN ET AL. VS. HILL.

No. 7.

Promissory Note—Holder in Due Course —Auction Sale—Warranty by Auctioneer—Breach—Implied Authority—Ratification—Procedure, Recovery Limited to Theory Plead — Instructions — Burden of Proof, Shifting.

1. Since a party may succeed in a case only on what he both pleads and proves, the defendant who pleads by way of confession and avoidance in an action for the purchase price of personal property the written warranty by the seller's auctioneer, may not succeed in the case upon the theory of material misrepresentation or fraud of such auctioneer.

2. It is not within the scope of the authority of the auctioneer of personal property to warrant it unless the seller actually authorizes such warranty. Where an auctioneer sells a horse and takes the purchaser's note with surety, and, without the direction or knowledge of the seller, issues to the purchaser a warranty of such horse, the seller as payee, or the indorsee of such note, may recover thereon despite such warranty, unless the seller has ratified the warranty.

3. Where a seller instructs his auctioneer not to warrant a certain horse; is not present at the auction or at the time the purchaser's note is taken, and later, upon his return, accepts such note together with the other proceeds of his sale; negotiates said note to the indorsee who, before purchasing it, informs the seller that the maker had come to notify him that the horse was not sound and would be returned, the seller having no knowledge whatever of the warranty of the horse by the auctioneer given in violation of his instruction; such facts are not sufficient to charge the seller with knowledge of such unauthorized warranty; nor do they constitute a ratification of the warranty.

4. A warranty executed by an auctioneer of personal property without the authority of the seller may make the auctoineer personally liable, but does not bind the seller.

5. An instruction that the burden of proof is upon the defendants to establish by a preponderance of the evidence the warranty and breach plead by them is a correct and necessary statement of the law of the case, and is not made erroneous by the failure or refusal of the court to further instruct that, upon such proof of the warranty and breach, the burden shifts to the plaintiff to prove his good faith in the purchase of the note in suit. In this case such error would have been harmless for the reason that defendants failed to establish their defence of warranty and breach.

Action by William Hill against John Green and Daniel Walker on a promissory note. From a judgment for plaintiff the defendants appeal. *Affirmed.*

Leo J. Ward and Maurice F. Smith for Appellants.

Ralph W. Bergman and Emmett J. Rohyans for Appellee.

VURPILLAT, J. The issues in this case were formed by the complaint in one paragraph based on a promissory note executed by the defendants, and their answer in three paragraphs: the first, general denial; the second, breach of warranty; and the third, alleging fraudulent transfer of the note to avoid defences. A cross-complaint was filed by the appellant, Daniel Walker, against his co-defendant and the plaintiff, alleging suretyship on the note in suit. The cause was tried by a jury which returned a verdict for the plaintiff and against the defendants, Green as principal and Walker as surety. Separate motion for a new trial was overruled, and judgment was accordingly entered from which this appeal is prosecuted.

The consideration for the note in suit was a horse purchased by the appellant, Green, at the public auction sale of Mr. Osborn. Mr. Osborn was unable to attend his sale, and specifically informed his auctioneer, Mr. Robinson, that this particular horse was unsound, and instructed him not to warrant the horse but to "get as much as possible" from the sale of the animal. Mr. Green attended the auction in person and himself purchased the horse in question after personally inspecting the animal and "trying him out" in the ordinary manner of testing stock at auction

sales. The horse was not advertised as sound or warranted by Mr. Osborn, nor was the horse so represented by the auctioneer to the public bidders. But to induce the appellant, Green, to bid and to purchase and settle for the horse, the auctioneer agreed to give him a warranty that the horse was "sound for wind and work." Accordingly the auctioneer, Mr. Robinson, did execute in his own name, but not in the name of the seller or as auctioneer for the seller, such a warranty and deliver the same to Mr. Green at the time of taking his note which the co-appellant, Walker, signed as surety.

The day after the sale a veterinary who happened to visit Mr. Green casually examined the horse and expressed the opinion that he had "lymphangitus." Mr. Green at once went to see Mr. Osborn, but not finding him, told the appellee, Mr. Hill, whom he met, of his intention to return the horse because he was unsound. Later in the day Mr. Osborn returned to his home and received the proceeds of his sale. He then sought to sell the note to Mr. Hill in order to get the money with which to pay the auctioneer. Then Mr. Hill informed Mr. Osborn of Mr. Green's visit and his avowed purpose to return the horse as unsound, whereupon Mr. Osborn said he had not warranted the horse. The following day Mr. Hill purchased the note. A week later Mr. Green offered to return the horse to Mr. Osborn and demanded his note. Upon being informed that Mr. Hill had purchased the note, Mr. Green made a similar offer to him and again demanded his note, which was refused.

As error for which the judgment should be reversed there is assigned the overruling of the motion for a new trial and that the verdict is contrary to law. In support of the motion for a new trial it is alleged that the verdict is not sustained by the evidence and is contrary to the law, and that the court erred in the giving and refusing of instructions.

This case must be decided upon the issue whether there was or was not a legal warranty of the horse sold, the sale of the horse furnishing the sole consideration for the note sued on. Appellants cite numerous cases in support of the general rule that a purchaser has a right to rely upon representations made by an auctioneer in effecting a sale, and that such representations are binding upon the seller. This is true where the representations are of fact so material that the court must construe them as forming part of the contract between the parties. Anson on Contracts, pg. 180; Behm v. Burness, 3 Best & Smith 751. Thus in the case of Roberts v. French, 153 Mass. 60, 26 N. E. 416, cited by appellant, it was held misrepresentation sufficient to avoid the contract for the purchase of land that the auctioneer stated specifically the boundary line measurements and the actual number of square feet contained in the tract, when as a matter of fact such lines were shorter and the number of square feet less than stated. And so too may a purchaser avoid his contract where the representations of the auctioneer were fraudulently made. Anson on Contracts, 199; Hughes v. Robertson, (Ky.) 15 Am. Dec. 104; Jeffreys v. Bigelow (N. Y.) 13 Wend. 518-28 Am. Dec. 476; Dowling v. Lawrence, 58 Wis. 282-16 N. W. 552; Lynch v. Mer. Trust Co., 18 Fed. 486.

But the appellant may not prevail upon the theory of misrepresentations of the auctioneer of facts material to the contract, nor upon his

fraud, for neither of these theories is plead by the appellants. The theory of their confession and avoidance plea is the express warranty of the horse and the breach of such warranty. The distinction between representation of facts which establish fraud and those which constitute a warranty is fundamental and vital in both the substantive and procedural law. Fraud is proceeded against in the *ex delicto* action of case, while breach of warranty is remediable in the *ex contractu* action of assumpsit. Chitty on Pleading, Secs. 97-99. A striking illustration of this important distinction between fraud and breach of warranty and the respective procedures involved is to be found in the early case of Caldbeck v. Simonton, 82 Vt. 69-71 Atl. 881, Sunderland's Cases on Common-law Procedure, 126.

A maxim of procedure is that one may recover only *secundum allegata et probata*—on what one both pleads and proves. Phillips on Code Pleading, Sec. 79. If therefore, one may recover only on what one proves, and may prove only what one pleads, and appellants plead only a warranty and its breach, then the court may consider the law and the evidence only for the purpose of determining whether appellants have established such warranty and breach, for on no other theory may they succeed in the case.

The auctioneer is the agent of the seller, and, as in other cases of agency, binds his principal in all contracts made by him within the scope of his authority. Roberts v. French, 153 Mass. 60-25 N. E. 416, 25 Am. St. Rep. 611, 10 L. R. A. 656. But when the auctioneer exceeds his authority the seller is not bound, Bush v. Cole, 28 N. Y. 261; Court v. Snyder, 2 Ind. App. 440, 28 N. E. 718. A warranty given by an auctioneer is binding if authorized by the seller and is within the scope of the authority conferred. 2 R. C. L. 470; Upton v. Suffolk County Mills, 11 Cush. (Mass.) 586. 59 Am. Dec. 163; Duff as Pioneer Stock Powder Co. v. Koontz, Notre Dame Law Reporter, Nov. No., page 2, 6. And the buyer of unsound personal property has the right to rely on the warranty thereof even though he may have made perconal inspection of such property before purchasing. First Natl. Bank, etc., v. Grindstaff, 45 Ind. 158.

In this case appellee's auctioneer gave to the appellant, Green, an express written warranty of the horse. Did appellee authorize his auctioneer to give such warranty? The facts disclose that he did not. On the contrary, appellee specifically charged his auctioneer not to warrant the horse. True in some cases where *general authority* to sell personal property is conferred upon an agent, such agent may bind his principal by a warranty though such authority is restricted by the principal, unless the purchaser knew of such restriction. I Am. & Eng. Enc. of Law 994; Talmage et al. v. Bierhause, 103 Ind. 270, 2 N. E. 716. But this rule does not apply to the auctioneer. The Am. & Eng. Enc., *supra,* quotes from the English case of Payne v. Leconfield, 51 L. J. Q. B., Div. 642, as follows: "The question is whether an auctioneer, in the absence of express authority from his principal, or even in spite of his authority, can warrant an article sold at a sale. In regard to that naked proposition I say he cannot. . . . An auctioneer receives miscellaneous articles of all descriptions to sell to others. He is *simpliciter* an agent to sell. His duty would

be to inquire of his principal if it were desirable that a warranty should be given."

An auctioneer has by virtue of his office no implied authority to warrant property sold by him. 3 Am. & Eng. Enc. of Law 491, 2nd Ed. Mechem on Agency, Sec. 904; Dod v. Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726; Com. v. Dickenson, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139; McGrew v. Foresythe, 31 Iowa 179; Court et al. v. Snyder, 2 Ind. App. 440, 28 N. E. 718. In the Iowa case of McGrew v. Foresythe, *supra*, the auctioneer, in selling a flock of sheep, said: "Here is a nice lot of young, sound sheep." The defendant heard the statement, bought the sheep and gave his promissory note in payment. The sheep proved to be diseased with "scab" at the time of sale, and the defendant resisted the seller's action to collect the note. The court said: "No particular form of words is necessary to constitute an express warranty. It is sufficient if the words used on the part of the owner that the chattel is what it is represented to be. Naked praise or simple commendation of property offered for sale does not, as a matter of law, amount to a warranty. A bare affirmation of the soundness of a horse or other animal which is at the time exposed to the purchaser's inspection is not *per se* a warranty. It is of itself only a representation. To give it the effect of a warranty it must be shown to the satisfaction of the jury that the parties intended it to have that effect. (Citing) House v. Fort, 4 Blackf. (Ind.) 296." The Indiana case of Court et al. v. Snyder, *supra*, was an action on a promissory note given for the purchase price of a horse sold at auction, a case in every particular analagous to appellants' case, except that the warranty of the auctioneer in that case was not in writing. A demurrer was sustained to the defendant's answer, and upon this alleged error alone the case was appealed. This answer and the ruling thereon are interesting in pleading as well as in the substantive law involved and we therefore quote the answer at some lnegth: The averments are, that the mare for which the note was given, and which constituted the only consideration for such note, was at and before the time of sale thereof "sick and diseased, and had the seeds of an internal disease or malady from which she died in about three months after sale; that said disease and malady with said mare was affected was latent, affecting her internal organs and functions, and the same was not discoverable by the utmost care and diligence, and these defendants did not know or suspect the existence of the same at the time of said purchase; that said plaintiff knew of the said disease or malady with which said mare was affected before said mare was sold to these defendants, and he purposely concealed the existence therof from these defendants in order to obtain a sound price for said mare; that the more effectually to sell said mare as sound, he procured and employed an auctioneer to sell said mare at public sale; that said auctioneer had full authority to sell said mare, and he was not instructed by said plaintiff not to warrant the soundness of said mare; that at the time said sale was progressing, and before the purchase was made, these defendants inquired of said auctioneer whether said mare was sound and free from disease, and they were informed by said auctioneer and by another employee of said plaintiff that said mare was sound

and free from disease, which information they relied upon as true, and on the faith thereof they purchased said mare as sound and free from disease, and for the full value of said mare if she had been sound and free from disease," etc. In disposing of the demurrer to this answer the court said: "Just what the circumstances were under which the sale was made, other than that it was a public auction, is not apparent from the answer. It is nowhere averred that the appellee was present at the sale or knew the slightest thing about it, except that he instructed the auctioneer to sell the animal and did not forbid him to warrant her. If there is any fraud shown, it must consist in his failure to go to the auction sale and there to make it known that the mare was unsound. But this cannot be so; on the contrary, it is well settled, we think, that he cannot even be bound by express warranties made by the auctioneer, or other special agent, unless he has specifically authorized such warranty. Richmond, etc., Co. v. Farquar, 8 Blacfk. 89; I Wait Actions and Defences 487; I Am. & Eng. Enc. of Law 981. This being the law, and the appellants being presumed to know the law, we do not see how it was possible for them to be legally defrauded by the acts or statements of the auctioneer or third party present at the sale. And how the silence of the appellee could have contributed to such result when he is not shown to have been personally present at the sale, or even to have had any communication with appellants upon the subject of the sale it is not easy to perceive.

Implied warranties arise by operation of law from facts pleaded. It seems very much to us that it was the theory of the pleader here to set up an express warranty by the auctioneer, rather than to establish an implied warranty by the facts pleaded. But, however that may be, we do not think the facts sufficient in either case. We conclude, therefore, that the court committed no error in sustaining the demurrer to the answer."

The same court says in the opinion: "The rule is that, where the sale is an executed one, the buyer takes the thing sold with all its defects, if there be neither warranty nor fraud. And the decided weight of authority is also to the effect that a sale for a sound price implies no warranty, Parsons on Contract, 584, and note (r). See also Postel v. Card, I Ind. App. 252; Benjamine on Sales, Sec. 641, *et seq;* 10 Am. & Eng. Enc. of Law 133, *et seq.*"

Since there was in fact no express authority given to the auctioneer to issue the warranty in question, and there is by law no implied authority to do so, the auctioneer acted without authority, and such warranty is, therefore, not binding upon the seller of the horse, unless in fact he ratified such warranty as appellants contend he did.

A lack of authority may, as in other cases of agency, be supplied by ratification. 3 Am. & Tng. Enc. of Law 491; Montgomery v. Pacific Coast Land Co., 94 Cal. 284, 28 Am. St. Rep. 122. One of the conditions upon which ratification depends is, that the principal must have full knowledge of the facts pertaining to the unauthorized acts, so as expressly or impliedly to assume full responsibility for them. Mecham on Agency, Sec. 128; Wheeler v. Sleigh, 39 Fed. 347; Thacke v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Cram v. Sickel, 51 Neb. 828, 71 N. W. 724, 66 Am. St. Rep. 478; Am. Exc. Bank v. Loretta

Mining Co., 165, Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233.

Upon the issue of ratification the appellants had the burden of proof. But the record preponderates strongly against them. Mr. Osborn, the seller, at no time, expressly ratified his auctioneer's warranty. And there is no evidence in the record showing that he had any knowledge of such warranty until the appellants plead the same in this case. Nor is there anything which charges him with such knowledge. He specifically instructed his auctioneer not to warrant the horse, and he had a right to rely upon his auctioneer's duty to obey such instruction and to assume that such instruction had been complied with. Mr. Osborn was not present at the sale, nor was he present when the appellants gave their note in settlement and received the auctioneer's warranty. When Mr. Osborn arrived home and received the proceeds of his sale, including the appellants' note, he knew nothing of the warranty. True, Mr. Hill, the appellee, afterwards informed Mr. Osborn, when the latter sought to sell him the note, that Mr. Green, the purchaser, had stated that the horse was unsound and that he would return him. But this is no information of the warranty issued in violation of his instructions. One cannot be held to have ratified so material an act of which he had at the time no knowledge. There is here no ratification.

Not infrequently the agent himself becomes personally liable to the third person for his unwarranted assumption of authority when the principal is not bound. If without authority, express or implied. from his principal he warrants property, he is personally liable. Mecham on Agency 914; 3 Am. & Eng. Enc. of Law 492; Woodward v. Boter, 115 Mass. 81; Dent v. McGrath, 3 Bush (By.) 174; Schell v. Stephen, 50 Mo. 375; McGrew v. Forsythe, 31 Iowa 179; Sealing v. Knowleton, 94 Ill. App. 443.

Again an agent may make himself personally liable when he executes the contract in his own name and not in the name of his principal. The warranty in suit was executed by Mr. Robinson in person, and not as agent for Mr. Osborn, his principal. It was not signed by Mr. Osborn, nor does it appear to have been executed by the auctioneer for and in behalf of Mr. Osborn. It is this form of execution of a contract that binds the agent himself and not his principal. Holson v. Hassett, 76 Cal. 203, 9 Am. St. Rep. 193; Tilden v. Barnett, 43 Mich. 376, 38 Am. Rep. 197; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; Stone v. Wood, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; Dayton v. Warne, 43 N. J. L. 659; Magill v. Hinsdale, 6 Conn. 464, 16 Am. Dec. 70.

The appellants having failed to establish the warranty either by the seller's authorization or ratification thereof, and having plead no other defence to the note, must fail in their appeal. There is evidence in the record to sustain the verdict of the jury, and this court will not disturb it on the mere weight of the evidence. Duff as Pioneer Stock Powder Co. v. Koontz, N. D. Law. Rep., Nov. 1920, page 2.

Appellants allege as error for which a new trial should be granted the giving by the trial court of its own motion the following instruction: "The court instructs you that upon these special defences the defendants have the burden of proof, and to succeed thereon they must establish one or the other of such defences by a

preponderance of the evidence, and upon thus establishing either of such defences against the note in suit, the verdict should be for the defendants." This instruction, considered apart from the other instructions (which may not be done) may be complained of only by the appellee, for it directs the verdict for defendants merely if warranty and breach are established, and ignores the right of the appellee to recover on the note as a *bona fide* holder despite such warranty and breach. But in no view of the case might appellants have recovered the verdict without having established by a preponderance of the evidence this special defence plead by them. Nor would they have been entitled to the additional instruction that the burden of proof would shift to the plaintiff as the holder of the note to prove that he was a good faith purchaser of the note for value and without notice of the warranty and breach plead, if in fact the appellants had not first established such warranty and breach. The instruction given by the court is correct and must be given to the jury whenever confession and avoidance plea is used by the defendant. Every such plea must conclude with the prescribed common-law form, "and this the said (defendant) is ready to verify." Andrew's Stephens Pleading, pg. 189; Phillips Code Pleading, pg. 57. The burden of proof is upon the party alleging new matter. Andrew's Stephens Pleading, pg. 219, sec. 12.

The appellants would have been entitled to an instruction to the effect that, upon proof by them of the warranty and breach plead, the burden shifted to appellee to prove that he was a good faith holder of the note. Winter v. Nobs (Idaho), 112 Pac. 525; Schulthiers v. Sellers, 223 Pa. 513, 72 Atl. 887; Parks v. Johnson (Idaho), 119 Pac. 52; Robertson v. U. S. Live Stock Co., 164 Iowa 230, 145 N. W. 535; Benson v. Conant et al., 214 Mass. 127, 101 N. E. 60; In re Hill, 187 Fed. 214. Having tendered no instruction in the form desired by them, they cannot be heard to complain of the form of instruction given by the court. But even if the trial court had failed and refused to give such instruction to the jury, the error in this case would have been harmless for the reason, as shown, that appellants did not establish the warranty and breach, and the appellee was therefore entitled to recover on the note whether he was a good faith holder or not.

And for this reason it is also unnecessary to consider and determine on this appeal the issue so thoroughly and admirably presented by counsel both for appellants and appellee, namely: that appellee was not a good faith holder of the note, and therefore not entitled to recover thereon.

The judgment of the trial court having been rendered for the appellant, Walker, on his cross-complaint as surety, he is relying upon the same errors assigned as his co-appellant. Having found no errors in the record the judgment of the Notre Dame Circuit Court is in all things affirmed.

WASHBURN V. BLAKE

No. 8.

Replevin—Existing Trover Judgment—Res Adjudicata.

An unsatisfied judgment in trover does not operate to pass title to the converted property from the owner to the wrong-doer, nor does it operate as a bar to a subsequent action against such wrong-doer or a third person who acquires the property from him.

Action in replevin by Henry Blake against James Washburn. From a judgment for plaintiff the defendant appeals. *Affirmed.*

Clyde A. Walsh and George D. O'Brien for Appellant.

William S. Allen and Frank E. Coughlin for Appellee.

VURPILLAT, J. By this action in replevin Blake, the appellee-plaintiff, recovered a judgment for the return of a steer from the appellant, Washburn. The declaration is in one count alleging the ownership and right of possession in the plaintiff and the wrongful taking and detention by the defendant. A plea was filed containing counts of *non cepit* and *non detinet* and former adjudication. To the latter plea plaintiff filed replication of general issue. The cause was tried by the court without a jury, and the court found for the plaintiff that he was the owner and entitled to the immediate possession of the steer described in the declaration, and to ten dollars damages for its wrongful detention. Separate motions of the defendant for non suit, a new trial, and in arrest of judgment were overruled and proper exceptions taken, all of which rulings are assigned as error on this appeal. Judgment was rendered on the finding from which this appeal is taken.

Briefly stated the facts of the case are that John Caldwell, while driving a herd of his cattle past the farm of the appellee, Blake, "picked up" and drove off the steer in question, which belonged to Blake. Afterwards the appellant, Washburn, with knowledge of the foregoing facts, bought the steer from Caldwell, and now retains it as his own. Before learning that Caldwell had sold the steer to Washburn, Blake brought action in trover against Caldwell, alleging conversion and demanding $150 damages, the value of the steer. Later, upon learning that Washburn had his steer, Blake demanded it and brought this action for its recovery. In the meantime a judgment in favor of the appellee, Blake, and against Caldwell was rendered in the other case. The latter judgment, however, remains unsatisfied, and no execution has been issued thereon.

It is this judgment in trover in favor of Blake against Caldwell that appellant, Washburn, pleads as *res adjudicata,* in bar of Blake's present action of replevin against him. Although this plea of former adjudication does not contain an allegation that such judgment has been paid and satisfied, yet the trial court overruled plaintiff's demurrer thereto, holding, as a matter of law, that such unsatisfied judgment itself was sufficient to bar plaintiff's recovery. But, notwithstanding such judgment was proven as plead, thereby constituting a bar to plaintiff's right of recovery, the trial court, contrary to its ruling on the demurrer, rendered judgment for the plaintiff. Either the ruling on the demurrer was erroneous or the finding and judgment are contrary to law.

The sole question in this case is whether or not a judgment in trover for the value of property converted, which judgment is unpaid and unsatisfied, of itself operates to transfer title to the converted property to the defendant so as to bar a subsequent action by the plaintiff for its specific recovery. There is much contrariety of opinion in the decisions of the courts upon this proposition, even among the courts of the same jurisdictions. Appellant, to support his contention that the judgment in trover bars the appellant's right to recover in this case, cites numerous decisions from various jurisdictions, and to sustain the contrary rule ap-

pellee also cites many cases from the same jurisdictions. After a careful study and analysis of these decisions and the rules deduced therefrom by the text writers and other general authorities, we are led to accept as a correct general presentation of the law, the statement found in 28 Am. & Eng. Enc. of Law, (2nd Ed.) 738, which is as follows: "There is conflict in the decisions with regard to the effect of a recovery in trover upon the title to the chattels converted. In the earlier cases the general rule was announced that a recovery in trover for the value of chattels converted vested of itself the title of the plaintiff in the defendant, without regard to a satisfaction of the judgment. In the later decisions, however, the rule, now generally recognized as the better doctrine, is that the mere recovery of judgment in trover does not vest in the defendant the title of the plaintiff, but the title is devested from the plaintiff and vested in the defendant only by a satisfaction of the judgment." (Cases are here collated).

Judge Phillips in his admirable work on Code Pleading, page 94, states the rule as follows: "Judgment for the value of the property converted, in trover, as for property carried away, in trespass, transfers the title to the property to the defendant," citing in support thereof I Chit. Pl. 161, n. 2; Acheson v. Miller, 2 O. S. 203; 2 Kent Com. 387; 6 Wait's Ac. & Def. 224. Following this statement of the rule is an admission that in some jurisdictions it is held that title does not pass until satisfaction of the judgment.

That Judge Phillips' deduction of the rule as stated by him is erroneous or unwarranted becomes obvious upon examination of his citations, all of which, save one, support the contrary rule. Chancellor Kent cautiously states the rule thus: "On a recovery by law in an action of trespass or trover of the value of a specific chattel, of which the possession has been acquired by tort, the title of the goods is altered by the recovery, and is transferred to the defendant." The rule as here stated is that to transfer title to the wrong-doer there must be *"a recovery . . . . of the value of the specific chattel"* and not merely the recovery of a judgment for its value. That satisfaction of such judgment must be made to effect the transfer of title is clearly held by Chancellor Kent, as shown by the remainder of his text on the subject, to-wit: "The books either do not agree, or do not speak with precision on the point, whether the transfer takes place in contemplation of law upon the final judgment merely, or whether the amount of the judgment must first be actually paid or recovered by execution. In Brown v. Wooten, (d) Fenner, J., said that in case of trespass, after the judgment given, the property of the goods is changed, so that the former proprietor may not seize them again; and in Adams v. Broughton, (a) the K. B. declared that the property in the goods was entirely altered by the judgment obtained in trover, and the damages recovered were the price thereof. On the other hand, the rule is stated in Jenkins (b) to be, that if one person recovers damages in trespass against another for taking his chattel, 'by the recovery *and execution* done thereon,' the property of the chattel is vested in the trespasser; and in the Touchstone (c) it is said that if one recovers damages of a trespasser for taking his goods, the law gives him the property of the goods 'because he hath *paid for*

them.' The rule of the civil law was, that when the wrongful possessor of movable property, who was not in a condition to restore it, had been condemned in damages, and had paid the same to the original proprietor, he became possessed of the title. The Roman and the French law speak of the change of rights as depending upon the payment of the estimated value, (d). So, also, in the modern case of Drake v. Mitchell, (e) Lord Ellenborough observed that he always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment was recovered, operating as a change of remedy, from its being of a higher nature than before, and that a judgment recovered in any form of action was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and until then it would not operate to change any other collateral concurrent remedy which the party might have. This (says Kent) is the more reasonable, if not the most authoritative, conclusion on the question. (a) I."

In 6 Wait's Actions and Defences, 224, it is said: "A judgment in an action of trover does not vest the property in the chattel, unless it is followed by satisfaction. (Brinsmead v. Harrison, L. R., 6 C. P. 584; Osterhaut v. Roberts, 8 Cow. 43; Morris v. Berkley, 2 Treadw. (S. C.) 228; Spivey v. Morris, 18 Ala. 254; Hepburn v. Sewall, 5 H. & J. (Md.) 211; Smith v. Alexander, 4 Sneed (Tenn.) 482; Lovejoy v. Murray, 3 Wall, 1, 16); nor unless it is for the *value* of the property. If damages are merely nominal, it is treated as covering only the damages for detention. Barb v. Fish, 8 Blackf. 481. A judgment and satisfaction is treated as equivalent to a purchase of the goods by the defendant, at the value assessed by the jury (Brinsmead v. Harrison, L. R., 6 C. P. 584), and it is upon this principal that a verdict, not estimated on the footing of the full value, does not vest the property in the defendant. Holmes v. Wilson, 10 Ad. & El. 511, n." After considering some early decisions of states which have since overruled them and established the rule as stated by Wait, this text writer continues: "Formerly, in England, a judgment for the plaintiff was held to transfer the title in the property to the defendant . . but it is now held not to have that effect until the judgment is satisfied, and such seems to be the most sensible rule. (Citing Lovejoy v. Murray and Brinsmead v. Harrison, *supra*)."

The case of Acheson v. Miller, 2 Ohio S. 203, which Judge Phillips cites as supporting his statement of the rule, is given in the annotation to 28 Am. & Eng. Enc. of Law, (2nd Ed.) 738, as supporting the contrary doctrine. And, although the syllabus of that case is misleading, the rule as stated and applied to the decision of the case by the court itself is as follows: "Where a party, for an injury to his property, elects to proceed by an action of trespass or trover for its value, the whole proceeding relates to the time of the taking or conversion; the controversy all relates to the property as of that time; the criterion of damages is the value of the property at the time of such taking or conversion. The party in effect abandons his property, as of that time, to the wrong-doer, and proceeds for its value; so that, when judgment is obtained *and satisfaction made*, the property is vested in the defendants."

Chitty on Pleading is the only au-

thority cited by Judge Phillips that lends any support to his statement of the rule that the mere judgment itself, rendered in trover or trespass, transfers title to the wrong-doer. Chitty's statement is so ancient that it is founded on the early English decisions. These, however, had been overruled by the courts of England and the United States Supreme Court at the time of Judge Phillips' deduction, as shown by Kent and Wait whom he cites as authority.

The generally accepted rule of today throughout the jurisdictions, with but one or two exceptions, is, that a judgment in trover or trespass, without payment or satisfaction thereof, does not pass title to the property to the wrong-doer or bar a subsequent action by the owner to recover such property or its value from the one who has wrongfully seized or converted it. In addition to the cases and authorities,*supra,* see: Notes (a) and 1 to Kent's Com. Vol. 2, pg. 389; Note to Wooly v. Carter, 11 Am. Dec. 524; 38 Cyc. 2112; Cooley on Torts, 537; Lovejoy v. Murray, 3 Wall, 1-18 Law Ed. 129; Atwater v. Tupper, 45 Conn. 144-29 Am. Rep. 674; Miller v. Hyde, 161 Mass 472, 37 N. E. 310-25 L. R. A. 42, 42 Am. St. Rep. 424; Spivey v. Morris, 18 Ala. 254-52 Am. Dec. 224 and note; Prior v. Portsmough Cattle Co. (N. Mex.), 27 Pac. 327; United Society v. Underwood, 11 Bush (Ky.) 265-21 Am. Rep. 214; Dow et al. v. King, 52 Ark. 282, 12 S. W. 737; John A. Tollman Co. v. Wait, 119 Mich. 341, 78 N. W. 124; Singer Mfg. Co. v. Skillman, 52 N. J. L. 263, 19 Atl. 260. Pennsylvania is the only state which seems to adhere to the contrary rule, as shown by the following cases cited by appellant: Floyd v. Browne, 1 Rawle 121, 18 Am. Dec. 602; Marsh v. Pier, 4 Rawle 273, 26 Am. Dec. 131.

Many of the states whose early decisions are in confusion and conflict have, in later cases, modified and overruled such decisions, and emphatically proclaimed the better and prevailing rule. Thus, in John A. Tollman & Co. v. Wait, *supra,* the Supreme Court of Michigan clearly distinguishes the cases of Kenyon v. Woodruff, 33 Mich. 310, and Brady v. Whitney, 24 Mich. 154, relied upon by the appellant, and declares in no uncertain terms for the modern rule as above stated. So, the Supreme Court of New Jersey, in the case of Singer Mfg. Co. v. Skillman, *supra,* in a terse opinion, waives aside as "rather loose intimations" of a "few judicial expressions" "in some of the cases of this court," and declares for the modern rule as follows: "The single question for the consideration of this court is whether a judgment in trover, without satisfaction, passes the title to the property converted to the wrong-doer. The reasons are so conclusive, and the decisions so numerous, in favor of the negation of this proposition, that all discussion of the subject seems to the court to be superfluous." The court then concludes with a quotation from Justice Miller of the U. S. Supreme Court taken from the case of Lovejoy v. Murray, *supra,* which follows: "In reference to the doctrine that the judgment alone vests the title of the property converted in the defendant, we have seen that it is not sustained by the weight of authority in this country. It is equally incapable of being maintained on principle."

We might venture our own opinion that the rule contended for by the appellant lacks both right reason and justice, elements which Blackstone

declares are the essentials of every law. What reason is there for denying to the aggrieved party the fruits of his right of action against a wrong-doer for the tortious taking or conversion of his property, by making the mere judgment, which such wrong-doer may evade and never satisfy, operate to defeat him in the actual recovery of his property or its value? and what justice is there in this process, which not only legalizes the wrong done, but actually transfers the title of such property from its rightful owner to the tortfeazor, and thus, by operation of law, forces such tortfeazor to profit by his own wrong.

A distinction, however, must be made between judgments in trover and trespass, *ex delicto* actions for the wrong or tort, which do not bar subsequent actions, and judgments in assumpsit or the *ex contractu* actions, where the plaintiff waives his right of action in tort and binds himself by the principle of the election of remedies, to proceed in contract, for the latter judgments do operate as a bar. 28 Am. & Eng. Enc. of Law (2nd Ed.) 739. Some of the cases cited by the appellant fall within this rule.

Not only is an unsatisfied judgment in trover no bar to the prosecution of a subsequent action in tort against the wrong-doer himself to recover the property taken or converted, but such action, as in appellant's case, may be maintained against a third party who acquires such property from the wrong-doer. Spivey v. Morris, 18 Ala. 254, 52 Am. Dec. 224; Dow et al. v. King, 52 Ark. 282, 12 S. W. 577.

There is no error in the record, and the finding and judgment of the trial court are sustained by the law and the evidence. Judgment affirmed.

BRIEF OF MAURICE F. SMITH IN CASE OF GREEN ET. AL. vs. HILL.

State of Indiana
In the Supreme Court of Notre Dame
John Green and Daniel Walker,
Appellants
vs.
William Hill, Appellee
Brief for Applicants.

NATURE OF ACTION

This is an appeal brought by John Green and Daniel Walker against the appellee, William Hill, from a judgement rendered in favor of the appellee, in the Notre Dame Circuit Court. The appellee as plaintiff brought action on a note given by the appellants to the appellee. The jury decided in favor of plaintiff-appellee in the sum of Two Hundred and Twelve Dollars, ($212.00) principle and interest and the court accordingly entered judgement for the amount stated in favor of the plaintiff and against the defendants, from which judgment the defendants prosecute their appeal to this court.

WHAT THE ISSUES WERE.

The issues formed consisted of a complaint in one paragraph on the note. The defendant filed a separate and several answer in four paragraphs; (1) general denial, (2) breach of warranty, (3) fraudulent transfer of the note to avoid defenses, (4) a special paragraph in behalf of Daniel Walker alleging no consideration for the suretyship.

The plaintiff filed a general demurrer ti the second, third, and fourth paargraphs of the defendants answer.

The plaintiff filed a general denial to the second and third paragraphs of the defendant's answer.

The defendant, Daniel Walker, filed a cross-complaint in one paragraph, against the plaintiff William Hill and the defendant, John Green, praying that he be adjudged a surety on the note.

The plaintiff William Hill filed a general denial to the defendants cross-complaint.

The defendant John Green also filed a general denial to the cross-complaint of Daniel Walker.

The trial was had by jury and both parties submitted interrogatories.

The defendants filed a motion for a new trial on the following grounds:

1. The verdict was contrary to the law.
2. The verdict is contrary to the evidence introduced.
3. The verdict is clearly against the weights of evidence.
4. The court erred in giving of its own motion, instructions numbered four and eight.
5. The court erred in refusing to give each of defendants instructions numbered five, eight, nine, ten, twelve, thirteen and fifteen.

HOW THE ISSUES WERE DECIIDED AND WHAT THE JUDGMENT WAS

The jury which tried the case returned the following verdict:-
State of Indiana,
County of St. Joseph,
In the Notre Dame Circuit Court,
September term, 1919.
William Hill
vs.
John Green and Daniel Walker.
Verdict.
We the jury find for the plaintiff

and against the defendant John Green as principal and against the defendant Daniel Walker as surety on the note in action and we assess the plaintiff's damages in the sum of Two Hundred and Twelve Dollars ($212.00).

Arthur B. Hunter,
Foreman

The plaitiff's general demurrer to the defendant's second, third and fourth paragraphs of answer was overruled as to the second and third paragraphs of answer and sustained as to the fourth paragraph of answer.

The court ovreurled the defendant's separate and several motion for a new trial, to which the defendants separately excepted.

The court then entered the judgment in accordance with the verdict.

ERRORS RELIED ON FOR REVERSAL

1. The verdict is contrary to law.
2. The verdict is contrary to the evidence.
3. The judgment appealed from is not supported by sufficient evidence.
4. The court erred n overruling the appellant's motion for a new trial.

CONDENSED STATEMENT OF THE EVIDENCE

Samuel Obsorne residing on a small farm situated near Healthwin IIndiana disposed of his realty and personalty at a public auction sale held on July3, 1919. He secured the services of Mr. Robinson, an auctioneer, and on the morning of July 3, Mr. Robinson reported at the farm at which time he was given his instructions regarding the sale by the seller, Mr. Osborne. The auctioneer was informed at this time that Mr. Osborne would not be able to be present at the sale. He was also instructed to get as much out of the sale as possible and while going over the property to be sold mention was made of a certain horse, the one for which the note in action was afterwards given. Knowledge of the disease with which the animal was afflicted reached the auctioneer through Mr. Osborne, who after mentioning the fact to the auctioneer, told him to obtain as much as possible for the diseased horse.

At the request of Mr. Osborne the plaintiff-appellee, Mr. Hill, assisted the auctioneer in arranging and disposing of the goods billed for sale. In effecting the sale of the defective horse the auctioneer warranted him to be "sound for wind and work," and after the animal had been paced several times it was bid off and "knocked down" to the defendant Mr. Green for the fabulous sum of $200.00. Mr. Hill was present at the time of the bidding and settlement, which was made after the sale. The buyer, Mr. Green, signed the conditions of sale, and an express written warranty was attached to the bill of sale. A promissory note was presented in payment for the horse and after it had been signed by the defendant, Mr. Walker, as surety, it was accepted.

The day following the sale, (July 4, 1919) Dr. De Coursey of South Bend, Indiana, happened to be visiting the home of Mr. Green, in Roselawn, Indiana. Mr. Green mentioned the purchase he had made the preceeding day and asked the licensed veterinarian to examine the animal. Upon examination the horse was found to be afflicted with a disease known as "lymhangitis," and immed-

iately following this examination Mr. Green went to Mr. Osborne's farm to inform him of the defective condition of the animal. Not finding Mr. Osborne he found Mr. Hill and told him of the unsoundness of the horse, also of his intention to return him at once. The proceeds of the sale were received by Mr. Osborne on his return the evening of July 4, 1919, at which time he also met Mr. Hill and asked him if he would purchase the not in question. It was at this time that Mr. Hill told Mr. Osborne that he had met Mr. Green that afternoon and learned of the unsoundness of the animal which was warranted to be sound. And after telling him of Mr. Green's intention to rescind the sale he asked whether or not he knew of the unsoundness of the horse previous to the auction sale. Mr. Osborne in answering stated that the animal was perfectly sound, for it appears he was over anxious about disposing of the note. He even said that he had the horse examined several days prior to the sale, but no evidence supporting the fact was introduced. Mr. Hill, being rather suspicious, did not purchase the note till the following morning, when he paid full falue for same ($200.00).

Being seriously ill for a week after the sale Mr. Green unable to return the animal to Mr. Osborne and demand the return of his note, but upon recovery he did so promptly. Mr. Osborne then refused to accept the return of the horse stating that he had sold the note and was no longer a party to the transaction. Mr. Green also went to Mr. Hill, the holder of the note, and demanded its return, but this demand was refused. Mr. Green then took the horse back home where he has kept and cared for it ever since. It was useless to him and he was willing to return it at any time. When the note fell due, Mr. Hill called at Mr. Green's store and demanded payment of the appellant which was refused, and as a result of the refusal to make settlement Mr. Hill brought action to recover on the note.

POINTS AND AUTHORITIES

I

The purchaser has a right to rely on the representations made by an auctioneer in effecting a sale, and parties selling at auction will be held to strict accountability for such representations.

Dowling vs. Lawrence. (Wis.) 16 N. W. 552.
Hugh v. Robertson. (Ky.) 15 Am. Dec. 104,
Jeffrey v. Bigelow & Tracey. (N. R.) 28 Am. Dec. 476.
Lynch v. Mercantile Trust Co. 18 Fed. 486.

II

The principal is bound as in any other case of agency by the contracts made by the auctioneer within the scope of his authority. And to the same extent as in other cases he is affected b ythe representations which the auctioneer makes in order to effect a sale.

Mechem Sec. 294.

III

Special Agents. Though the authority of an agent be restricted by instructions from the principal, the latter will be bound by a warranty attending a sale by the agent unless the purchaser knew of such restriction.

Talmage v. Bierhauh, 103 Ind. 270,
Davis v. Talbot, Receiver, 137 Ind. 235.

IV

Ratification by the principal of an *ultra vires* act of his agent auctioneer makes him liable for such acts as in other cases of agency.

Montgomery v Pac. C. Land Co. 28 Am. Rep. 122 Calif.

V

A holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face, (2) that he became a holder of it before it was overdue, and without notice that it had been previously dishonored if such was the fact, (3) that he took it in good faith and for value, (4) that at the time it was negotiated to him he had no notice of any infirmities or defects in the instrument or defect in title of the person negotiating it.

Art. IV Sec. 52 Uniform Negotiable Inst. Act.
Norton on Bills and Notes—414.

VI

To constitute notice of an infirmity in the instrument or defect in title of the person negotiating it, the person to whom it is negotiated must have actual knowledge of the infirmity or the defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Art. IV Sec. 56. Uniform Negot. Inst. Act.

Notice is the information concerning a fact, communicated to a arty by an authorized person or actually derived from him or by him from a proper person, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge.

Pomeroy on Equity Jurisprudence —594.
Winter v. Nobs, Idaho, 112 Pac. g25.
Vaughn v. Johnson, 119 Pac. 879.
Rublee v. Davis, 51 N. W. 135.

VII

Bad faith is the suspicion of the existence of facts constituting the equity or defect of title, followed by a failure to make a reasonably thorough investigation to discover them because offear of such discovery—or a failure on the part of the transferee to make a reasonably thorough investigation to determine whether or not a certain equity or defect in title exists under such circumstances as an ordinary person in the position of such transferre would invariably in the usual course of business sus. yect that there was such a defect in title.

Googman v. Simonds, 15 L. Ed. 934
Union Nat. Bk. v Mailoux, 132 N. W. 168.
Jobes v. Wilson, 124 S. W. 548.
Norton—Bills and Notes—429.

VIII

Every person is deemed, prima facie to be holder in due course but when it is shown that the title of any person who has negotiated the instrument is defective then the burden of proof is on the holder, that is, to prove that he or the person under whom he claims acquired the title as a holder in d ue course.

Art. IV Sec. 59, Uniform Negot. Inst. Act.
Vaughn v. Johnson, 119 Pac. 879.
Parks v. Johnson, 119 Pac. 52.
Robertson v. U. S. Live S. Co, 145 N. W. 535.

Benson v. Connant, 101 N. E. 60.
Kuhe v. Beehan, 82 Pac. 884.
In re Hill, et al., 187 Fed. 214.
Goodman v. Simonds, 15 L. Ed. 934
Union Nat. Bk. v. Mailoux, 132 N. W. 168.

ARGUMENT

The real grounds upon which the defendants are basing this appeal are: (1) should a warranty given at the time of an auction sale, by an auctioneer, be valid and binding upon the principal or holder of the note, given in payment, with notice of the warranty and prior equities, (2) If such warranty was not ordinarily proper in the usual course of business, will subsequent ratification of same make it binding and valid and what constitutes ratification. (3) What will constitute a holder in due course. (4) Under what circumstances will bad faith be imputed, so as to make an indorsee, taking before maturity, a holder not in due course. (5) What will constitute notice such as to make an indorsee not a holder in due course. (6) After showing that fraud was perpetrated in the execution and negotiation of the instrument, upon whom does the burden of proof fall to show that the indorsee or holder is not a holder in due course.

The auctioneer in this case was vested with the powers of special and general agents, since he was given the express authority of managing and selling all of the property by the express words of the owner, Mr. Osborne. And furthermore, the absence of Mr. Osborne from the sale gave the auctioneer numerous additional powers which do not ordinarily vest in an auctioneer who is considered as merely a special agent. The essence of the express power given was that the auctioneer should "get as much as possible" out of the sale and he certainly acted in strict accordance with his instructions. The evidence brought out this fact very clearly, that is, that the owner, Mr. Osborne, had knowledge of the unsoundness and defective condition of the animal and even went as far as to inform the auctioneer to that effect prior to the sale. But in utter, disregard of the above mentioned facts, the auctioneer warranted the horse, and as a result of these false representations effected a sale obtaining the unreasonable price of $200.00 from an innocent purchaser. A similar situation existed in the case of Jeffrey V. Bigelow, a New York case reported in 28 A. D. 476. Here we have an agent authorized to sell sheep which he and his principal knew to be unsound, and at the time of the sale he failed to disclose the facts to the purchaser. The ruling of the court was:

> "That the principal is liable for his agent's failure to disclose to a purchaser of sheep, which he was authorized to sell, the fact that they are diseased, where that fact is known to the agent."

"That the principal is liable for his agents failure to disclose to a purchaser os sheep, which he was authorized to sell, the fact that they diseased, wher that fact is known to the agent."

It is impossible to conceive of any judicial tribunal that would not consider such a warranty binding upon the vendor, for the acts of the auctioneer were fraudulent in every sense of the word. The evidence which tended to show that the warranty was binding was so great that the trial jury in answering plaintiff-appellee's interrogatory, found that the agent had authority to warrant

the horse and consequently, such a warranty must have been binding on the vendor. In the case of Dowling vs. Lawrence reported in 16N. W. 552, the Wisconsin Supreme Court held:

"If in a contract of sale, the vendor knowingly allows the vendee to be deceived as to the thing sold, in a material matter, his silence is grossly fraudulent in a moral point of view and surely may be treated accordingly in law tribunals."

There are numerous cases that support our contention that the vendor is bound to disclose such facts that he knows the buyer will not be able to find, and where such defects are known to the seller and he goes so far as to warrant an article through his agent, who also knew of the defects, how can such a warranty be anything but binding—common honesty and business intergrity in such cases commands a man to speak out.

Supposing at the time of the sale that the warranty had not been valid and binding would not Mr. Osborne's acquiescence and acceptance of the proceeds and benefits therefrom constitute ratification. This certainly would amount to a ratification, for the evidence pointed out very distinctly that Mr. Osborne realized that the purchase price paid was greatly in excess of the actual value of such a useless animal, and still did not attempt in any way to make reparation. The acceptance and transfer of the instrument to the plaintiff Mr. Hill must be construed as an acceptance and naturally a ratification of the act of his agent.

Since we have produced sufficient facts as will bar the original payee's right to recover, we must show that the plaintiff-appellee did not obtain the note under such circumstances as would constitute him a holdre in due course, and therefore, he possesses no greater right of recovery than the original payee and is bound by all of the defenses and equities which the maker of the note might have against the original payee. Section 52 of the Uniform Negotiable Instrument Act provides as follows:

> "A holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular on its face, (2) that he became a holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact, (3) that he took it in good faith and for value, and (4) that at the time it was negotiated to him he had no notice of any infirmity or defect in the title of the person negotiating it."

In considering this section we can readily see that the first two of the necessary elements have been complied with by the holder of the note, but as to the third and fourth the contrary is true. The evidence tends to show bad faith and actual notice of defects in title of the person negotiating it, consequently it is ridiculous to consider Mr. Hill a holder in due course. Norton defines bad faith as follows:

> " 'Bad Faith' is a suspicion of the existence of facts constituting the equity or defect in title, followed by a failure to make a reasonably thorough investigation to discover them, because of a fear of such discovery."

Mr. Hill certainly must have harbored a suspicion as to the validity of the instrument, for Mr. Green informed him on the day before he purchased the note that there was a failure of consideration on the part

of Mr. Osborne in that the animal was not as per the warranty made by the auctioneer. Upon receiving this information which must have created a suspicion in his mind, he merely made one single inquiry as to the truth or falsity of the matter related by Mr. Green, and in making what he called a thorough investigation he went to Mr. Osborne who would naturally refute the statements of Mr. Green since he was very anxious to rid himself of the note. Bad faith could not be more evident than it is in this particular case and many cases are on record holding bad faith on less positive evidence.

Now, we must consider the fourth essential necessary to constitute a holder in due course and this essential is notice. In Norton on Bills and Notes the following may be found:

> "Notice may be actual or constructive and bad faith means not merely knowledge, but means of knowledge to which the party willfully shuts his eyes. In equity jurisprudence notice may be knowledge of any fact sufficient to put a prudent man upon inquiry as to the existence of some right or title in conflict that he is about to purchase. It is the duty of every purchaser of property, if facts are brought directly home to him such as would put a reasonably prudent man upon his guard to prosecute an inquiry."

The Idaho Supreme Court in the Winter vs. Nobs case which was practically identical and analagous to our case, rendered a decision in favor of the maker of the note. Therefore, we contend that Mr. Hill could not have been a holder in due course, because the information given him from the mouth of Mr. Green regarding the defective condition of the horse was nothing less than actual notice. The fact that he failed to prosecute an inquiry that a reasonably prudent man would surely have done under similiar circumstances, makes the presumption of bad faith and actual notice too strong to be overlooked.

The appellants sixth point need not be discussed very thoroughly, for the weight of authority is obviously in their favor. On page 454 of Norton's Bills and Notes the burden of proof question is definitely decided:

> "The holder of a bill or note, is in the first instance, presumed to be a holder for value and without notice; but, if it is proved on the trial that the bill or note in its execution or negotiation was affected by fraud, it is incumbent for the holder to prove that he is a holder in due course."

The following alone should be sufficient to indicate that the trial court erred in giving of its own motion Instruction Number Four (4)

> "The court instructs you that upon these special defenses the defendants have the burden of proof and to succeed thereon, they must establish one or the other of such defenses by a preponderance of the evidence, and upon thus establishing either of such defenses against the note in suit, the verdict should be for the defendants."

Readily we notice that the court should have further instructed the jury to this effect, that upon showing the existence of a contract of warranty and a breach thereof, the burden of proof immediately shifts upon the holder to satisfactorily prove that he was a holder in due course.

In considering the burden of proof as to good faith of an indorsee on a promissory note in the Schulthiers

vs. Sellers case (72 Atl. 887) the Penna. Sup. Court held that the holder of a promissory note required to show the consideration paid, and how it came into his hands, where the defendant proved that it was put into circulation fraudulently. It is our firm belief that the above mentioned instruction was plainly erroneous and in the fact was the prime cause of a verdict being returned against the appellants herein. Unquestionably, such an error in the lower court is a sufficient sause for a reversal and judgment in favor of the appellants. A few more cases in support of our contention may be cited:

Parks v. Johnson, Idaho, 119 Pac. 52.
Robertson v. U. S. Live Stock Co., Iowa 145 N. W. 535.
Benson v. Conant et al. Mass., 101 N. E. 60.
In re Hill et al., 187 Fed. 214.

In concluding, the appellants believe that they are entitled to a judgment in their favor and a reversal of the judgment of the trial court n the following two grounds: (1) that the appellee was not a holder in due course, thereby making a recovery as against the breach of warranty an impossibilty, and (2) that the court erred in its failure to instruct the jury that the burden of proof was on the holder in due course where it was shown that the instrument had been fraudulently executed and negotiated. Consequently, our precise contention is that the trial court erred grossly in overrulnig the appellants motion for a new trial.

We respectfully submit that for the errors which we believe we have clearly indicated in this brief, the judgment of the court below should in all things be reversed.

BRIEF OF RALPH W. BERGMAN IN CASE OF GREEN ET. AL. vs. HILL.

State of Indiana
In the Supheme Court of Notre Dame
John Green and Daniel Walker,
Appellants
vs.
William Hill, Appellee

Brief for Appellee.

Appeal from the Notre Dame Circuit Court.

RECORD

The Appellant counsel's report of the evidence is substantially correct.

EVIDENCE

The statement of the evidence as set out in the appellant's brief is conditionally true. We find that what is said is true but he does not state all that was said, and does not complete the sentences as uttered by the witnesses themselves, and as also recorded by the clerk. A reference to the court's records will disclose and substantiate this affirmation.

Such an abridged statement is a very dangerous thing, as its inevitable consequences is deception. A half reiteration is more illusive than a complete misstatement. Such cunning briefing of facts and evidence much be abolished and it is my duty, to the furtherance of justice and righteousness, to so point them out to the learned court.

Mr. Osborne owned a farm and considerable personal property near Healthwin, Indiana. Wishing to retire, he offered at auction the personal property on the farm. This sale was, as advertised, held at his farm on the date of July 3, 1919. The services of Mr. Robinson an auctioneer were contracted for. On the morning of that day Mr. Osborne instructed Mr. Robinson as to the details of conducting the sale—the various articles to be sold—and especially did Mr. Osborne instruct the auctioneer concerning the horse, for which the note in question was given. As the appellants admit, Mr. Osborne told on that occasion of the unsoundness of the horse, and mentioned that it seemed to be afflicted with "lymphangitis", but told him to get as much out of it as possible. Mr. Osborne and the auctioneer, on the witness stand, both testified that Mr. Osborne in terse and emphatic language directed and cautioned the auctioneer that in the event the horse was sold, not to warrant him; and under no condition to warrant him because the horse was "not sound".

The horse was "put up" for auction and in due course sold and "bid off' to the highest bidder, who was the appellant, Mr. Green, for the sum and consideration of $200. Mr. Green was reluctant about buying this horse and the auctioner hearing that Mr. Green would not buy unless the horse was warranted, promised and did give Mr. Green the warrant. The auctioneer stated that he did this because it would increase his commission. His exact words were: "The more goods I sold, the more would be my commission". As the appellants contend, the auctioneer warranted the horse "sound for wind and work". This was defendant's exhibit Numbed 2. The warranty and bill of sale was then given to Mr. Hill. It is to be remembered that the above bill of sale and warranty was signed by Mr. Robinson, the auction-

eer, and not by Mr. Obsorne. We will show later that this is an important fact. The note in question was then given, having been signed by Mr. Green as principal, and Mr. Walker as surety.

Mr. Osborne was unexpectedly and unavoidably called to Chicago, due to the expected death of his mother. For this humanitarian reason he was unable to be present and attend the sale.

The horse was examined by a man named Dr. De Courcey. Dr. De Courcey, by the evidence, was taking dinner with Mr. Green and Mr. Green informed him of a purchase of a horse the other day and asked the doctor to "look him over." Such examination was merely a visual inspection, as was testified to by both the doctor and Mr. Green.

The doctor was a licensed veterinary. The appellants in their brief, say "The horse was found to be afflicted with lymphangitis." The doctor said "It appeared to be affected with such disease." The record will sustain this statement. This is a question of little importance to our case. Though the appellants seem to lay great stress upon it. The more they enlarge the noticability of the disease, the more they cast upon the appellant himself, his culpable, careless and indifferent purchase.

Mr. Hill took the stand and told the court and jury that he had been at Healthwin since the first of January 1918, and had known Mr. Osborne personally all this time, and had in fact spent most of his time in conversing with Mr. Osborne. Time lagged for Mr. Hill, and he made this pleasurable and sincere acquaintance. Mr. Hlil was a soldier and had been gassed in the world war. He knew Mr. Osborne very well and respected him highly.

The appellants allege the presence not distinguish between mental presence and mere physical presence. Mr. Hill told the court that he was not paid for the little ministerial duties he performed, saying in substance, "My object was merely to return past favors that Mr. Osborne had done for me." Nor did he assert at any time that he knew of the condition of the live-stock on the farm. When asked this question direct he replied: "I knew nothing of their condition." He stated he did not know that the horse for which the note was given was, as alleged, defective; stating that such suspicion came to him only on the day following the sale. Also stating that when Mr. Osborne asked him (Mr. Hill) to buy the note, he told of the information received from Mr. Green. Mr. Osborne emphatically and forecibly denied this disease and assured him of the horse's health because, as he stated, it was just examined by Dr. O'Hara. Having been such personal friends for a year and a half, Mr. Hill had a right to accept that statement in good faith; also having met and known Mr. Green but once.

Mr. Osborne wished to discount the note because the auctioneer was there and asking for his commission money.

The next day, July 5, 1919, Mr. Hill brought the note, paying Mr. Osborne the sum and consideration of $200.

The reason which Mr. Green gives for not returning the horse at the proper time if he thought it defective, is that he was sick and unable to do so: with which excuse he hopes to absolve himself from the legal obli-

gation to return or offer to return such goods.

POINTS AND AUTHORITIES

A special agent is one authorized to act only in a articular event and in accordance with specified instructions.

Mechemon Agency. Art. 14. Page 12.

II

It is ordinarily not only the right, but the duty of the agent to observe and comply with such valid and established customs and usages as apply to the subject matter or the performance of his agency. Such customs and usages, however, cannot, as between the principal and the agent, overrule positive instructions to the contrary.

Wanless vs. McCandless, 38 Iowa 20.
Osborn vs. Rider, 62 Wis. 235.

III

When an auctioneer exceeds the scope of his authority he does not bind the owner of the property.

Bush vs. Cole, 28 New Aork, 261.
Court vs. Snyder, 2 Ind. App. 440.

IV

A warranty given in an auction sale is valid and binding if such warranty is within the scope of the authority of the agent so giving it.

2 Ruling Case Law. 470.
Bush vs. Cole, 28 N. Y. 261.
Upton vs. Suffield County Mills, 59 Am. Dec. 163.

V.

Bad faith means nothing more than participation in the fraud and resolves itself into the question of honesty or dishonesty, for guilty knowledge and wilful ignorance, alike, involve the result of Bad Faith.

Murray vs. Lardner, 17 Law. Ed. 857.
Richmond Trading & Mfg. Co. vs. Farquar, 8 Flk. 89.

VI.

It is now the rule of the Law Merchant that *mere knowledge* of any facts sufficient to put a reasonably prudent man on inquiry is not sufficient, but that to defeat his claim to be considered a bona fide holder he must be guilty of Bad Faith.

Arndt vs. Aylesworth, 145 Ia. 185.
Hakes vs. Thayer, 165 Mich. 476.
Reeves & Son vs. Letts, 143 Mo. App. 196.
Ketchem vs. Govin, 71 N. Y. Supp. 991.
Rice vs. Barrington, 70 Atl.. 169.
Dorsey vs. Wellman, 122 N. W. 989.

VII

Actual bad faith is a suspicion of the existence of facts constitnting the equity or defect in title, followed by a failure to make a reasonably thorough investigation to disrlose them because of the feas of such discovery.

ARGUMENT

There are certain underlying principles which the appellants have ignored. (1st) The authority to issue the warrant. (2nd) The auctioneer exceeding the scope of his authority, or was warranting done in obedience to the commands and instructions of the principal, Mr. Osborne. (3rd) The signatures on the warranty. (4th) Did not Mr. Green, as appellants argue, return the horse a week after the sale and four days after the sale of the note. (5th) How much and what purity of circumstances are necessary before a man can be charged with bad faith. (6th) Did the auctioneer because of personal

gain, commit the fraud, if such was committed, by resorting even to a written warranty to increase and swell his cofmission. (7th) No evidence to show that Mr. Osborne had cognizance of the fact that the horse was to be returned until four days after the sale of the note. (8th) Did Mr. Green, upon learning from Dr. DeCourcey that the horse appeared to be affected with "Lymphangitis," rescind and notify Mr. Osborne as soon as possible. No. He waited five days before he notified him, and after the sale of the note.

We will remember from the evidence of the forcible language used by Mr. Osborne to Mr. Robinson concerning the condition of the horse and regarding the warranty thereof, and we can see that the warranty was not within the scope of the auctioneer's authority, nor was it signed by the principal in order to ratify this act, nor was such ever ratified by the principal. There was no evidence to show that Mr. Osborne even knew that the horse was sold, nor was it shown that Mr. Osborne knew that Mr. Green bought the horse. Nor did he know that the note in question was given as consideration for this horse. And under these considerations, how could he have ratified the unauthorized act of the agent! Knowledge is an essential element of ratification. How could a man ratify an act when he did not know of the act. Consequently under these conditions and the law of simple contracts, those whose names appear upon the contract are *prima facie* liable thereon. The agent here is not a general agent, but the law tells us he is a special agent, and as such this special agent, and not the principal, is liable on the warranty question. Since breach of warranty is a personal defense and available to the parties to it, the defense should not be applicable to a third person, who was not a party to such warranty. The appellants see mto lay much stress upon ratification, and to establish this they hope to have the case reversed. The case in question does not deal with the fraud of Mr. Osborne in selling a defective instrument: our duty rests upon showing that Mr. Hlil was a good-faith purchaser, and for a valuable consideration. No matter if Mr. Osborne did deceive both Mr. Green and Mr. Hill in his representations, if Mr. Hill, according to the law, was a holder in due course, in good faith and for a aluable consideration, he can recover on the instrument.

We have a case decided in this the same circumstances, and these operative facts and the evidence in this cited case are not half as strong as in this case and yet the court decided a swe pray the court will in this case sustain the verdict.

Court vs. Snyder, 2 Ind. Appellate 440.

A mare was sold at auction. It was diseased at the time of sale. The disease could not have been discovered at the time of the sale because of its internal location. The plaintiffs knew of this disease and purposely concealed the same from the Defendants. The auctioneer was not instructed by the principal not to warrant. In our case the honesty and fairness of the principal drove him to emphatically warn the auctioneer "not to warrant": also the auctioneer did warrant.

The holding of the court in this case was:

1st—In executed sales, the buyer takes the thing sold with all de-

fects, if there is neither warranty nor fraud.
2nd—A sale for a sound price implies no warranty of soundness.
3d—Without wilfull misrepresentation or artful devise the character or concealed defects in a thing sold, the vendee is bound by the contract even though the vendor gets a decided advantage and puts off on the vendee a defective article.
4th—That the seller is aware of a latent defect in an animal sold does not amount to fraud unless he makes some statement or uses some act or devise calculated to deceive the buyer, or to induce him not to make inquiry.
5th—A seller is not bound by express warranties made by an auctioneer or other special agent unless he has especially authorized such warranty.
6th—In executed sales, without express warranty, no warranty is implied.

Now, Learned Justices of the Supreme Court, let us look to the question of bad faith and see what the modern law deems necessary to constitute bad faith and which will prevent the decision from being sustained.

Allow me to quote from Parsons on Contracts. Page 577-8.

I becomes, therefore, important to know what the law means by fraud in this respect, and what it recogprenizes as such fraud as will prevent the application of the general rule. The weight of authority requires that this should be active fraud. The Common Law does not oblige a seller to disclose all that he knows which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself o rto require a warranty.

Beninger vs. Corwin 24 N J L 257
The Court said:

Where there is no wilful misrepresentation or artful devise to disguise the character or conceal the defects of the thing sold, the vendee is found by contract even though the vendor got a decided advantage in the trade and put off on the vendee a defective article, such as an unsound horse.

The Richmond Trading & Mfg. Co. vs. Farquar. 8 Blackford 89.

Again in this Indiana case the court held: It is well settled, we think, that a vendor cannot even by express warranty made by an auctioneer or other special agent, unless he has specially authorized such warranty, bind the principal.

Bush vs. Cole. 28 New York 261.

The Coure found as follows: Where the auctioneer is instructed not to sell property under a specific sum, and sells it for less, and the owner refuses to convey it on that account, the auctioneer is liable and not the principal.
131 American State Reports 483.
As to matters on which the express terms of his agency are silent, his authority is to be measured by the general usages of business. Thus an express warranty made by an auctioneer does not bind the seller, unless he has specifically authorized the auctioneer to make it, for a mere agency to sell does not carry with it by implication, power to warrant.

Let us take the case that is cited by the appellants and upon which they lay great stress. Winter vs. Nobs. 112 Pac. 525. The language of the court on innocent purchasers and bona fida pucrhasers, and it might be well to say that this is a very similiar case, but differs in the express warning given by the auctioneer. And the method of notice to Hill. We find in this previous case of the ap-

pellant's the following decision of the court:

"Mere suspicious circumstances are not sufficient to charge the purchaser of a promissory note with bad faith and notice of equities and defenses. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative issues as to diligence or negligence."

As the evidence showed, Mr. Hill certainly, if nothing else, was sincere and honest and diligent in the purchase of this note. He believed Mr. Osborne who was a good friend, long standing, at no time had Mr. Hill ever doubted or had reason to doubt Mr. Osborne's intergrity for truthfulness. He only bought the note when positively assured by Mr. Osborne, his personal friend, that the horse was sound and assured that Dr. O'Hara had just examined him. Isn't it most natural and conclusive to the condition of a thing, to inquire of the man who would most naturally know that condition? And who would be a better man to inquire of the condition of this horse than Mr. Osborne, the man who owned and possessed the horse, and who, because of these things would be the most authorative person to interrogate on this hypothesis. And above this, wouldn't the decision or statement of a personal friend be satisfactory proof and relieve the doubt in an ordinary person's mind. If everyone was a liar and no man's word could be given weight, then we could see how the appellants' contention should be sustained. By what rule of human nature and conduct should Mr. Hill disbelieve Mr. Osborne and believe the words of Mr. Green whom he had met but once. We cannot say what Mr. Hill thought of Mr. Green, not knowing him.

Let us now look at the language of the decision in the case of Gray vs. Boyle. 104 Pacific 829. This was taken Crawfords Annotated Negotiable Instruments Law.

> The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts the paper afloat, the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith and not by a speculative issue as to his diligence and negligence. The holders' right cannot be defeated without proof of actual notice of the defect on title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless unless he acted mala fides, his title according to settled doctrines will prevail.

Richards vs. Monroe. 85 IoIwa 357. The Court said:

> The rule that when a purchaser of a negotiable promissory note for value, before due, has such knowledge or information of infirmities in the note as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter, he will be held to have had notice.

Mr. Hill did act as a prudent man and would not buy the note the day Mr. Osborne offered it to him. His worde were these: "I will not buy the note. Mr. Greentold me that he wa sgoing to bring that horse back; it is unsound." To which Mr. Osborne replied;" The horse is sound

because I just had it examined the day before the sale by Dr. O'Hara." Mr. Hill even did not buy the note but waited until the next day after having thought the matter over. Undoubtedly he weighed the matter and thought of the circumstances and reached the honest conclusion that the words of Mr. Osborne were true. Certainly, Mr. Hill cannot be guilty of bad faith in purchasing the note. The note was not bought at a startling discount, but on the contrary the full face value was given. Which shows that there was no intention of profit or gain in the transaction. And would again show his good faith in purchasing the instrument.

Let me again call your attention to another Iowa case.

Lehmna vs. Press. 76 N W 818.

"The fact that the plaintiff was merely put on suspicion or was careless in not making inquiry, is not sufficient. He must be shown, by direct or circumstantial evidence to have taken the paper with knowledge or notice of its infirmities or circumstances must be such as to indicate wilful negligence to inquire, or such gross carelessness in failing to do so when inquiry would have led to such knowledge as shall establish bad faith."

Regarding the appellants' sitxh point, as to the burden of proof. Let me call the Learned Court's attention to the pleadings in this case. The record will show that the appellant filed by way of answer: 1. General denial. 2. Breach of Warranty. 3. Fraudulent transfer of the note to avoid defenses. 4. A special paragraph in behalf of the surety. We are concerned with 2 and 3. These are by way of confession and avoidance. It is a sacred rule of pleadings, "He who alleges must prove." It was their duty show these special defenses asthe trial court rightfully instructed.

We find from the decisions of other cases that definitions of Bad Faith and Good Faith are impossible to give. 1st. Because the facts involved are so different and varied. 2nd. Because good faith or bad faith involve a mental condition. These must be decided by, and depend upon many circumstances, such as, the demeanor of the witness, the consistency of the statements, his appearance in the court room, and the general scrutiny of the parties. The jury has, I venture to say, the best opportunity to observe these and answer the interrogatories accordingly and allow for same in the verdict which they return. The appellee prays that the Supreme Court will accordingly consider the question of good faith and give it consideration based upon the trial court's finding of good faith.

We respectfully submit this brief and beg that the judgment of the Lower Court be in all things affirmed.

NOTRE DAME CIRCUIT COURT

CAUSE NO. 18.

Charles Dressler
vs.
Nellie Cranford and
Walter Cranford

Archibald Duncan and
Alden J. Cusick,
Attorneys for Plaintiff.
James L. O'Toole and
Joseph L. Rafter,
Attorneys for Defendants.

FACTS.

On August 1, 1920, Nellie Cranford and Walter Cranford were married. While spending their honeymoon at the country home of Nellie Cranford's father, Andrew Rater, the plaintiff and divers other persons, men, women and children of the neighborhood, came to the Rater home for a charivari party on the defendants. Guns were fired in the air, bells were rung, cans dinned, etc., (bedlam noises). Rough house tactics ensued when the defendants refused to "come out" and "come across."

Plaintiff contends that, as he stood in the yard near the house, the defendant, Nellie Cranford, stuck the barrel of a shotgun out the bed room window and fired, the shot striking him in the hand and forearm, breaking the arm and badly lacerating the hand and forearm; that he was at the time and ever since a farmer of moderate means and compelled to depend upon his work on the farm for a livelihood for himself and family of wife and small children; that he was rendered sick and unable to perform his work for a period of two months; incurred costs and expenses of physician, surgeon and nurse; that he suffered bodily and mental pain; that he is permanently injured in this: that his hand and forearm are left stiff or rather inflexbile to a degree making use of them awkward and difficult. He demands $1,000. Plaintiff alleges that Nellie Cranford was in the presence of her husband, Walter Cranford, and fired the shot with his knowledge and consent. Walter Cranford was in the Rater home at the time of the shooting, but his exact location is in dispute.

Defendants contend that the crowd had been ordered off the premises by Mr. Rater; that the crowd remained and continued their serenade of the defendants; that plaintiff at the time he was shot had raised the window of the bed room in which Nellie Cranford and her little four-year-old niece were hiding; Nellie Cranford alleges that she shot in self-defence and in defence of her niece. Plaintiff denies that he pushed his gun through the window at any time, as alleged by Nellie Cranford.

Walter Cranford claims to have been in another part of the house at the time of the shooting, and denies having knowledge of or giving consent to the shooting.

TRIAL RECORD.

Plaintiff files complaint that Nellie Cranford injured him by perpetrating an assault and battery upon him, in the presence of and at the direction of her husband, Walter Cranford.

Defendants file motion to strike out certain parts of complaint, which motion is sustained.

Plaintiff files amended complaint in two paragraphs.

Defendants file separate and several demurrer to complaint, which the court overrules, defendants separately and severally excepting to the rulings.

Defendants file answer in four paragraphs, 1st, general denial, 2nd, *son assault demesne,* 3rd, defence of property, and 4th, plaintiff engaged in unlawful act, charavari.

Plaintiff files reply in general denial to the 2nd, 3rd and 4th paragraphs of answer.

Jury empannelled, and cause submitted and tried.

Plaintiff and defendants tender certain instructions, some of which are given and some refused, to which rulings they take their respective exceptions.

Arguments by counsel after which the court instructs the jury in writing, ordering the instructions filed and made part of the record without bill of exceptions.

Jury return verdict for plaintiff against both defendants for $1,000.

Defendants file separate motions for new trial which are overruled and exceptions taken.

Defendants separate motions in arrest of judgment overruled to which rulings they except.

Judgment rendered on the verdict to which defendants separately take exception.

Defendants pray appeal to the Supreme Court of Notre Dame which is granted upon the filing of appeal bond in the sum of $500 with the Great Northern Surety Company as surety. Ten days are given in which to file general bill of exceptions.

Defendants file the appeal bond prescribed and approved.

CAUSE NO. 19.

John Wagner
vs.
Nathan Parker

Charles P. J. Mooney and
Gerald Craugh,
Attorneys for Appellant
Walter A. Rice and
Charles M. Dunn,
Attorneys for Appellants.

FACTS.

On the 1st day of August, 1920, Nathan Parker owned a retail grocery store consisting of stock and fixtures, located in a ground-floor room on the corner of ———— and ———— streets in the city of Niles, Michigan. John Wagner owned an equity in a certain tract of land, to-wit: a contract for the purchase of (Here insert legal description of any forty-acre tract of land in St. Joseph County, Indiana). Parker and Wagner reside in South Bend, Indiana, and, on the first day of August, 1920, entered into the following written contract for the sale and exchange of their said properties, to-wit:

"Contract of Sale and Exchange."

This agreement, made and executed this 1st day of August, 1920, at South Bend, Indiana, between Nathan Parker, party of the first part, and John Wagner, party of the second part, WITNESSETH: That, that the party of the first part does hereby sell, assign, transfer, exchange, set over and deliver unto the party of the second part his grocery store consisting of stock and fixtures located on the ground-floor room of the building, on the corner of ——— and ——— streets, in Niles, Michigan, said grocery store and its con-

tents being more particularly described in the inventory thereof just completed which is hereto attached, referred to and made part of this instrument. And the said party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to warrant the sale of said property and the title thereof to the said party of the second part, his heirs, executors, administrators and assigns; and agrees to pay all debts against said property and said party of the first part on account thereof, up to the day, which debts now amount to about $1000. In consideration of which, the party of the second part does hereby sell, assign, transfer and deliver over to the party of the first part, all his right, title and interest in a certain tract of land situated in St. Joseph County, Indiana, as evidenced by the contract of purchase held by the said party of the second part and this day assigned and delivered by written assignment endorsed thereon, signed, sealed and acknowledged and delivered by the said second party unto the party of the first part, which said contract together with said assignment endorsed thereon is attached hereto referred to and made part of this instrument. And as a further consideration the party of the second part hereby executes and delivers to the party of the first part his promissory note, of this date, for $400, payable in one year, with interest at 6 per cent per annum from date, and attorneys fees, which note is hereby referred to, attached to this instrument and made part thereof.

Executed in duplicate by the parties this 1st day of August, 1920, at South Bend, Indiana, each party retaining a copy as the original contract.

(Signed) Nathan Parker,
(Signed) John Wagner.

Pursuant to the foregoing instrument John Wagner, after delivering the assigned contract and promissory note, went into possession of the store at Niles, Michigan.

In Michigan the Bulk Sales Law was in force but was entirely ignored by the parties in their contract, no attempt at compliance with its provisions being made by the parties. After going into possession of the store, the National Grocery Company, the Great Atlantic & Pacific Tea Company and the South Bend Wholesale Grocery Company, as creditors having claims against the first party to the contract, Nathan Parker, brought action in the Michigan Court under the Bulk Sales Law and took possession of the stock, placed it in the hands of a Receiver and sold the entire stock and fixtures to satisfy the claims of the creditors, these claims aggregating $1100. Parker and Wagner were made defendants to this proceeding in the Michigan court. Parker has paid no part of these claims.

Plaintiff brings action in the Notre Dame Circuit Court against Parker to secure the reassignment of the land contract back to him, and the cancellation of the note given to Parker under the contract.

TRIAL RECORD

Plaintiff files complaint in one paragraph for recission of assignment of his land contract and for cancellation of his note on ground of total failure of consideration.

Defendant files answer in two paragraphs, 1st, general denial and 2nd, that contract between parties is illegal and that both parties are in *pari delicto*.

Plaintiff files demurrer to the 2nd paragraph of answer which is sustained.

Defendant files amended 2nd paragraph of answer, to which plaintiff files demurrer, court overruling demurrer and plaintiff taking exception.

Plaintiff files reply in two paragraphs to the amended 2nd paragraph of answer, 1st, general denial, 2nd, fraud of defendant.

Defendant files demurrer to 2nd paragraph of reply on ground of departure. Court sustains the demurrer to which plaintiff excepts.

Plaintiff files amended 2nd paragraph of reply, and an additional paragraph alleging facts in confession and avoidance.

Defendant files motion to strike out the 3rd paragraph of reply, which court overrules and to which ruling defendant excepts.

Defendant files several demurrer to the amended 2nd and the 3rd paragraphs of reply. Court sustains demurrer to the amended 2nd paragraph of reply to which plaintiff excepts, and overrules demurrer to the 3rd paragraph, to which defendant excepts.

Defendant files general denial to the 3rd paragraph of answer.

Cause is submitted to the court for trial.

At close of plaintiff's case in chief, defendant moves for non suit, which is overruled, defendant taking exception.

Trial is concluded and arguments of counsel heard.

Finding for defendant that plaintiff take nothing by his suit and that defendant recover his costs.

Plaintiff files motion and causes for a new trial, which motion is overruled by the court, plaintiff excepting.

Plaintiff files motion in arrest of judgment which also is overruled and exception to the ruling taken.

Judgment rendered on the finding to which plaintiff takes his exception.

Plaintiff prays appeal to the Supreme Court of Notre Dame which is granted, plainting filing his appeal bond in the sum of $200 with Globe Surety Company as surety, which bond is approved. Ten days are given in which to file general bill of exceptions.

JUNIOR MOOT COURT

CAUSE NO. 1

Charles Dunn
vs.
Maud Thomas

STATEMENT OF FACTS

Rose Kramer and Maud Penny, aged respectively 22 and 20 years, resided in South Bend, Indiana, and had been intimate friends for years. Rose was an orphan without brothers or sisters while Maud had parents and a brother living.

Because Maud had better means of getting information, Rose requested generally of Maud that she give her such information as she might get at any time about any young men of the town who might seek Rose's company. Two years later Maud was married to John Thomas, and the girls at that time became estranged and were no longer companions.

A year after Maud's marriage, Rose met for the first time Charles Dunn, a young lawyer of South Bend, to whom she became engaged. Maud Thomas, upon learning of the engagement wrote to Rose in a letter addressed to her that "Charles Dunn bore an unsavory reputation, was said to be addicted to drinking and gambling and had other bad habits." Rose received the letter while Charles Dunn was calling on her, and in his presence read the letter and then gave it to him to read.

After his marriage to Rose, Dunn brought action against Maud Thomas for libel. Maud Thomas avers that she acted only on Rose's request, without malice and in good faith on some information she had gained. The information was not reliable and the facts stated in the letter were untrue.

Who should recover in the action?

James F. Murtaugh and
Alfonso A. Scott,
Attorneys for Plaintiff.

Plaintiff claims that he should recover damages in as much as the libelous matter accused him of a crime and therefore was libelous per se which imputes malice. That therefore the letter could not have been written in good faith. Chapin on Torts 314, 305, 338; Count Joannes vs. Bennet, 81 Am. Dec. 738; Simpson vs. The Press Publishing Co., 67 N. Y. Supp. 401; 18 Am. & Eng. Ency. of Law 2nd Edition 863; Burns Ind. Statutes Revised Sec. 2180; Smith vs. Matthews, 27 N. Y. Supp. 120; Brooker vs. Coffin, 4 Am. Dec. 337; Fiero on Torts, 717, 722, 746; Cooley on Torts, 200, 207; Byam vs. Collins, 7 Am. St. Rep. 726; Hale on Damages, 151; Terwilliger vs. Wands, 72 Am. Dec. 420.

Clarence Manion and
Therman Mudd,
Attorneys for defendant.

The theory of the defense in this case is that the communication alleged to be libellous is privileged. The general rule concerning privileged communications is as follows: A communication made in good faith on any subject in which the person has an interest or with reference to which he or she has a duty, public or private, legal, moral or social, if made to a person having a corresponding interest is privileged. 21 So. 109; 35 So. 615, McBride vs. Ledoux; 42 So. 591, Abraham vs. Baldwin; 79 Atl. 316, Krause vs. Rabe; 52 S. W. ——, Caldwell vs. Story; 101 S. W. 1164, Rosenbaum vs. Roche; 24 Am. S. R.

717, Rude vs. Nass; 31 So. 293, Buisson vs. Huard; 80 So. 316, Putnal vs. Inman; 180 Pac. 216, Burton vs. Dickenson; 167 Pac. 1118, Fahey vs. Shafer; 99 N. W. 847, Mertens vs. Bee Publ. Co.; 48 S. E. 327, Flanders vs Daley; 110 Pac. 181, Melcher vs. Beeler; 73 Mr. 87, Fresh vs. Cutter; 44 N. E. 992, Harriatt vs. Plimpton.

CAUSE NO. 6

Jaul J. Donovan
vs.
South Bend Motor Sales Co.
corporation

STATEMENT OF FACTS

The plaintiff purchased a four-cylinder, new, 1920 model, Maxwell Automobile of the defendant. Defendant is a corporation, organized under the laws of Indiana, and is engaged in selling automobiles at South Bend, Indiana. On August 1, 1920, plaintiff purchased the model of machine described, having at the time inspected a sample machine in the sales rooms of the defendant. Afterwards, the defendant delivered the sample machine which he had inspected, which plaintiff accepted.

The plaintiff retained the car and operated it for a period of ten months and then returned it and demanded his money, $900, paid for the machine. The machine was defective in that the driving parts were not in alignment—that is, the incased driving shaft and transmission gears—thereby causing trouble and several "grinding out" of parts. There was no express warranty of the machine sold. The Maxwell car is manufactured by the Maxwell Motor Car Co., of Detroit, Michigan, and not by the defendant.

Who should recover?

John P. Brady and
E. John Hilkert,
Attorneys for Plaintiff.

This was not the sale of any one specific car but a sale of a certain model by means of a sample car, the specific car to be selected by the defendant later.

"Where the purchase necessarily trusts and relies on the judgment of a seller of an article that it is fit for a particular purpose there is an implied warranty that the article shall be reasonably fit for that purpose." Anson on Contracts, Note pp. 131; Tiffany on Sales pp. 257; Little v. G. E. VanSyckle & Co., 73 N. W. 554; Omaha Coal & Coke Co. v. Fay 55 N. W. 211; Hyatt v. Boyle 25 Amer. Dec. 276.

The defect was latent and any reasonable inspection of the car on delivery could not have revealed the defect.

"If the seller is a dealer in goods there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample." Sec. 16 C., Sales Act. (Sales by sample); Griffin v. Metal Products Co., 10 Atl. 713; Chapin v. Dodson, 34 Amer. Rep. 512.

The price paid by the plaintiff was the price of a new car which impliedly warranted a corresponding article necessarily free from defects.

"Where you pay a sound price for a sound article you ought to get a sound article, and if the article is defective and not fit for the purpose for which it was bought, the seller ought to make it good." Standard Boiler & Plate Iron Co. v. Brock, 99 S. E. 769; Best v. Flint, 56 Amer. Rep. 570; Morse v. Union Stock Yards, 14 L. R. A. 157.

The defect was not discovered until after the car was driven for about ten months and upon discovery the sale was promptly rescinded.

"The time within which the right to rescind is to be exercised must be computed from the discovery of the fraud or defect on which recission is based and not from the date of sale." Smith v. Columbus Buggy Co. 123 Pac. 580.

"Where the purchaser has exercised his right of rescinding the contract for fraud or breach of warranty, (express or implied) he is generally entitled to recover any payments he may have made for the machine." White, Auto Co. vs. Dorsy, 86 Atl. 867; Beecroft v. VanSchaick, 104 N. Y. Sup. 458; Taylor v. 1st Nat. Bank, 167 Pac. 707.

J. Paul Cullen, and
Chas. B. Foley,
Attorneys for the Defense.

A latent or hidden defect in the article of sale which has arisen thru the fault of the manufacturer and not thru any fault of the vendor, does not give vendee the right to rescind the contract. Note to 22 L. R. A. 193; Note to Bragg v. Morrill, 24 Am. Rep., 104.

To constitute a recission the property must be returned promptly after the discovery of the defect; and any unreasonable delay, or continued recognition of the contract of purchase as a valid contract constitutes a waiver of the right of recission. Sturgis v. Whistler, 130 S. W. 111; Coverdale v. Rickards & Watson, 69 Atl. 1065.

Where the purchased article after it has been accepted by the vendee turns out to have a latent defect or in some respect is not fit for the purpose for which it is intended, this does not give the vendee the right to rescind the contract on implied warranty, since the vendee does not impliedly warrant th article as to latent defects which are unknown to him, and have arisen thru the fault of the manufacturer. Remsberg v. Hackney Mfg. Co., 164 Pac. 792.

The rule of caveat emptor is strictly construed where the purchaser has the opportunity to inspect the article and has the privilege to try it out and ascertain its worth. Beirne v. Lord, 55 Am. Dec. 321; Rogers v. Niles (Ohio) 78 Am. Dec. 290.

TRIAL BRIEFS IN CASE OF

James Whitcomb vs. Marshall Carper

Cause No. 2

Junior Moot Court

By

Arthur C. Keeney for Plaintiff

John F. Heffernan for Defendant

STATEMENT OF FACTS

Plaintiff brings action to recover $200 paid to defendant as purchase price for a horse, harness and buggy.

Plaintiff was a minor at the time of purchase, a married man with wife and child, worked as a day laborer for the support of himself and family, and did not use the purchased property except for pleasure riding. Plaintiff, at time of bringing the action, had sold the harness and buggy, and the horse had been condemned by the Society For The Prevention of Cruelty To Animals as unfit for use. Notwithstanding plaintiff offered no return of the property purchased he seeks to recover the money paid by him as stated.

BRIEF FOR PLAINTIFF

Arthur C. Keeney, for Plaintiff

The first point we wish to present is that this contract is a voidable infant's contract, and the doctrine is too elementary to require the citation of authorities. That the plaintiff herein is a minor and an infant for all legal purposes and hence a minor in regard to personal contracts. That the termination of the guardianship on marriage does not make him of legal age. Antonio v. Miller, 34 Pac. 40.

The plaintiff brings an action to recover the consideration he has paid; and in so doing is only exexrcising a right given him by law to rescind his contract, and not suffer by reason of such contract. The action is to recover $100.00 for a horse, buggy and harness which were used for pleasure purposes.

The articles of property involved in this case were not articles of necessity, because, as set out in the facts, the property was used only for pleasure riding. It is manifest that such horse and buggy are not necessaries. We believe this to be so because it would be a gross inconsistency to say that a horse and buggy used for pleasure purposes by a man who labored by the day to support his wife, his child and himself, were necessaries to him.

If it is a legal necessity then there must be further proof that the infant was in need of them. Therefore a horse, buggy, and harness purchased and used for pleasure purposes are not necessaries.

Peck, Persons & Domestic Relations, pg. 212; 165 N. Y. 289.

Goodman vs. Alexander, 55 L. R. A. 781.

Guthrie vs. Murphy, 28 Amer. Dec. 681.

On the question as to the articles in this case being necessaries we cite Price vs. Sanders, 60 Ind. 30. In this case it specifically states that

these articles are not necessaries. Any thing further on this point would seem superfluous.

The fact that the infant is a married man has no effect, we believe, on the status of the infant as he is concerned here. The fact that he is married has no effect on his status either for his benefit or to his detriment, but if it influences his relation in contract at all, it does to his benfit.

Contracts not within the exceptions for example, contracts of marriage, those demanded by law, as the release of mortgage for payment, and such contracts as the law sets down as mandatory for the infant to comply with and perform, are all voidable. It makes no difference that the infant has become emancipated by his father, or is married, or is engaged in business, or is nearly twenty-one years of age and capable and of actual business capacity.

15 N. E. 476.
96 N. W. 895, Beichler vs. Guenther.
27 Amer. Rep. The Rose case.

Further—His status is not effected by the fact that he has a wife and child or even children, if anything in his status is to be changed in regard to his liability he will be further protected, exclusive of contract for necessaries, because personal necessity includes that of the wife and children.

Peck 213.
Ryan vs. Smith, 165 Mass. 303.
43 N. E. 109.
House vs. Alexander, 105 Ind. 109.
(Barber Tools by which infant makes living.)

It is set out in the statement that the infant sold the harness and buggy and that the horse was condemned by the Society for the Prevention of Cruelty to Animals as unfifit for use. This fact we believe, has very little bearing on the case, except in a passive way. In selling the harness and buggy he exercised almost the capabilities of a competent person, there being no further use for the bugy and harness after the horse had been condemned and taken from him. The condemnation of the horse as unfit for use lends to the inference that the infant was a victim because of incompetency. It is natural to believe that a horse sold to be used for driving and for pleasure purposes would not to be the kind to be so readily condemned. The fact remains that the horse was taken from the infant plaintiff and out of his control.

This contract as we view it, was not a contract for necessaries—not a contract where the law binds the infant; that this contract was injurious to the plaintiff, or was at least disadvantageous and it was not to his benefit but was to his damage.

The courts have held many times that, as between different classes of contracts, such contracts as were clearly disadvantageous to an infant, were void; such as were clearly beneficial to the infant were valid and binding, as the receipt of a gift, or the purchase of necessaries; and such as could not b eclearly classified as either harmful or beneficial were voidable at the option of the infant, and it is left for the infant himself to determine the question, and to avoid his contract ifit is injurious to him.

Peck, Domestic Relations pg. 207-208; 5 Tenn. 41;
Wheaton vs. East, 26 Amer. Dec. 251.
Forda vs. Van Horn, 30 Amer. Dec. 77.

N. & C. R. R. vs. Elliott, 78 Amer. Dec. 506.

From these facts and for these reasons it is plain that the infant in this case is not liable on his contract; that in order to enforce it, it must be reduced to a necessity, even business deailngs, removing the contract one degree from necessity, are not valid without the intervention of a guardian.

Wallace vs. Leroy, 110 Amer. St. Rep. 777 and 50 S. E., 243

The facts also set out that the infant did not return the property.

Why didn't he return the property?

1. Because, part ot it (the horse) had been taken from him and out of his control.

2. Because the remainder had been disposed of by him and applied to help in part furnish the recreation that he lost.

3. Because his statue as an infant did not require him to make a return of the consideration under the circumstances and acts of his case.

The authorities on this point concur that a faliure to return consideration dose not preclude recovery. The case of Green vs. Green N.Y. 553 is very clear on this point. That court held: "The right to repudiate is based on the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are spent or lost or otherwise disposed of during minority, the infant should not be held responsible for an inability to restore them. To hold him for the consideration would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether."

Miles vs. Lingerman—"One who has disaffirmed a conveyance made during infancy is not required to tender back the purchase money to session of the land.

If there is still a question as to whether or not the infant can recover or not without returning the consideration given him in this case, we offer as additional authority in support of our contention that he does not; The Lemon Case, an Ohio decision 15 N. E. 476, which says—"An infant may, before or on arriving at age, disaffirm a purchase of personalty, other than necessaries, made by him during his minority, and recover back the consideration paid, without restoring the property sold and delivered him where it has been taken from him, or itis sufficient that the property ceases to be in his possession or subject to his control. "The case of Wallace vs. Lercy 110 Amer·St. Rep. 777 and 50 S. E. 243, holds that in an action against an infant to recover the purchase money of property sold to him, part of the proceeds he still retains, he is entitled to the plea of infancy as a defense, wtihout having returned or offered to return such property or proceeds. The successful intervention of such plea confers upon the person who made the sale to the infant only the righ to reclaim his property or such part of it as remains in the possession of the infant.

The case of Lamkin vs. Foster 64 Atlan. 1048—In this case the plaintiff tried to recover goods sold to an infant. The infant had taken the goods and did not pay any consideration, the infant sold the goods and now the plaintiff tries to recover the goods or their value, decision is for the infant defendant. The reason stated is that; This contract made by

an infant, not for necessaries, and his contract not having been ratified the action to recover the price cannot be maintained.

In concluding the point we cite three leading Indiana decisions, which all hold that right of an infant to disaffirm and recover is not dependent on the return of consideration.

Dill vs. Bowen 54 Ind. 204

Carpenter vs. Carpenter45Ind. 142

Specifically states that the infant does not have to return the property received before he can recover.

White vs. Branch 51 Ind. 210

In this case the property was a horse, and the infant wass allowed to recover his consideration without return and where the consideration received by him, he had abused and depreciated its value.

Also in House vs. Alexander 105 Ind. 109 an infant who has purchased an unecessary article of personalty may rescind the contract and recover.

Beichler vs. Guenther 96 N. W. 895.

The infant's consideration was a team of horses, he sold the team of horses and sued for his consideration, and the court held that the infant was not required to return his consideration.

The Indiana court also says in 45 Ind. 142 Carpenter vs Carpenter —That it is not necessary, in order to give effect to he disaffirmance of a deed or contract of an infant, that the other patry should be placed in statu quo.

We believe we have shown conclusively:—

1. That the plaintiff was a minor, and as such was not liable on this contract.

2. That his marriage had no effect on his contract relation.

3. That the property in question did not constitute necessaries.

4. That the consideration he received was inferior, and that he was not a competent judge.

5. That under the circumstances and facts in this case he was not required to return the property or make a tender.

Wherefore the plaintiff's attorneys ask hat the law be applied as here set out and that the infant plaintiff be sustained in this action.

John F. Heffernan, for Defendant.

ISSUES.

The Issues in this case are:——

1. Has this infant the general privilege extended to infants of avoiding their contracts, in view of the fact that he has an emancipated status as the result of the fact that he is a married man and has a wife and child..

2. Even if this infant can avail is it not essential that he return the consideration he received before he can hope to rescind the contract and secure the consideration from which he parted,

We contend: 1. That this infant, by reason of his emancipated status has the same obligations as a married person of adult age, i.e. at least "The support and maintenance of his family."

2. That it is essential before the contract can be rescinded that the infant return the consideration which he received.

ARGUMENT

If ever there was a case in which the ends of justice were sought to be defeated by the technical plea of infancy, this is it. It must have been

just such a case as this that prompted the famous Kent to write into his "Commentaries", the sentence "Infancy is to be used as a shield and not as a sword."

The first question to consider is whether the infant's marital status does not "emancipate" him from the disabilities of infancy. To quote a vs. Sherfey, 1 Iowa 358. "By emancipation, we understand such act of the father as sets the son free from his subjection, and gives him the capacity to manage his own affairs *as if he was of age.*

Ruling Case Law: "In some states by statute, all persons are made adults upon marriage. Such statutory emancipation has the immediate effect of vesting the minor with the capacity which the law recognizes in persons of full age."

Glenn vs. Hollopeter 21 L. R. A. 847, California: "Under the general rule of law, Grover Hollopeter became of lawful age when the marriage ceremony was performed. He is thus entitled to sue in his own name. The ordinary legal consequences follow his marriage."

Surely, it is the logical rule that the infant who considers himself, and whom the law considers, as qualified to enter upon the most vital and important contract which he could possibly make,— the contract of marriage, is also qualified and capable to protect himself in the ordin ary and incidental contracts incurred during life.

It is at least admitted that the infant's liability for contracts extends from those for mere necessaries to all contracts made in the furtherance of the support and maintenance of his family. Cochran vs. Cochrane 196 N. Y. 86. Commonwealth vs. Graham 16 L. R. A. 578. Aldrich vs. Bennett 56 A. R. Stower vs. Hollis 83 Ky. 544.

The meaning of "support and maintenance" is not restricted merely to the bare necessities of life. In "Words & Phrases, p. 680 Vol. 8": "The word "support" as used in a contract whereby one agrees to support his wife, does not include merely sufficient provisions, but other conveniences and necessaries as are reasonable and suitable to make such wife comfortable.'

Brewer vs. Brewer 113 N. Y. 161: "Every wife is entitled to a home corresponding with the circumstances and conditions of her husband."

Cyclopedia of Law—P. 73 Vol. 3: "The husband undertakes to furnish his wife a suitable home and maintain her according to his means and condition and provide for their offspring."

It is clear from the above authorities that all contracts are deemed contracts for the furtherance of the support of the family, when they are made for the benefit of the family and are in keeping with the family's station in life.

We contend that a horse, harness and buggy, intrinsically intended for family purposes as they were, are included within the term "Support and maintenance" when they are not incompatible with the husband's station in life, and we further contend that this $300.00 contract made in order that the plaintiff's family obtain recreation and pleasure was not incompatible—was not an extravagant purchase on the part of the plaintiff.

In many of the western states, such as Iowa, Colorado, Oregon, Washington, Nebraska, etc., not only is the husban dliable for items of

family expense but the wife also may be held liable even though the purchase was made by the husband. Therefore, the plaintiff's wife, if she were an adult, would be held liable under the statutes of these states.

A case directly in point with ours, with respect tothis theory, is that of Houck vs. La Junta Hardware Co., Colorado, 114 Pac. 645. In this case a buggy was purchased by a husband for the use of his wife and family. The question hinged upon whether the purchase was properly one in which the family was interested and the court held "A PURCHASE BY A HUSBAND OF A BUGGY FOR FAMILY USE WHILE HE AND HIS WIFE ARE LIVING TOGETHER CONSTITUTES A PROPER ITEM OF FAMILY EXPENSE.'

Inasmuch as my colleague has prepared an elaborate brief on the other issue of this case (plaintiff cannot rescind without restitution), I shall not mane more than a passing reference to this phase of the case. This is indeed a complete bar to the plaintiff's recovery. As stated concisely in Peck on "Domestic Relations" p. 224: "If the contract when made was a fair and reasonable one, if it has been completely performed on both sides, and if by this actual performance the infant has been enriched or otherwise benefited, tho he may not now retain in specie the precise consideration which moved to him, *it is unjust for him to demand restoration of what the other party received, unless he can so restore what he himself received as to put the adverse party in statu que.* Cases in support of this proposition are:

Riley v. Mallory 33 Conn. 201.
Coburn v. Raymond 100 Am. St. Rep. 1000.
Carr v. Clough, 26 N. H. 280.
Taft v. Pike 14 Vt. 306.
Bailey v. Barnberger, 11 B. Mon. (Ky.) 113.
Johnson v. N. W. Mutual Life Ins. Co. 56 Minn. 365.
Rice v. Butler, 160 N. Y. 578 ecetera.

CONCLUSION

In view of the following rulings of law:—

1. Restitution by an infant is a necessary requisite before disafirmance.

2. An infant, emancipated by marriage, assumes the liabilities with respect to contract of an adult.

3. An infant's obligation to "support and maintain" his family covers the purchase in question which was made for the benefit of his family.

Any one of which is sufficient to defeat the plaintiffs action, we respectfully urge, in further of the obvious justice to be meted, that the plaintiff in this case be stopped from disaffirmance of his contract.

TRIAL BRIEFS IN CASE OF

John D. Carson as Administrator of Estate of Ray Stephens, Deaceased, vs. Charles D. Simpson and Edward Williams.

Cause No. 3

Junior Moot Court

By

Patrick E. Granfield for Plaintiff

Clarence R. Smith for Defendants

STATEMENT OF FACTS

Ray Stevens entered into an agreement with Charles D. Simpson to sell him a horse on approval. The understanding was that Simpson was to take the horse and try him, and if the horse should suit him, give Stephens his note with approved sceurity; but if the horse should not suit him he was to return the horse to Stephens.

A few days after this agreement Stephens was killed. Simpson did not return the horse and did not execute his note, but later traded the horse to the other defendant, Edward Williams.

Plaintiff brings action to recover the horse or its value.

BRIEF FOR PLAINTIIFF

Patrick E. Granfield, for Plaintiff.

Rrom the facts above stated, it is obvious that the case involves a sale on approval.

In 24 R. C. L., article on Sales on Approval, the law is stated as follows: "The seller may in the default of the buyer enforce his right to retake possession by an action of replevin."

The facts as stated are, that if defendant Simpson wanted the horse he was to give a note with approved security. This Simpson did not do. Therefore we contend that he defaulted and for this default we can rescind the contract as against Simpson.

The following cases are cited to support this contention:

Hollenberg Music Co. vs. Barron, 140 S. W. 582.
Frisch vs. Wells, 86 N. E. 775.
Page vs. Ulrich, 72 Pac. 454.

In the case of Sturo v. Hoile found in 2 Neb. 186, the court held that where a vendee has taken possession of the property but has not fulfilled his contract by giving his note, the vendor may rescind the contract and maintain an action in replevin. Corby on Law of Replevin, pages 127-135, also state the law as applied by the court in the Nebraska case.

From the cases and authorities cited we contend that the right to rescind the contract was vested in the plaintiff upon the default of Simpson, in not giving the note with approved security.

We submit that it is a sound principle of law that a man cannot give a better title than he has himself and because of the default of Simpson, the other defendant, Williams, has no title ot the property.

We do not deny that Williams is a purchaser in good faith, but we hold that even though Williams is a purchaser in good faith we can replevin the horse from him.

In the case of Ballard v. Brigett, 40 N. Y. 314, plaintiff sold and delivered over to one, William France on the agreement that they were to remain the property of plaintiff until paid for. France later sold them to defendant who bought in good faith for a fair price and without notice of the condition. The court held that the defendant even under such circumstances got no title as against the plaintiff.

In the case of Bradshaw v. Warner, et al. an Indiana case, found in 54 Ind. 58, the facts of which are as follows: The owner of personal property sold and delivered it to the purchaser at an agreed price payable at a certain time, upon the express condition and agreement that the title thereto should remain wholly in such vendor until the full payment of said purchase price, which was never paid. An officer holding an execution in favor of a third person against such vendee, to satisfy the writ, levied upon and sold such property to such third person, who knew nothing of the vendor's title thereto, and who had been informed by the first purchaser that it was his own property. The vendor later replevied the property from the purchaser at said judicial sale. It was *held* that the title to such property remained in the plaintiff and that the defendant acquired no rights by his purchase at such judicial sale.

The case of Dunbar vs. Rawles, 28 Ind. 225, and the case of Hodson et al. v. Warner et al., 60 Ind. 214 also apply the law that should be applied to this case, namely: That a third person purchasing property in good faith from another who has no title to it, such property may be recovered by an action of replevin.

Wherefore, upon the reasons and authorities cited the plaintiff contends that he had a right to rescind the agreement upon the default of Simpson and that the defendant, Williams, having acquired no title because his co-defendant had nont, plaintiff can maintain this action in replevin against both defendants for the recovery of the horse.

FOR THE DEFENDANT

Clarence R. Smith, for Defendants.

It is true that the plaintiff made an agreement with our client, Mr. Simpson, to sell him a horse on approval. Our client took the horse, and if satisfactory he was to give the plaintiff a note with approved security, nothing being said as to the time in which he was to accept or reject the horse. Nor was there a time set within which he was to execute and deliver the note. Therefore it is certain that he was to have a reasonable time. The plaintiff died. Sometime later our client, Simpson, traded the horse to Williams. Our clients were given no notice of Stephen's death nor was there a demand made upon them by Stephens' administrator for the note or the horse. They were not even informed by the administrator of their obligation toward him.

The first notice given our clients is this action against them for recovery of the horse or its value.

The plaintiffs have no right of action against our clients for recovery of the horse or its value.

Our client Mr. Williams received a valid title to the horse when he received him from Mr. Simpson. The very fact that Simpson traded the horse to another was a valid acceptance of the sale and therefore he passed a clear title to Williams. Ac-

ceptance as used in the law of sales of personalty means anything that amounts to a manifestation of a determination on the part of the vendee to accept the offer of the seller which has been communicated or put in a proper way to be communicated to the party making the offer.— Mactiers admr's. v. Frith, 21 Am. Dec. 262.

The Sales Act, Part II, Sec. 19, provides that "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer when he signifies his approval or acceptance to the seller or does any other act adopting the transaction. This rule of law is applied in the case of Dearborn v. Turner, 30 Am. Dec. 630. In this case the plaintiff delivered to Nason a cow and a calf, for which he took his written promise, to return the same cow within a year, with a calf by her side, or to pay twenty-two dollars. The court said: "We are very clear, that the security of the plaintiff vested in contract; and that Nason, having the alternative to return or pay, the property passed to him and he was at liberty to sell the cow.

The action of replevin is founded on a tortious taking and detaining, and is analogous to an action of trespass, but is in part a proceeding in rem, to regain possession of the goods and chattels; and in part a proceeding in personam, to recover damages for the caption and detention. It is a possessory action, th egist of which is the right of possession in the plaintiff and the wrongful seizure and detention by defendants.

Daggert v. Robins, 21 Am. Dec. 752.
Beach v. Botsford, 40 Am. Dec. 45.
Chestnut v. Sales, 121 Pac. 986.

An action of replevin does not necessarily determine title. It is a possessory action, and may fail either because the plaintiff shows no right of possession, or because the defendant is not shown to have wrongfully withheld it.

Pearl v. Garlock, Michigan, 28 N. W. 155.

We therefore maintain that the plaintiff has no right of action against our client, Mr. Simpson, for he has not failed in fulfilling his obligation to the plaintiff. He has not refused to eecute the note nor has there been a demand made upon him for its execution. And although he has not executed and delivered the note it is not a breach of the contract of sale since he had a reasonable time in which to deliver it. A reasonable time—In the case of Bower v. Detroit Ry. Co. 20 N. E. 559, is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case.

This note, which was to be given with approved security, requires more time in its execution than an ordinary note. For in Sweeney v. Vanghor, 29 S. W., 903, it was held that the word approve means to make or show to be worthy of acceptance and it has such meaning in a contract providing that the purchaser of certain goods shall give a note with approved security.

The plaintiff cannot recover in a replevin action in this sale on approval when our client has never refused them the note. Tction cannot be brought until a reasonable time has expired and until our client has refused to fulfill his obligations.

Bradford vs. Marbury, 46 Am. Dec. 264.

Girard v. Taggart, 9 Am. Dec. 327.

It is evident that our client Mr. Simpson, has not failed in his agreement so as to give the plaintiffs a right of action in replevin for the tortious detention of the horse; there being no such wrongful detention.

In the the celebrated case of Russell v. Englehardt it was held that mere neglect to give a not in consideration of goods delivered to him, without a refusal of any application therefore, will not give a right of immediate action but it must affirmatively appear that the defendant *upon demand* refused to execute the note.

A demand is a requisition or request to do a particular thing specified under a clai mof right on the part of the person requesting.

Brackenridge v. State. 11 S. W. 630

In the case of Yale v. Coddington, reported in 21 Wendall, 173, the court said: "When goods are sold to be paid for by a note or bill payable at a future day and the note or bill is not given, the vendor cannot recover on common count for goods sold and delivered until the credit has expired."

In Grant v. Groshaon, 3 Am. Dec. 724, in an action of covenant, the court determined that the plaintiff must show in the declaration that he had, before bringing his suit, demanded the property; because without doing this he had not shown that the debt was due and payable.

There are several cases where the seller or vendor of goods has brought action and recovered a note for the measure of damages as the contract price of the goods sold but in these cases, without exception, there has been a demand made upon the purchaser and a refusal by him before action was brought. For example, in the Ohio decision, Stephenson v. Repp 25 N. E. 803, it is stated that "Where goods are purchased upon an agreement to give a promissory note for the price payable in one year with interest, the vendor may, without waiting for the expiration of the credit, maintain an action at once for the breach of the agreement and the measure of damages will be the price of the goods sold and delivered, but there must be a refusal of the purchaser to make and deliver the note to the seller after the goods have been delivered to him.

In Foster v. Adams, 15 Atlantic 169, it is decided that when one sells property and agrees to accept in payment a note payable in time, and the buyer refuses to give the note, then the seller can sue at once. But our clients have never refused to give the note.

It is therefore the duty of the plaintiff to show a right to the possession of the horse and a corresponding tortious possession in the defendant. We maintain that we legally and lawfully obtained title to the horse, first in the defendant Simpson, who later traded the horse to Williams. Our client Simpson obtained the horse on a legal sale on approval and title passes by our acceptance of such sale. Since our client Simpson has neve rfailed to fulfill his contract and since the plaintiffs have never demanded the note nor been refused its payment, it is our contention that judgment should be entered in defendant's favor.

ALUMNI DEPARTMENT
Contributing Section

A STUDY IN SPECIAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW.*

By Francis J. Vurpillat, '91

*These findings of fact and conclusions of law were prepared and filed by the writer as Judge of the Starke Circuit Court of Indiana, in the case of Friebe vs. Elder etl al. A new trial as of right was immediately granted the plaintiff under the statute directing the trial court to grant a new trial without cause, upon the filing of the application and bond by the aggrieved party. A special judge tried the case anew and filed substantially the same findings and conclusions. From the second judgment the case was appealed to the Appellate Court of Indiana and affirmed. The case was then transferred to the Supreme Court of Indiana, where it was again affirmed. Friebe vs. Elder et. al (Ind. App.), 103 N. E. 429 Id., 181 Indiana 597-105 N. E. 151.

State of Indiana, ss:
In Starke Circuit Court,
January Term, 1910.

Paulina Friebe, deceased,
original Plaintiff;
Adolph Friebe;

Adolph Friebe, as Executor of the will of Paulina Friebe, deceased:

Ida Whipple,
Clara Kaempfe,
Carl Friebe,
substituted Plaintiffs,

vs.

Elmer D. Elder, and
Emma G. White, Administratrix of the estate of
Henry Friebe, deceased.

SPECIAL FINDING OF FACTS AND CONCLUSIONS OF LAW.

The court having been requested to find the facts specially and state thereon conclusions of law, does now find the facts to be as follows, to-wit:

FIRST

That Paulina Friebe, the original plaintiff, and Henry Friebe, now both deceased, were married in the year 1857, and lived together as husband and wife until the 6th day of August, 1901, when they separated; that for thirty years continuously prior to thier separation they were *bona fide* residents of Starke County, Indiana, residing on a farm in North Bend Township; and that they continued to reside in Starke County, Indiana, throughout the year 1901.

SECOND

That at the time of their separation on August 6th, 1901, Henry Friebe was the owner in fee simple and in possession of the following described real estate situated in Starke County, Indiana, to-wit: (H. I.) that said real estate was worth at that time $4,500 and was incumbered with a school fund mortgage of $2,000, dated August 25, 1898, in the execution of which Paulina Friebe joined. That Henry Friebe was also the owner of personal property at

that time which was of the value of $500, and was indebted in the sum of $300 in additional to the mortgage indebtedness mentioned. The court finds that in the purchase of said real estate and personal property of Henry Friebe, said Paulina Friebe had invested $700 of her own money.

THIRD.

That there were born to said Henry and Pauline Friebe seven children, six of whom were living at the time of the separation, namely, Adolph Friebe, Clara Kempfe, Emma G. White, Ida Whipple, Martha Brown and Carl Friebe. That all of said children except Carl Friebe, had long since come of age, married and lived apart from their parents. The parents, Henry and Paulina Friebe, at the time of their separation were living alone with their son Carl Friebe who was then 37 years of age and who has all his life been an imbecil and a care and charge upon his parents.

FOURTH

That for a long time prior to August 6th, 1901, said Paulina Friebe and Henry Friebe, in their old age were dissatisfied and irritable, were completely estranged, had no affection for one another and did not live together in peace and harmony. That on said 6th day of August, 1901, Paulina Friebe left the old homestead and abandoned Henry Friebe with the avowed purpose to never live with him again; and the court finds that said Paulina Friebe from that time till the death of Henry Friebe neither lived nor cohabited with him.

FIFTH

That after such separation Henry Friebe continued to live at the old home with the demented son, Carl Friebe, while Paulina Friebe lived at the home of her daughter, Emma G. White in the same neighborhood. That sometime thereafter Henry Friebe informed Paulina Friebe that he intended to apply to the Starke Circuit Court for a divorce and proposed to her a financial settlement in view of such divorce; that negotiations to that end were carried on between Henry Friebe, acting through the son, Adolph Friebe, and Paulina Friebe in person. And it was mutually agreed between said Henry Friebe and Paulina Friebe that if said Henry Friebe should be granted a divorce upon his petition he was to pay Paulina Friebe $1000 in installments of $50 per year without interest, secured by notes and mortgage, and that said Henry Friebe was to take care of the imbecil son, Carl Friebe. That Paulina Friebe was induced to waive her demand for interest upon the deferred payments by the promise of the son, Adolph Friebe, that he would give her a home with him. That after this agreement was made it was further agreed that they should go to the town of Knox, in Starke County, for the purpose of carrying out their agreement, and that Henry Friebe might make his application for divorce.

SIXTH

That on the 10th day of October, 1901, Paulina Friebe and Henry Friebe came to Knox, accompanied by their daughter, Emma G. White, and son-in-law, William White; that there they went to the office of Peters & Peters, lawyers, where Henry Friebe told Charles H. Friebe that he wanted to procure a divorce from his wife Paulina Friebe. That thereupon said attorney Charles H. Peters informed them that he could not act for both of them, that Mrs. Friebe

must employ a lawyer, to which Paulina Friebe replied that they had made a settlement between them and she did not want a lawyer. They then left the office of Peters & Peters and went to the court house where, in the corridor they met the Judge of the Starke Circuit Court. That Paulina Friebe told the Judge that Henry Friebe inetnded to apply for a divorce, that they had settled their property right, that she did not want to resist the divorce and would not employ a lawyer. Then Paulina Friebe and Henry Friebe, accompanied by their daughter and son-in-law, Emma G. White and William White, and the Judge returned to the office of Peters & Peters, where Charles H. Peters, as attorney for Henry Friebe, reduced to writing the agreement theretofore entered into by Paulina Friebe and Henry Friebe; also drafted the notes and mortgage in accordance with said agreement and also a written appearance and waiver of issue and service of process in the contemplated divorce. That said written contract signed and executed by said Paulina Friebe and Henry Friebe has become lost and cannot be found after diligent search and inquiry therefor; That said contract provided that Henry Friebe should pay to Paulina Friebe $1000 in settlement of her property rights and as alimony in installments of $50 cash and $50 per year thereafter until paid, without interest, to be secured by mortgage on eighty (80) acres of the real estate of Henry Friebe, described in finding No. two, said Henry Friebe to pay for recording said mortgage and to pay the taxes thereafter assessed on said mortgage; and in the event of the death of said Paulina Friebe, the balance of said $1000 remaining unpaid, should be paid within a year thereafter to the heirs of Paulina Friebe. It was further stipulated in said contract that Henry Friebe, should take the care and custody of their thirty-seven years old son, Carl Friebe, and that he should pay all the costs of the divorce proceeding should the divorce be granted.

That Henry Friebe then made and executed to Pauline Friebe his nineteen promissory notes for $50 each, payable at the Farmers' State Bank of Knox, Knox, Indiana, in one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, and nineteen years after date respectfully and also executed and acknowledged his mortgage to Paulina Friebe upon eighty acres of his said real estate described as follows, to-wit: (H. I.) To secure the payment of said notes, which mortgage also provided that at the death of the mortgagee, Paulina Friebe, the entire unpaid balance of this mortgage should become due and payable, within one year thereafter to the heirs of said Paulina Friebe.

That Paulina Friebe also signed, swore to and acknowledged the following written instrument as a part of the same transaction in which the notes and mortgages were executed, to-wit:

State of Indiana
SS
County of Starke,

In the Starke Circuit Court
to October Term, 1901.

Henry Friebe
vs.
Paulina Friebe

The defendant, Paulina Friebe, hereby enters her appearance to the above entitled cause of action, and

waives issueing of summons and the service thereof, or any other notice herein.

PAULINA FRIEBE.

Witnesses

William J. White

Emma G. White.

Paulina Friebe; being first duly sworn by me, swears that she is the identical Paulina Friebe mentioned in the above and foregoing cause of action as the defendant therein, and that she signed the above waiver of notice.

PAULINA FRIEBE.

Subscribed and sworn to before me, the undersigned notary public in and for the County and State aforesaid, this 10th day of October, 1901.

Charles H. Peters,

(L. S.) Notary Public.

My commission expires Nov. 23, 1904

At the time of the execution of said papers Henry Friebe paid to Paulina Friebe $30 of the cash to be paid on said contract, and after October 28th, 1901, paid to her $20 the balance of said first cash payment.

SEVENTH

The court finds that Paulina Friebe and Henry Friebe were German people, speaking and writing the German language; that Paulina Friebe was an intelligent and capable woman and that on October 10th, 1901, at the time of the execution of the contract, waiver of service and notes and mortgage described in the last preceding finding she examined and considered said papers; that all of them were translated and explained to her in German by the daughter, son-in-law, and the Judge, and that she approved and executed them with a full knowledge and understanding of their purpose and purport. And it was further agreed between said Paulina Friebe and Henry Friebe at the time, that all the papers so prepared and executed should be left at the office of Peters & Peters until the hearing upon the application of Henry Friebe for divorce which, they were then informed, would be heard in the Starke Circuit Court on October 28th, 1901, when they were to be used in said divorce proceedings, and it was also agreed that if a decree of divorce should be granted to said Henry Friebe, then the property rights and alimony should be considered as settled according to the terms of said written contract and the notes and mortgage described should be delivered to said Paulina Friebe.

EIGHTH

That on the 28th day of October, 1901, Henry Friebe, through his attorneys, Peters & Peters, filed his complaint against said Paulina Friebe for a divorce and the custody of their son Carl Friebe in the Starke Circuit Court. That no summons or other process was issued on said complaint or served on said Paulina Friebe, but the written waiver of such summons and service executed by said Paulina Friebe as set out in finding number six was filed and presented in open court and the following minute thereof was made by the trial court upon his bench docket, to-wit:

"Defendant files waiver of summons and service"

The court finds that Paulina Friebe had notice that such complaint would be filed and a hearing had thereon at that time, that on the morning of said day she was informed by William White, her son-in-law, with whom she was making her home at the time, that that was the day upon which the

hearing would be had on Henry Friebe's application for divorce, and she was asked to prepare herself and accompany said White to Knox, for the purpose of appearing at said trial; that she refused to go, stating at the time that it was not necessary for her to be present on the trial. And she then requested and directed said William White to go to Knox and appear upon the trial for her and state to the court that she did not want to resist said Henry Friebe's application for divorce, that they had settled their property rights, and that he, William White, should get the notes and mortgage that had been executed by Henry Friebe for her if the divorce should be granted; that said William White as thus directed by Paulina Friebe went to Knox, and appeared at the trial for her and in her behalf. That upon the filing of said written waiver and appearance executed by the defendant, Paulina Friebe, the court called said defendant; that said William White responded to such call in open court and stated that he had been directed by the defendant to appear and state to the court that she did not want to resist the plaintiff's application for divorce; that they had settled their property rights by agreement and that she wanted to be protected in said agreement. That no other appearance was made by the defendant Paulina Friebe, that no lawyer appeared for her or in her behalf at such proceedings for the reason that she refused to employ one.

That thereupon the Starke Circuit Court assumed jurisdiction of said cause, tried the same and made a finding and pronounced judgment thereon, the record of which appears in Order Book No. 29, at page 287, and is as follows:

Henry Friebe
vs. No. 5130
Paulina Friebe

Comes now the plaintiff herein by Peters & Peters, his attorneys, and files the waiver of the defendant of the summons and service, whch waiver is in words and figures following, to-wit:

State of Indiana, County of Starke, SS:

In the Starke Circuit Court, to October Term, 1901.

Henry Friebe vs. Paulina Friebe

The defendant, Paulina Friebe, hereby enters her appearance to the above entitled action, and waives issueing of summons and the service thereof, or any notice herein.

PAULINE FRIEBE.

Witnesses
William J. White
Emma G. White.

Paulina Friebe, being first duly sworn by me, swears that she is the identical Paulina Friebe mentioned in the above and foregoing cause of action as the defendant therein, and that she signed the above waiver of notice.

PAULINA FRIEBE.

Subscribed and sworn to before me, the undersigned Notary Public in and for the County and State aforesaid, this 10th day of Oct., 1901.

(Seal) Charles H. Peters,
Notary Public.

My commission expires Nov. 23, 1904.

And said defendant now failing to appear and plead further is three times audibly called in open court, comes not but herein wholly makes default. And the cause being now at issue, and a jury being waived, is submitted to the court for trial, finding and decree; and after hearing all of

the evidence and being fully advised in the premises the court does find in favor of the plaintiff, that the allegations of his complaint are true, and that he is entitled to a decree of divorce from the defendant on the grounds alleged in his complaint; and also finds that all of the property rights of the plaintiff and the defendant have been amicably settled between them. And the court further finds that the plaintiff is a fit person to have the care and custody of their infant child, Carl Friebe, and that said plaintiff is entitled to the care and custody of such child till the further order of this court.

It is therefore ordered, adjudged and decreed by the court that the bonds of matrimony existing between the plaintiff and the defendant be dissolved and the plaintiff be granted a divorce from the defendant; that the plaintiff have the care and custody of Carl Friebe until the further order of this court. And it is also ordered that the plaintiff pay all costs of this action, taxed at $——.

NINTH

The court finds that on said 28th day of October, 1901, after the rendition of said decree of divorce, Henry Friebe delivered to William White for Paulina Friebe, the notes and mortgages described in finding number sixth and that said William White on that same day delivered said notes and mortgage to said Paulina Friebe in person and informed her of the proceedings had in court and of the decree of divorce granted by the court to Henry Friebe; and that from that time until the death of said Henry Friebe she lived separate and apart from him, characterized herself, and held herself out to the world by her statements and her conduct, as the divorced wife of Henry Friebe. And that at no time from the rendition of said decree of divorce until the institution of the present suit did she ever question the validity of said decree or take any steps to vacate the same, but on the contrary she recognized said decree and every year collected from Henry Friebe the notes held by her by reason of said divorce proceedings and caused the mortgage securing the same to be recorded in the Recorder's Office of Starke County, Indiana, which notes and mortgage, the court finds, constituted a part of the consideration for the settlement of all property rights of the plaintiff and the defendant that said decree of divorce refers to as having been made by them. That Henry Friebe complied with all the terms and conditions of the contract between him and Paulina Friebe described in finding sixth, to be complied with on his part from the time of the rendition of said decree; he had the care and custody of said imbecil son, Carl Friebe, with whom he lived until his death; that he paid to Pauline Friebe every year the installment notes as they fell due and paid the taxes on the mortgage held by Paulina Friebe together with the fee for recording same.

TENTH

The court finds that Henry Friede continued to own the real estate described in finding number two and lived thereon until the 8th day of August, 1907, when he sold and conveyed the same to the defendant Elmer D. Elder; that on said day Henry Friebe executed and delivered to said Elmer D. Elder three deeds of conveyance for said real estate, in each of which deeds he described himself and acknowledged himself to be a

widower, and warranted the title to the real estate therein described by general covenants of warranty; that Paulina Friebe did not join in any of said conveyances. That one of said deeds conveyed the following tract of land, to-wit: (H. I.) to Elmer D. Elder as grantee; that another of said deeds conveyed the following described tract, to-wit: (H. I.) to Bessie R. Elder, a daughter of the defendant Elmer D. Elder, said Elmer D. Elder paying all the consideration therefor, and taking title to himself in his daughter's name; that another of said deeds conveyed the following described tract, to-wit: (H. I.) to Vina B. Elder, another daughter of the defendant Elmer D. Elder, said Elmer D. Elder paying all the consideration therefor, and taking title to himself in said daughter's name. That all of said deeds of conveyances were delivered by said Henry Friebe to the defendant Elmer D. Elder, who immediately took possession of all the lands therein as the owner, and he has ever since occupied and claimed title to all of said lands by virtue of said conveyance, and by no other or different source of title, except that afterwards in October, 1907, said Bessie R. Elder and Vina B. Elder, his daughters both unmarried, executed and delivered to him their deeds of conveyance for said real estate. That all of said deeds herein mentioned were duly recorded in the Office of the Recorder of Starke County, Indiana.

And the court further finds that said Elmer D. Elder paid as consideration for said real estate $30 per acre, and that as a part of said consideration he assumed and agreed to pay the notes and mortgage held by Paulina Friebe against eighty acres of said land, as described in finding sixth; that he also executed and delivered to said Henry Friebe a mortgage in the sum of $850 to secure the balance of the purchase money for said real estate, which mortgage is upon the following described tract, to-wit: (H. I.)

ELEVENTH

The court finds that prior to the purchase of the lands of Henry Friebe by the defendant Elmer D. Elder, as found in the last preceding finding, said defendant Elder had occasion to examine the abstract of title to said real estate and had knowledge of the decree of divorce rendered in the Starke Circuit Court in favor of said Henry Friebe against said Paulina Friebe, as set out in finding number eight, and that he also had knowledge of the mortgage and notes executed by said Henry Friebe to said Paulin Friebe covering eighty acres of said real estate as mentioned in finding number sixth, which mortgage and notes he afterwards assumed and agreed to pay to said Paulina Friebe as part of the purchase money for said real estate. That the defendant Elder also had the opinion of an attorney-at-law, who examined said abstract for him, that the title to said real estate was then in said Henry Friebe, as the divorced husband of said Paulina Friebe.

And the court further finds that before the purchase of said real estate said defendant Elder went to the lands for the purpose of inspecting the same and with the view to negotiating for their purchase, and that on his way to said lands he called at the home of William White, which was also the home of said Paulina Friebe, because he had been informed by said William White that said Friebe

lands were for sale. That at the time he called at the William White home he saw and met Paulina Friebe, and that at the time he believed her to be the divorced wife of Henry Friebe, living separate and apart from him because of such decree of divorce, and that said Paulina Friebe was then and there informed by the daughter, Emma G. White, and her son-in-law, William White, that the defendant, Elmer D. Elder, was the man who was to purchase said lands, and that said Elder was then going to the lands and the home of said Henry Friebe in company with her son-in-law, William White, to negotiate for their purchase.

And the court finds that said Paulina Friebe then and there remained silent and made no protest against said purchase and said nothing and asserted no claim that she was the wife of Henry Friebe, although, as the court finds, she had sometime prior thereto been advised that the decree of divorce rendered six years before in favor of said Henry Friebe was defective and invalid. That said defendant, Elmer D. Elder, in company with said William White then went to the home of Henry Friebe on the lands described and there negotiated the purchase of said real estate from said Henry Friebe, as detailed in finding number ten; and immediately thereafter said William White returned to his home and informed Paulina Friebe that said defendant Elmer D. Elder had purchased the real estate of said Henry Friebe, and that he had agreed to pay the notes and mortgage held by her.

And the court further finds that after said Elder had purchased and taken possession of said real estate that said Paulina Friebe knew that said defendant was claiming to be the owner of all said real estate by virtue of the deeds of conveyance to him from Henry Friebe as widower and free from any claims she might assert as his wife; and that said Elder made lasting improvements on said real estate with the knowledge of Pauline Friebe, and without any assertion by her of any right, title or interest in said real estate as the wife of said Henry Friebe, and without calling in question the validity of said decree of divorce; but that from the time of said purchase of the real estate by the defendant Elmer D. Elder said Paulina Friebe continued to live separate and apart from said Henry Friebe.

And the court further finds that said defendant Elmer D. Elder has paid two of the annual installments notes falling due since the purchase of said real estate; that the first of said notes so falling due he paid to Paulina Friebe, in person, at her home, during the life time of Henry Friebe, and she accepted such payment and deivered up to said Elder said note in person, and that the second of said notes due and payable to said Paulina Friebe said defendant Elmer D. Elder paid at the Farmers' State Bank of Knox, in Knox, Indiana, where said notes were made payable, and that said note was then and there delivered to said defendant Elder and had indorsed thereon at the time of such payment the name "Paulina Friebe," which note the court finds had been so indorsed by said Paulina Friebe, and that said Paulina Friebe received the money in payment for such note, and that this second note paid by the defendant Elmer D. Elder was paid, and the money therefor re-

ceived by said Pauline Friebe, after the institution of this suit by her.

And the court further finds that said Paulina Friebe continued to hold said notes so payable to her and secured by said mortgage until after the institution of this suit and until the time of her death; and that said notes remaining unpaid at the time of her death are now held by her estate.

And the court further finds that at no time prior to the commencement of this action or since, did Paulina Friebe or the substituted plaintiffs surrender or offer to surrender to any one the notes and mortgage held by said Pauline Friebe in settlement of her property rights under the decree of divorce as heretofore found.

TWELFTH

And the court also finds that after the sale of his said real estate to the defendant, Elmer D. Elder, as heretofore found, said Henry Friebe informed Paulina Friebe of his intention to divide his estate and distribue the proceeds of said real estate among their children, and that Paulina Friebe at the time expressed her approval of said purpose; and that thereafter said Henry Friebe did distribute the proceeds of the sale of said real estate among his said children as follows:

To Adolph Friebe, $ 800.00
To Clara Kempfe, $1000.00
To Ida Whipple, $ 50.00

And that he retained the note for $875.00 secured by mortgage on his real estate, being the mortgage that the defendant Elmer D. Elder gave to secure the unpaid purchase money as heretofore described in the findings, for the future care and support of the imbecil son, Carl Friebe; that Henry Friebe also gave to Emma G. White, another daughter, $50.00.

The court finds that at the time of said distribution all of said distributees, children of said Henry and Paulina Friebe, knew that the money so distributed was a part of the proceeds of the sale of the Henry Friebe lands, and knew said Henry Friebe had sold all of said real estate, had warranted the title thereto by general covenants of warranty in the conveyance made by him, as the divorced husband of their mother, Paulina Friebe, and that they also knew of the rendition of the decree of divorce between their said parents, and that since is rendition said Paulina Friebe and Henry Friebe lived separate and apart as divorced. That from the time of the rendition of said decree of divorce said Pauline Friebe made her home with her said children and expressed her satisfaction with that such decree of divorce had been granted and that she was living separate and apart from said Henry Friebe.

THIIRTEENTH

That Henry Friebe died inestate in Starke County, Indiana, on October 28th, 1907, leaving surviving him said Paulina Friebe and his children named in finding number two; that on or about the 2nd day of December, 1907, the defendant, Emma G. White, was duly appointed administratrix of the estate of said Henry Friebe, deceased, and she qualified and gave bond as such administratrix and is now acting as such.

And the court finds that said administratrix has in her possession among the assets of said estate the note of the defendant Elmer D. Elder for $850.00 secured by mortgage on the land described in the forgoing

findings, to-wit: (H. I.) which were given for the balance of the purchase money for said real estate as heretofore found as described in plaintiff's complaint in this action.

FOURTEENTH

That on the 21st day of August, 1909, and during the pendency of her action, said Paulina Friebe died testate in Starke County, Indiana, and her last will and testament was fully probated in the Starke Circuit Court on the —— day of ——, 1909, and duly recorded in the office of the clerk of the Starke Circuit Court; that by the provisions of her said will Adolph Friebe was named as the sole executor thereof, and that said Adolph Friebe on the —— day of ———, 1909, duly qualified and gave bond and entered upon the duties of his said trust and is now acting in that capacity, and as such executor is one of the substituted plaintiffs in this action. That by the provisions of said will, Adolph Friebe, Clara Kempfe, Ida Whipple and Carl Friebe are made and constituted the only devisees and legatees of said Paulina Friebe, and to them her estate is given, devised and bequeathed share and share alike; and that all of said devisees and legatees are substituted plaintiffs in this action.

CONCLUSIONS OF LAW

WHEREFORE upon the foregoing facts the court concludes the law to

FIRST:—

That the original plaintiff, Paulina Friebe, at the time of the death of Henry Friebe and at the time of the filing of her complaint herein, was estopped to deny the validity of the decree of divorce rendered by the Starke Circuit Court of Indiana in the case of Henry Friebe against Paulina Friebe as set out in the foregoing findings, and that she was estopped at such time from asserting any claim of right, title or interest in or to the real estate conveyed by Henry Friebe to defendant Elmer D. Elder as the surviving wife of said Henry Friebe.

SECOND:—

That the substituted plaintiffs and each of them at the time of the death of their mother Paulina Friebe were estopped to deny the validity of the decree of divorce rendered by the Starke Circuit Court of Indiana, in the case of Henry Friebe against Paulina Friebe as set out in the foregoing findings, and that they and each of them are estopped to assert any claim of right, title or interest in or to the real estate conveyer by Henry Friebe to the defendant, Elmer D. Elder, in right of their mother, Paulina Friebe, as original plaintiff through her last will and testament as devisees and legatees of said will.

THIRD:—

That the plaintiffs take nothing by this action either as original or substituted plaintiffs and that the defendants and each of them recover from plaintiffs their costs in this action laid out and expended and taxed at —— dollars.

NOTRE DAME MEN OF THE ST. JOSEPH COUNTY BAR ASSOCIATION (Indiana)

By

Arthur B. Hunter, LL. B., '20

The Bar dockets of the Circuit and Superior Courts of Saint Joseph County list the names of thirty-one N. D. men, each one of whom is proud to claim the honor of having attended the Law School of Notre Dame University. Cncerning not a few of these men whole volumes might profitably be written, but inasmuch as each considers himself not better than the others, it shall be my purpose to give but a short matter-of-fact statement regarding each. If I should omit any Notre Dame man from the list I hope that he will be kind enough to believe that it is inadvertence or ignorance on my part rather than ill will or design and that he will prmptly supply the Reporter with the information concerning himself.

Mr. Leo J. Cook, 1918, is building up a good practice for himself and is well located in the Union Trust Building.

Mr. Walter L. Clements, 1918, a Kentucky gentleman who was attracted to South Bend during the years that he spent at Notre Dame, returned to us after serving in the army, and has since been associated in a very active way with Messrs. Hubbell and Van Fleet in the Citizens Bank Building.

Mr. Edward M. Doran, president of the class of 1920, is well connected with the law firm of Shively and Gilmer in the Farmers Trust Building.

Mr. G. A. Farabaugh, 1907, is one of the leading attorneys of South Bend. "Judge" is so well known to every Notre Dame man that it is hardly necessary to recount his many legal activities. He won his title of affection from the term which he served as City Judge of South Bend. He has offices in the J. M. S. Building.

Mr. Samuel Feiwell, 1918, was a candidate for the Democratic nomination for Prosecuting Attorney in the last election. He has offices of his own in the Citizens Bank Building.

Mr. Ralph Feig, 1907, is at present city judge of Mishawaka. He finds time in addition to take care of his large practice in the Circuit and Superior Courts here.

Mr. Edwin A. Frederickson, 1920, has offices with "Judge" Farabaugh. In addition he finds time to teach in the Notre Dame Law School along with the Judge. "Freddie" assures us that he loves the law and we are convinced.

Mr. Charles Hagerty, 1912, also has offices with Judge Farabaugh and thus completes a 100 per cent N. D. law office. Mr. Hagerty has been active as a lobbyist at the present session of the Indiana legislature and explains his success as such by reminding us that he has just completed a term as State Senator from Saint Joseph County.

Mr. Vernon R. Helmen, 1917, since returning from military service has maintained an office for himself in the Farmers Trust Building where he is building up a profitable business.

Mr. Patrick J. Houlihan, 1892, is

one of the old "grads" who are always proud of Notre Dame. He has been prominent in political circles locally for a number of years. He has offices in the Title Building. His ability was best demonstrated by the fact that he was chosen and served four years as County Attorney of Saint Joseph County.

Mr. Thomas Hoban, LL. B., 1899, LL. M., 1900, is Sec'y.-Treas. and Gen'l Mgr. of the South Bend Brewing Assn. His arduous duties with this company, however, do not prevent him from maintaining his law office, which is located in the Union Trust Building.

Mr. Floyd O. Jellison, 1915, is the newly elected Prosecuting Attorney of St. Joseph County. He took office January 1, 1921.

Mr. Vitus G. Jones, 1903, is one of the most active and prominent of the lawyers of South Bend. He is the senior member of the firm of Jones & Obenchain with offices in the Union Trust Building. His lucrative practice is but a faint index to his high abilities as a lawyer and a true Notre Dame man.

Mr. Joseph J. Kovacs, 1916, has a thriving practice. He is associated with Messrs. Dekelbaum and Hosinski. They have offices in the Farmers Trust Building.

Mr. Arthur L. May, 1918 and LL. M. 1919, is well located with the prominent law firm of Anderson, Parker, Crabill and Crumpacker. "Art" is steadily increasing his clientle. He is located in the J. M. S. Building.

Mr. Ernest M. Morris, 1906, is a former member of the Board of Public Works and is at present president of the Associated Investment Company. The latter company, with offices in the Farmers Trust Company building, has grown to such an extent as to claim practically all of his time and thus to draw him out of the active practice of the law.

Mr. Thomas D. Mott, 1895, is an ex-judge of the Saint Joseph Superior Court. He has also held the office of Federal Judge in Porto Rico. At present he is busily engaged in floating a corporation which will engage in the shipping business.

Mr. Joseph Walter McInerny, 1906, of the firm of McInerny, Yeakley and McInerny, is an active booster for Notre Dame. He was formerly editor of the South Bend News-Times. During the last campaign he was chairman of the election board of St. Joseph County.

Mr. William A. McInerny, 1901, of the firm of McInerny, Yeagley and McInerny, located in the Conservative Life Building, is one of the leading lawyers in Indiana. Soon after his graduation he was appointed to the Board of Public Works of the city of South Bend and has ever since made good with a vengeance. He is well known as a legislative lobbyist and a real estate promoter. His chief fame as a lawyer, however, is founded upon the many important cases which he has handled for public utilities before the various State commissions.

Mr. Mr. William B. O'Neill, 1906, served as Lieutenant Governor of Indiana for four years beginning in 1913. Although Mr. O'Neill's home is in Mishawaka he has offices for his practice, Ronald S. O'Neill, 1914, in the Citizens Bank Building in South Bend, Indiana. Ronald is at present however, connected with the Erwin-Wasey Co., 58 E. Wash. St. Chicago, Illinois.

Mr. J. Elmer Peak, 1912, in addition to his legal activities is at present kept very busy as the Grand

Knight of the South Bend Council of the Knights of Columbus. He has offices in the Farmers Trust Building.

Mr. George W. Sands, is a former member of the Indiana legislature. He cares for his extensive practice from his offices in the Conservative Life Building. Genial George is a prominent court attorney of the Saint Joseph County Bar.

Mr. John M. Raab, former student of the Notre Dame Law School, is the newly elected secretary of the Saint Joseph County Bar Association. He is connected with the law firm of Deahl and Deahl whose offices are located in the J. M. S. Building.

Mr. F. Armand Schellinger, 1919, is well located with the strong law firm of Jones and Obenchain in the Union Trust Building. In addition Armand has recently opened a part time office in his home town of Mishawaka.

Mr. John Schindler, 1909, is one of the prominent attorneys of Mishawaka. He has just been elected vice-president of the Saint Joseph County Bar Association for 1921.

Mr. George A. Schock, 1917, has just finished a term as deputy prosecuting attorney. He was snowed under in the fall election when he was the Democratic candidate for Prosecuting Attorney but he had the satisfaction of knowing that he ran several hundred votes ahead of the rest of his ticket. Since January 1, 1921, he has been associated with the firm of Deahl and Deahl.

Mr. Samuel Schwartz, 1913, completed two very successful terms as Prosecuting Attorney on January 1, 1921. He is now engaged in private practice with offices in the J. M. S. Building.

Dudley M. Shiveley, '91, is a prominent member of the Bar in South Bend, is the senior partner of the firm of Shiveley & Gilmer, with offices in the Farmers' Trust Building. Mr. Shiveley enjoys a lucrative general practice.

Mr. Edwin H. Sommerer, 1916, is engaged in practice for himself with offices in the Farmers' Trust Building. At the last election he was a candidate for the State legislature.

I am happily situated here with the firm of McInerny, Yeagley and McInerny. Mr. Yeagley is president of the Saint Joseph County Bar Association for 1921. Altho he is a big man and a very busy man he is never too busy to listen to my problems and questions. He, too, is a very good friend of Notre Dame. During the football season our whole office force generally attends the home games played here and roots for Notre Dame every time and all the time.

CLASS OF '20 AT THE BAR EXAMINATIONS

Their Letters and Reports

OHIO

BELCHER & CONNOR
Attorneys-at-Law
52-56 Ruggery Bldg.
Columbus, Ohio

Hon. F. J. Vurpillat
Notre Dame, Ind.

My dear Judge:

As I told you some time ago in an abrupt postal message, I am now an honest-to-goodness attorney "by reason of the authority in me vested by the state." The Ohio Bar examination was held December 7th and 8th, and I came through in good style. Paul Daugherty, whom you probably remember as being in the Law School in 1817-1918 and 1918-1919, was also

present and received his certificate. "Walter Rielly Miller" was called three times, but no response was forthcoming.

The Exam. was no easy matter. Constitutional Law was an especially hard subject ,and I felt the need of all the training you tried so earnestly "to imbibe us with" every day from eleven to twelve a. m. last year.

I am now connected, however slightly, with this reputable firm, and am getting some real experience. Mr. Connor is a Fourth Degree K. of C. and Mr. Belcher is a good old Socialist. It makes an invincible combination.

Well, this is on the firm's time, so I must close and seek to overcome my unfamiliarity with the Code of Ohio. Remember me to the Faculty and students of the Law School.

Sincerely yours,

Harry P. Nester.

P. S. I signed my first demurrer yesterday. Hope that unlike our Moot Court experience, this one will be sustained.

Although the Reporter has received no word from Walter himself, the foregoing letter of Mr. Nester reports that the name of Walter Riley Miller was called for the reception of the certificate of admission to the Ohio Bar. True to his habit of silence whenever he made a spectacular touchdown on the gridiron for the Varsity football team, Walter is again silent upon the occasion of his first touchdown on the field of the law, attaining the goal of admission to the Ohio Bar.

65½ Public Square,
Lima, O., Jan. 17, 1921.

Hon. F. J. Vurpillatt,
Dean of the College of Law,
University of Notre Dame,
Notre Dame, Indiana

Dear Judge:

After a few months of absence from Notre Dame I find it necessary to call upon you to duplicate the favor which you tendered me some time past. Will you please sign the within enclosed certificate and return the same to me immediately?

School days for myself have passed into oblivion, I am afraid, but there is a possibility that I can return to Notre Dame for a degree. It will be some time, however.

I hope you are getting along real well. I find that you have the correct system of teaching and every subject I had under you seems to be the surer nowledge of law in my mind. Judge altho I made several (what I thought were convincing) speeches on The League of Nations nevertheless it didn't seem to do much good for Cox. "It is better to have tried and failed, than not to have tried."

Will stop now Hoping you will continue in your success for years to come and thanking you very much for the interest which you took in me while a student at Notre Dame, I am

Respectfully,
Joseph H. Flick.

MEXICO

PRESIDENCIA DE LA REPUBLICA
Correspondencia del Secretario Particular

Mexico, 13 Jan. 1921.

Mr. Francis Vurpillat,
Dean of the College of Law,
Notre Dame University,
Notre Dame, Indiana.

My very dear friend and esteemed Prof.:

Excuse me the unreasonable delay. I tried to write you many times, but never succeed. Causes? Reasons? I don't know. Really that laziness—I'm guilty of, was unwillfully out of my wishes.

Now, with the most sincere pleasure—I write you sending my New Year's greetings for you and your very respectable family.

I was appointed by the President of the Republic, Private Counsellor for the Presidency, Chief of the Legislative Commission of the Executive and Chief of Official Information in the Capital, and, as such, I'm glad to be at your unconditional service.

Moreover, I opened a private office to do any kind of business in the city, and hope to do something good.

nd you, dear Prof., how are you getting along? Send me your Law Magazine immediately and the "Scholastic"—I'll pay all, as soon as I get 'em

Give my friends, specially to Prof. Tiernan and Costello, all kind of regards. Love for Notre Dame. And for you and your family my heart as your best friend and pupil.

Alfnso Anaya.

P. S.—Show this letter to the Very Rev. Burns. Shake hands with him in my name, and tell him I'm his as ever and forever.

CALIFORNIA

Word comes to us that Leo J. Ward has taken the recent examination for admission to the California Bar. Although official announcement of the results of the examination have not yet been made, we are informed that Leo is elated over his showing in the examination and confidently expects his certifificate of admission.

INDIANA

Edward C. McMahon, upon his recent visit to the University to the Madison County Bar Association at Anderson, Indiana, and of his start in the practice of the law.

MICHIGAN

We are informed that Clifford O'Sullivan, who passed the examination for admission to the Bar in Illinois last June and whose letter appeared in the November issue of the Reporter, has since successfully passed the Bar examination in Michigan where he has located for the practice of the law, in the offices of Walsh & Walsh, 37-39 White Block, Port Huron.

POINTS, PERSONAL, PROFESSIONAL, POLITICAL

About the Alumni

The Chicago Tribune of February 4th carried the following reference to a talented LL. B man of Notre Dame:

"YOUNGEST AID OF MR. CROWE TAKES UP NEW DUTIES"

"William C. Henry, who commenced his duties in the office of State's Attorney, Rober E. Crowe yesterday, is the youngest assistant state's attorney in the office. He comes from the Eighth ward. He was admitted to the bar in 1916, when 21 years old. Mr. Henry is a graduate of Notre Dame. He was in the military service and was two years overseas. He is an appointee of P. H. Moynihan, newly named member of the State Utilities Commission and the Republican committeeman of the South Chicago district. He has been assigned to the South Chicago Court." Needless to say we are proud of Will Henry's success and the credit he is reflecting upon the University and the Law School.

A letter from Thos. V. Truder, Las Vegas, New Mexico, tells us that he has been appointed to the position of assistant District Attorney, the district comprising three counties. The salary is one thousand dollars. "Tom" is also starting a night school under the auspices of the Vocational Department, and later he will endeavor to establish a K. of C. school. Good, Thomas V. Continue.

We are in receipt of a letter from Joseph C. McGinnis, LL. B., 1920, who is now in the offices of Branigar Bros. Co., 117 North Dearborn St., Chicago. Joe requests certificate of work in the Law School for filing with the State Board of Law Examiners of Illinois, before whom he expects soon to take the examination for admission to the Illinois Bar. Joe writes: "I am contemplating taking the bar examination in the near future and hope that in so doing I shall be able to reflect upon you, your assistants and the Institution the highest credit possible." Success, Joe, Old Boy.

During the holiday vacation, William A. Miner, of the junior class, took occasion to visit Francis J. Clohessy of the Class of '20 in his law office in Waverly, New York. Miner speaks in glowing terms of Clohessy's busy office, numerous clients, evident prosperity and prospects. He says that Francis J. is very popular and is freely spoken of as a probable nominee for a judicial office.

Since the November Reporter, in which we related the facts about Richard B. Swift, '20, and his start in the practice of law in Muscatine, Iowa, in an office all his own, we learn that Richard has formed a partnership with an old attorney of that city and hereafter will be known as a member of the firm of Warner & Swift, the senior member being Attorney E. M. Warner of the Mustatine Bar.

John T. Star, LL. B., '15 of Duluth, Minn., was recently married to Miss Mary M. Taff of Des Moines, Iowa. Alumni congratulations.

From Elgin, Illinois, comes the report of the recent marriage of William E. Pierce LL B. '06, formerly city attorney of Elgin, to Miss Nell Agnes Wallace, of Elgin. The Reporter extends best wishes on behalf of the alumni.

A letter has just reached us from Vincent Giblin, '19, who is attorney for the Florida East Coast Hotel Co., Jacksonville, Fla., with enclosure of an interesting specimen of pleading. We are thankful for the enclosure, and may make it useful in the April number of the Reporter.

Llewellen James LL. B., '18, of Kansas City, Mo., was a recent visitor to the Hoynes' College of Law. He related some experiences of his introduction into the practice of law. Mr. James was making a business trip to Chicago and took occasion to call at the University, to look at the scenes and the friends of college days.

Francis King, one of the Illinois members of the Class of '19, paid us a visit. He is trying to climb the hights of the law.

ALUMNI "GREAT AND NEAR GREAT"

From the Notre Dame *Scholastic* we glean the following references to alumni of the Law School who are attaining prominence for themselves:

"Mr. Albert J. Galen (LL.B., '96), Associate-Justice of the Supreme Court of Montana, in a letter acknowledging the congratulations sent by the President of the University on the occasion of the Judge's recent election, writes: 'Whatever I have accomplished or may yet accomplish in life is due chiefly to the interest which was taken in me during the years I attended Notre Dame. If dear old Col. Hoynes is still alive, I wish yould convey to him my best wishes and advise him of my election. I should be very happy to have my boy at Notre Dame, and have been at work in an endeavor to bring it about. . . . After the first of the year many grave and important duties and responsibilities will devolve upon me, and I only hope and pray that with my limited capacity I may be able to function satisfactorily.' "

Hon. Albert J. Galen was attorney general of Montana for eight years, and during the late war was Judge-Advocate-General of the A. E. F. in Siberia.

The Tulsa Daily World of Tulsa, Oklahoma, in a leader editorial for the issue of January 18th, dwells long and favorably on the possibilities of Judge Thomas D. Lyons, LL. B., '06, a gubernatorial candidate of promise for the campaign two years hence. 'Tom' was an exceptionally brilliant and popular student while at Notre Dame, saw service overseas in the past war, and has demonstrated his ability in public affairs in so marked a way during the past few years that little doubt exists as to his capacity for the office which the press and statesmen of Oklahoma are considering for him."

"Thomas V. Craven, LL. B., '14, has been recently appointed First Assistant District Attorney of his native City, New Orleans, La. Tom has made rapid progress in his chosen profession since he left Notre Dame. He was elected State Senator, was sent as delegate to the Constitutional Convention, and in all his assigned duties so conducted himself as to be candidate for higher honors. A letter from Governor John M. Parker accepting Tom's resignation as State Senator to take up his new office had nothing but praise for the work of this son of Notre Dame."

ABOUT OURSELVES

"The first quarterly issue of the Notre Dame *Law Reporter* for the present year seems to indicate that

this periodical, the publication of which began last year, is destined to be of great interest and value to the students and alumni of the Hynes College of Law. The current issue contains, in addition to the reports of cases of the last quarter of last year and the Junior Moot Court, the Court of Appeals, and the Supreme Court of Notre Dame, an instructive article contributed by Colonel William Hoynes, entitled "The Law and 'Lawyers,' a number of letters from men of the class of '20 and news items concerning other members of that class. An excellent idea is the alumni directory of the College of Law, begun in this number. All in all, the faculty and the students of law are to be complimented on the quality of the *Reporter."—The Notre Dame Scholastic.*

LAW REPORTER SUBSCRIPTIONS

Receipt of two dollars in payment for the 1920-1921 subscription to the Law Reporter from each of the following named alumni, is hereby acknowledged, towit: Earl F. Gruber, Delbert D. Smith George J. Hanhauser, Sherwood Dixon, Robert L. Bracken and Frank P. Burk.

DIRECTORY
Of the Notre Dame Law Alumni

In Forwarding Business to a Distant Point Remember Your Fellow Alumni Appearing in This List.

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