

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 auctioneer 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 "lymphangitis." 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 con-

trary 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 personal 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 length: 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 thereof 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*, 1 Ind. App. 252; *Benjamin 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. & Eng. 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 divested 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 1 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. Portsmouth 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 tortfeasor, and thus, by operation of law, forces such tortfeasor 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 judgment 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 to the second, third, and fourth paragraphs 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 DECIDED 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 plaintiff'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 overruled 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 in overruling the appellant's motion for a new trial.

CONDENSED STATEMENT OF THE EVIDENCE

Samuel Osborne residing on a small farm situated near Healthwin Indiana disposed of his realty and personalty at a public auction sale held on July 3, 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 preceding day and asked the licensed veterinarian to examine the animal. Upon examination the horse was found to be afflicted with a disease known as "lymphangitis," and immed-

imately 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 value 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 by the 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 party 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.

Ruble 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 of fear 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 transferee would invariably in the usual course of business suspect that there was such a defect in title.

Googman v. Simonds, 15 L. Ed. 934 Union Nat. Bk. v Mailoux, 132 N. W. 168.

Jobs 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 due 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 agent's failure to disclose to a purchaser of sheep, which he was authorized to sell, the fact that they were diseased, where 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 integrity 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 holder 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 ac-

tual 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 cause 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 on 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 impossibility, 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 overruling 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 Supreme 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 auctioneer 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 Numbered 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. Osborne. 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. Hill 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 forcibly 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 particular 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 York, 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. Suffolk 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.

Ketchum 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 constituting the equity or defect in title, followed by a failure to make a reasonably thorough investigation to disclose them because of the fear 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 commission. (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. DeCoursey 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 into 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. Hill 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 valuable 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 as we 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 recognizes 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 or to 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 bound 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 Courc 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 purchasers, and it might be well to say that this is a very similar 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 integrity 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 authoritative 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 Iowa 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 words were these: "I will not buy the note. Mr. Green told me that he was going 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' sixth 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 appel-

lant 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 as the 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.