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.