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NOTICE OF APPEAL.

(Filed December 18, 1928.)

10

New Jersey Supreme Court

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT Co., INC., a
Corporation,

Plaintiff,

vs.

RUDOLPH BURES,

Defendant.

Action at Law.

Notice

of Appeal.

20

To Green & Green, Attorneys for Plaintiff, or to
whom it may concern:

Sirs:

PLEASE TAKE NOTICE that the defendant
Rudolph Bures in the above entitled cause ap-
peals to the Supreme Court of New Jersey from
the whole of the judgment entered in this cause.

30

Respectfully yours,

LEVITAN & LEVITAN,
Attorneys for Defendant, Rudolph Bures.

Dated: December 13, 1928.

40

GROUNDS OF APPEAL.

10 (Filed January 11, 1929.)
 NEW JERSEY SUPREME COURT.

COLONIAL DISCOUNT Co., INC., a Corporation, <i>Plaintiff,</i> <i>vs.</i> RUDOLPH BURES, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Grounds</i> <i>of Appeal.</i>
--	---	--

20 To Green & Green, Attorneys for Plaintiff, or to
 whom it may concern:

Sirs:

PLEASE TAKE NOTICE that the defendant-appellant, Rudolph Bures, shall base his appeal on the following grounds, to wit:

1. The defendant, Rudolph Bures, was deprived of his constitutional right of trial by jury.

 2. The signature of the defendant, Rudolph Bures, was fraudulently obtained and such instrument is therefore void.
- 30
3. The answer of the defendant, Rudolph Bures, sets up a sufficient and legal defense.

 4. The substitution of instruments constituted such a fraud as would vitiate the note in the hands of a holder for value.

 5. The answer of the defendant, Rudolph Bures, raises a material question of fact which should have been submitted to the jury.
- 40

Summons.

6. The question of whether or not the Colonial Discount Co., Inc., is a bona-fide purchaser was raised and thus should have been submitted to the jury. 10

Respectfully yours,

LEVITAN & LEVITAN,
Attorneys for Defendant-Appellant.

SUMMONS.

(Filed September 8, 1927.) 20

The State of New Jersey to Harry Heyman and Rudolph Bures:

YOU ARE SUMMONED to answer the annexed complaint of Colonial Discount Co., Inc., a corporation, in an action at law in the Bergen County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Court, at Hackensack, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 30

Witness, Edwin C. Caffrey, Esq., Judge of the said Court, at Hackensack, this 6th day of September, nineteen hundred and twenty-seven.

JAMES W. MERCER,
Clerk.

GREEN & GREEN,
Attorneys. 40

COMPLAINT.

10

(Filed September 8, 1927.)

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT Cc., INC., a Corporation, <i>Plaintiff,</i> <i>vs.</i> HARRY HEYMAN and RUDOLPH BURES, <i>Defendants.</i>	}	<i>Action at Law. Complaint.</i>
---	---	---

20

Plaintiff, a corporation, having an office in the City, County and State of New York, says that:

1. It is the holder of a certain promissory note made by the defendants, Harry Heyman and Rudolph Bures, a true copy of which is annexed hereto and made a part hereof.

2. Defendants paid nothing thereon.

30

3. Defendants received a credit of \$203.03, as the result of the foreclosure of a conditional sale contract on a motor vehicle given to secure said note.

4. The sum of \$1070.32 remains unpaid thereon.

Plaintiff demands as damages the sum of \$1070.32 with interest from October 28th, 1926.

40

GREEN & GREEN,
 Attorneys for Plaintiff.

Complaint.

Do not make any corrections or erasures in 10
Note as to do so may require it to be rewritten.
\$1273.35 At New York City, September 1, 1926

Town or City Month Day Year

The undersigned, promise to pay to the order
of W. A. G. Motors Corporation Twelve Hundred
and Seventy-three and 35/100.....Dollars
in Gold Coin of the United States of America of
the present standard weight and fineness, at 20
Colonial Discount Co., Inc., 262 Fulton Street,
Brooklyn, N. Y., in 1@\$106.14 equal monthly pay-
ments of \$11@\$106.11 each month after the above
date. Value received. And upon default in the
payment of any installment when due, the whole
amount remaining unpaid shall immediately be-
come due, and if not paid shall bear interest at
the rate of six percent per annum thereafter, and
the maker and endorsers will also pay all costs
of collection. All endorsers hereon are jointly
and severally liable for payment as makers. If 30
the time for payment is extended notice of such
extension is waived by all endorsers and makers.
Demand, presentment for payment and notice
of dishonor is hereby waived.

Partnerships sign firm name by partner sign-
ing. Corporations sign corporate name by Officer
signing who must be authorized to sign checks.

The buyer signs his name here:

HARRY HEYMAN.
By RUDOLPH BURES. 40

Complaint.

- 10 Endorsers
 A. G. Motors Corp.
 Morris Hirsch, Pres.
 Colonial Discount Co., Inc.
 Benjamin Spitzer, Vice-Pres.

COLONIAL DISCOUNT CO., INC.

- 20 CONFIDENTIAL CREDIT APPLICATION
 INCOMPLETE APPLICATIONS NOT
 ACCEPTABLE.

262 Fulton Street, Brooklyn, N. Y.
 Telephones: Main 9042-9043-9044-9045-9046-9047.

Date:

For the purpose of securing credit in connection
 with the Motor Vehicle mentioned herein, under-
 signed makes the following representations:

- 30 Single
 Married—
 Name of Applicant, Rudolph Bures. Race .
 Age 31 years.
 Residence address, 263 Wilson Ave. Fairview,
 N. J. Tel.
 How long there years.
 Previous residence address . How
 long there years.
 Business address, 4350 Hudson Blvd. Union
 City, N. J.
 40 Kind of Business, automobile. Tel

Complaint.

Previously employed by _____ Address _____ 10
 Now employed by, Velie Motor Sales Co.
 Position, partner.
 How long _____ years.
 Monthly Income \$4,000. per year.
 Savings account with, Guttenberg Trust Co.
 Bank, Guttenberg. Branch in name of
 Account No. _____
 Check account with _____ Bank
 Branch in name of _____
 Carry Life Insurance with _____ Company
 Amount \$ _____ 20
 Fraternal Order and Unions of which you are
 Member _____
 Do you own any Real Estate? Location _____
 Amt. of 1st Mtg? 2nd Mtg. \$ _____
 If previously owner of car through whom fi-
 nanced? _____
 Where will car be garaged _____ Name
 of Garage. _____

WILL CAR BE USED FOR HIRE? _____ 30

I want all notices for payment sent to _____

GIVE BELOW THREE BUSINESS HOUSES
 WHO HAVE EXTENDED CREDIT TO YOU.
 Fuller Motor Co. 4334 Hudson Blvd. Union City.
 Mr. Sinek 460 E. 70th St. N. Y. C.

RUDOLPH BURES,
 Applicant's Signature.

40

Complaint.

10 CONFIDENTIAL CREDIT APPLICATION

Name of Applicant: Harry Heyman.

Residence Address: 108 Van Waignon Ave.
Jersey City.

Business Address: 156 Newark Avenue, Jersey City, N. J.

Business: Furniture.

Now Employed by: Heyman Bros. Inc. Position: Manager.

20 Check Acct with: Mercantile Trust Bank, Jersey City.

Reference: M. Waldy 4350 Hudson Blvd. Union City.

 NEW JERSEY

DUPLICATE.

CONDITIONAL SALE AGREEMENT.

30 THIS AGREEMENT made this thirtieth day of September, 1926 between W. A. G. Motors Corp. of 40 W. 62nd St. first party, his or its successors, or assigns (hereinafter called "Seller"), and Harry Heyman and Rudolf Bures at 47 Mercer St., in Jersey City, N. J. second party (hereinafter called "buyer")

40 1. WITNESSETH:—That the Seller in consideration of the payments, agreements and conditions contained herein, which on the part of the

Complaint.

Buyer are to be made, done and performed, has 10
 this day delivered and agreed to sell and the
 Buyer has this day agreed to buy from the Seller,
 but upon the conditions hereinafter recited, to
 the Buyer the following Passenger or Commercial
 Car, or Tractor (hereinafter called the "Car").

Make, Velie; Type of Body, Coupe; Model Letter or No., 60; Manufacturer's Serial No., 151360; Motor No., 41884; No. Cylinders, six; Advertised Horse Pow., 24.3; Year Model, 1927; List Price, 1540.00; Selling Price, 1838.35.

with extra equipment, for the sum of fully 20
 equipped \$1695.00.

The Buyer has this day paid to the Seller 565.00.

And the Buyer agrees to pay the Seller, or order balance, in instalments as follows: 1273.35.

\$106.11 One month after date.

\$106.11 Two months after date.

\$106.11 Three months after date.

\$106.11 Four months after date.

\$106.11 Five months after date.

\$106.11 Six months after date. 30

\$106.11 Seven mos. after date.

\$106.11 Eight mos. after date.

\$106.11 Nine months after date.

\$106.12 Ten months after date.

\$106.12 Eleven months after date.

\$106.12 Twelve months after date.

which instalments shall bear interest from maturity until paid at the highest legal contract rate and are to be evidenced by a promissory note (not as payment, but as evidence of the amounts to 40

Complaint.

10 become due hereunder) made by the Buyer to the order of the Seller, bearing date hereof, and maturing on the due dates of said respective instalments. Any extensions or assignments of this Agreement or said note shall not waive any condition herein contained.

2. Title to the Car and extra equipment shall not pass by delivery to the Buyer but shall remain vested in and be the property of the Seller or Assigns until the purchase price has been fully paid. Buyer agrees to operate and control said Car in conformity with all Laws and Ordinances and to indemnify and save harmless the Seller from any and all loss or damage to persons or property caused by said Car, or by the use and operation thereof to which the Seller might possibly be subjected.

3. Buyer agrees and acknowledges that the within Contract covers all conditions and agreements between the parties, that the loss, injury or destruction of said Car shall not release said Buyer from payments as provided herein. Buyer hereby acknowledges receipt of and accepted the Car, having first examined and tested the same and found same in sound and first class condition, and agrees to keep the Car insured against loss by fire and theft with insurance companies acceptable to the Seller for not less than the amount owing, and until fully paid, payable to and to protect the interest of the Seller, and the Seller may place, continue and renew said insurance for

Complaint.

the Buyer at the Buyer's expense if the Seller 10
so elects.

4. Buyer agrees to pay all taxes, fees or charges against said Car and to keep same in good condition, and that any equipment, repairs or accessories placed upon said Car shall be at Buyer's expense and become a component part thereof and included in the terms of this Agreement. Buyer further agrees not to use or permit said Car to be used for passenger hire.

20

5. Buyer agrees that in the event of any law or ordinance requiring the recordation of this agreement, that it shall be recorded at the expense of the Buyer and in his name, and at any time, by the Seller, or the holder of this Agreement.

6. Should the Buyer fail to keep and perform any or all his agreements herein contained, and to promptly pay at maturity any and all sums hereunder, or if said Car is removed or attempted to be removed from the State in which the Buyer now resides, or to be otherwise disposed of, or if Buyer shall lend, sell or encumber, or shall attempt to sell or encumber said Car, or in case of misuse or abuse thereof, or whenever the Seller or his assigns shall deem the debt insecure, said Seller may without any demand or notice take possession of said Car and equipments, wherever found and without process of law, and all rights of the Buyer hereunder, shall cease and terminate 40

30

40

Complaint.

10 thereupon absolutely. Buyer does hereby expressly waive any right of action against the Seller growing out of the removal, repossession and retention of said Car or otherwise, and hereby consents that upon any default (or in the event of the Buyer, for any reason gives up or loses possession of the Car), all unpaid balance of said purchase price and note representing the same shall forthwith become due and payable. Buyer agrees that all payments made shall belong to and be retained by Seller as liquidated damages for
20 the nonfulfillment of this agreement, for loss in value of the Car, and for the rental value thereof.

7. Seller may, by suit or otherwise, enforce payment of said note, and no legal proceedings with respect thereto shall be deemed any waiver of said right of Seller to take possession on default or breach as aforesaid. Upon the Seller so taking possession of the Car, Seller may sell the Car at public or private sale at any time thereafter without any notice to the Buyer, and
30 said Seller may become the purchaser thereof, and if the proceeds thereof are insufficient to pay all sums remaining unpaid hereunder and the expense caused by such repossession, removal, reparation, storage, liens and sale, including a reasonable attorney's fee, incurred in taking possession of said Car, or in or about the sale thereof, or in collecting in any manner any sums which may be due and owing hereunder, Buyer agrees to pay any deficiency as damages for use of said
40 property. The waiver or indulgence of any de-

Complaint.

fault shall not operate as a waiver of subsequent defaults. 10

8. Buyer agrees that the said Seller, in case said Buyer fails to comply with any of the agreements aforesaid on Buyer's part to be performed, may cause judgment to be entered against said Buyer upon this agreement for the whole amount unpaid, or upon the said note, interest and costs, whether or not the same shall have become due and payable by reason of maturity or under the conditions of this agreement, and said Buyer hereby waives stay of execution, exemption laws, right of inquisition on real estate, errors and appeals, and further authorized the prothonotary to take a commission of 10% as attorney's commission in case execution shall be issued thereon, and for that purpose the Buyer hereby appoints the prothonotary or any attorney of any Court of Record as his lawful attorney to appear for and confess judgment against said Buyer. Time is of the essence of this agreement. 20

9. This agreement shall apply to and bind the heirs, executors, administrators and assigns of the Buyer, and shall inure to the benefit of the Seller, Seller's heirs, executors, administrators, successors and assigns, and contains the entire agreement between the parties hereof, their agents or employees, either verbal or written. 30

The Buyer at all times agrees to store his motor vehicle at Bryan-Smiths Garage, Jersey City, 40

Affidavit of Merits.

10 N. J., and therefore changing the location to notify the Seller, and receive written permission to move the motor vehicle.

10. IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this Agreement, in duplicate the day and year first above written.

RUDOLPH BURES,
Buyer.

20 HARRY HEYMAN,
Owner, Officer or Firm Member.

AFFIDAVIT OF MERITS.

(Filed September 16, 1927.)

BERGEN COUNTY CIRCUIT COURT.

30	COLONIAL DISCOUNT Co., INC., a corporation, <i>Plaintiff,</i> <i>vs.</i> HARRY HEYMAN and RUDOLPH BURES, <i>Defendants.</i>	}	<i>Action at Law Affidavit of Merits</i>
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State of New Jersey, }
 County of Hudson. } ss.:

40 RUDOLPH BURES of full age being duly sworn according to law upon his oath deposes and says as follows:

Answer.

That he is the defendant in the above entitled 10
cause and he believes that he has a just and legal
defense to said action, on the merits of the case.

RUDOLF BURES.

Subscribed and sworn to before me
this 14th day of September, 1927.

Sigmund Auerbach,
Attorney at Law of
State of New Jersey.

20

ANSWER.

(Filed October 8, 1927.)

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT COMPANY
INC., a corporation,

Plaintiff,

vs.

HARRY HEYMAN and RUDOLPH
BURES,

Defendants.

30

Action at Law
Answer.

Defendant, Rudolph Bures, residing in the
Township of Fairview, County of Bergen and
State of New Jersey, answering the complaint of
the plaintiff says:

40

Answer.

- 10 1. He denies each and every allegation contained in the complaint.

FIRST SEPARATE DEFENSE.

Discretion
 Defendant as and for his first separate defense says that the plaintiff is not a holder in due course of the note mentioned and sued upon in the plaintiff's complaint.

SECOND SEPARATE DEFENSE.

20

Fraud
 Defendant as and for his second separate defense alleges that the note sued upon and mentioned in the plaintiff's complaint was obtained by fraud and duress.

THIRD SEPARATE DEFENSE.

- 30 Defendant as and for his third separate defense alleges that there is no consideration for the note sued upon and mentioned in the complaint from the plaintiff to this defendant.

OBJECTION.

Defendant reserves the right to move to strike out at the trial or at any time before or during the trial the complaint of the plaintiff on the ground that same does not disclose a good cause of action.

40

LEVITAN & LEVITAN,
Attorneys for Defendant,
Rudolph Bures.

**NOTICE OF APPLICATION TO STRIKE
OUT ANSWER AND ENTER SUM-
MARY JUDGMENT.**

10

BERGEN COUNTY CIRCUIT COURT.

<p>COLONIAL DISCOUNT Co., INC., a corporation, <i>Plaintiff,</i> <i>vs.</i> HARRY HEYMAN and RUDOLF BURES, <i>Defendants.</i></p>	}	<p><i>Action at Law.</i> <i>Notice of Ap- plication to</i> <i>Strike out An- swer and en- ter Summary</i> <i>Judgment.</i></p>
		20

To Levitan & Levitan, Esqs.,

PLEASE TAKE NOTICE, that on Thursday, the 3rd day of November, 1927, at 9:45 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court House, Hackensack, New Jersey, before Hon. Edwin C. Caffrey, Circuit Court Judge, or the Judge holding the Circuit Court at that time, we will move to strike out the answer filed in the above entitled cause by the defendant, Rudolf Bures, on the ground that the same is sham or frivolous, and filed only for the purpose of delay; and at the same time and place we will move that summary judgment be entered in favor of the plaintiff and against the defendant, Rudolf Bures.

30

In the event the Court does not strike out said answer, we will apply at the same time and place to extend the time in which a reply may be filed until ten days after the determination of this application.

40

*Notice of Application to Strike Out Answer and
Enter Summary Judgment.*

10

We will use the annexed affidavit in support of
our application.

Dated, October 18th, 1927.

Respectfully yours,

GREEN & GREEN,
Attorneys for Plaintiff.

20

State of New Jersey, }
County of Essex. } ss.:

30

HAROLD F. PREISON, of full age, being duly
sworn according to law, on his oath saith, that he
is a clerk in the office of the "Newark Evening
News" and that a notice of which the annexed is
a true copy, and published on the 16th day of Oc-
tober, A. D. 1926, in the said "Newark Evening
News," a public newspaper, printed and published
at Newark, in this state.

HAROLD F. PREISON.

Sworn and subscribed to this
18th day of October, 1926.
before me

Harold W. Bailey,
Notary Public.

40

Affidavit of John Warner.

NOTICE OF SALE.

10

TAKE NOTICE, that on Thursday, October 28, 1926, at 9:30 A. M., at 738 Broad Street, room 608, Newark, Essex County, New Jersey, the undersigned will sell, at public auction, 1 Velie Coupe, Serial No. 151360, Motor No. 41884, and equipment, as is.

Said motor vehicle was retaken from Harry Heyman, who purchased the same from W. A. G. Motor Corporation, under a conditional sale contract, assigned by latter to Colonial Discount Company, for breach of the conditions thereof.

*not taken
vs.*

Dated, October 15, 1926.

JOHN WARNER,
Bailiff.

AFFIDAVIT.

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT Co., INC., a corporation,	} Plaintiff,	} Action at Law	} 30
<i>vs.</i>			
HARRY HEYMAN and RUDOLF BURES,	} Defendants.	} Affidavit.	

State of New Jersey, }
County of Essex. } ss.:

JOHN WARNER of full age, being duly sworn according to law, on his oath, deposes and says, that:

40

Affidavit of John Warner.

- 10 1. He is one of the Constables of Essex County, New Jersey.
2. He retained motor vehicle, Velie Coupe, Serial No. 151360, Motor No. 41884, in his possession for a period of 10 days, at Newark, New Jersey.
3. On October 15th, 1926, he set down October 28th, 1926, 9:30 A. M., and 738 Broad Street, room 608, Newark, Essex County, New Jersey, as the
20 time and place respectively to sell said motor vehicle at public auction, to the highest bidder.
4. On October 16th, 1926, he posted 3 notices of sale in the City of Newark, viz.: one at the City Hall, one at the Court House, and one in front of building at 738 Broad Street, Newark.
5. On October 28th, 1926, at 9:30 A. M., at 738 Broad Street, Room 608, Newark, New Jersey, he offered the said motor vehicle and equipment for sale at public auction, to the highest bidders. The
30 highest bid was \$250.00, and same was sold for the sum of \$250.00, to Colonial Discount Co., Inc. Said sum was an adequate price, and the largest that could be obtained at the time.
6. The expenses of the sale were:
 Retaking motor vehicle, holding sale, &c., \$46.97.

JOHN WARNER.

Sworn and subscribed to before me
this 26th day of October, 1927.

40 Harold Farkas,
 Notary Public of N. J.,
 My commission expires 9/17/32.

AFFIDAVIT.

BERGEN COUNTY CIRCUIT COURT. 10

COLONIAL DISCOUNT Co., INC., a corporation, <i>Plaintiff,</i> <i>vs.</i> HARRY HEYMAN and RUDOLPH BURES, <i>Defendants.</i>	}	<i>Action at Law Affidavit.</i>
---	---	--

State of New York, County of Kings.	}	ss.:	20
--	---	------	----

LEOPOLD WOLF, of full age, being duly sworn according to law, on his oath deposes and says, that:

1. He is Assistant Secretary of Colonial Discount Co. a corporation organized and existing under the banking laws of the State of New York, the plaintiff in the above entitled action; that he is authorized to make this affidavit on behalf of plaintiff and that he is cognizant of the facts hereinafter stated. 30

2. On September 1, 1926, the defendants made and delivered their note of that date for \$1273.35 to W. A. G. Motors Corporation, or order, payable at the office of Colonial Discount Co., Brooklyn, New York, in eleven equal monthly installments of \$106.11 each, and one installment of

40

Affidavit of Leopold Wolf.

10 \$106.14, said installments being payable one
month apart. Said note was given simultaneously
with the purchase of an automobile by the defend-
ants from the said W. A. G. Motors Corporation,
and represented the balance due on the purchase
price.

3. Payment of said note was secured by a con-
ditional sale contract on said automobile.

20 4. Plaintiff purchased said note from the W.
A. G. Motors Corporation for value before matur-
ity, and in the usual course of business, and also
all the right, title and interest of the said W. A.
G. Motors Corporation, in and to the said con-
tract.

5. Said note was regular upon its face, and
plaintiff had no knowledge or notice of any de-
fects therein, it was not overdue, and plaintiff
purchased the same in good faith and for value
as aforesaid.

30 6. Defendants paid nothing on account of said
note, and received a credit of \$203.03, as the re-
sult of foreclosure of conditional sale contract on
motor vehicle given to secure said note, leaving an
unpaid balance of \$1070.32.

7. Interest is due thereon from October 15,
1926.

40 8. Deponent believes that there is no defense
to the above entitled action, and that the answer

Order for Summary Judgment.

filed therein by the defendant, Rudolph Bures, is sham or frivolous, and filed only for the purpose of delay. 10

LEOPOLD WOLF.

Sworn and subscribed to before me,
a Notary Public of New York, at
Brooklyn, New York, this 17th
day of October, 1927.

Benj. L. Cardoza,
Notary Public,

Queens Co. Clerk's No. 233, Reg. 2671, 20
Cert. filed in Kings Co. No. 26, Reg. No. 9206,
Cert. filed N. Y. Co. No. 465, Reg. No. 9340,
Cert. filed in Nassau County,
Commission expires 3/30/29.

ORDER FOR SUMMARY JUDGMENT.

BERGEN COUNTY CIRCUIT COURT. 30

COLONIAL DISCOUNT Co., INC., a
corporation,

Plaintiff,

vs.

RUDOLF BURES, impleaded, &c.,

Defendant.

*Action at Law
Order for Sum-
mary Judg-
ment.*

It appearing by affidavit filed in the above en-
titled cause, that the defense made by the answer 40
of the defendant, Rudolf Bures, is , and

Amended Answer.

10 filed only for the purpose of delay, and the said defendant, after due notice, having failed to show such facts as entitle him to defend:

It is, on this day of November, 1927, on motion of Green & Green, Attorneys for Plaintiff, ORDERED, that the said answer be and the same is hereby stricken out.

EDWIN C. CAFFREY,
Circuit Court Judge.

20

AMENDED ANSWER.

(Filed November 22, 1927.)

BERGEN COUNTY CIRCUIT COURT.

30

COLONIAL DISCOUNT COMPANY,
INC., a corporation,

*Plaintiff,**vs.*

HARRY HEYMAN and RUDOLPH
BURES,

*Defendants.**Action at Law.**Amended**Answer.*

Defendant, Rudolph Bures, residing in the Township of Fairview, County of Bergen and State of New Jersey, answering the complaint of the plaintiff says:

40 1. He denies each and every allegation contained in the complaint.

Amended Answer.

FIRST SEPARATE DEFENSE.

10

Defendant as and for his first separate defense says that he was fraudulently induced to sign the note sued upon and mentioned in the complaint, by the false representations of the other defendant and other people, the particulars which are as follows:

On or about the first day of September, 1926, the defendant Rudolph Bures was requested by one Michael Waldy to accompany the latter to the storage warehouse of Heyman Brothers of Jersey City. He was informed that there was to be a sale of a Velie car in which business the defendant Rudolph Bures was engaged, with Michael Waldy.

At the time of the sale this defendant was shown a batch of papers and was asked to sign them as he was informed that it was necessary and customary for all dealers to sign such papers. Defendant was never informed that it was a note he was signing and had he known it to be such, he surely would never have signed it, particularly for this defendant Harry Heyman whom he had never known up to this time.

LEVITAN & LEVITAN,
Attorneys for Defendant,
Rudolf Bures.

40

found

20

30

Affidavit of Leopold Wolf.

to extend the time in which a reply may be filed 10
 until ten days after the determination of this
 application.

We will use the annexed affidavit in support of
 our application.

Dated, December 8th, 1927.

Respectfully yours,

GREEN & GREEN, 20
 Attorneys for Plaintiff.

AFFIDAVIT.

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT COMPANY, Inc., a corporation, <i>Plaintiff,</i> <i>vs.</i> HARRY HEYMAN and RUDOLF, BURES, <i>Defendants.</i>	}	<i>Action at Law.</i> 30 <i>Affidavit.</i>
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State of New York, }
 County of Kings. } ss.:

LEOPOLD WOLF, of full age, being duly sworn
 according to law, on his oath deposes and says, 40
 that:

Affidavit of Leopold Wolf.

10 1. He is Assistant Secretary of Colonial Discount Co., a corporation organized and existing under the banking laws of the State of New York, the plaintiff in the above entitled action; that he is authorized to make this affidavit on behalf of plaintiff and that he is cognizant of the fact hereinafter stated.

20 2. On September 1, 1926, the defendants made and delivered their note of that date for \$1273.35 to W. A. G. Motors Corporation, or order, payable at the Office of Colonial Discount Co., Brooklyn, New York, in eleven equal monthly installments being payable one month apart. Said note was given simultaneously with the purchase of an automobile by the defendants from the said W. A. G. Motors Corporation, and represented the balance due on the purchase price.

3. Payment of said note was secured by a conditional sale contract on said automobile.

30 4. Plaintiff purchased said note from the W. A. G. Motors Corporation for value before maturity, and in the usual course of business, and also all the right, title and interest of the said W. A. G. Motors Corporation, in and to the said contract.

40 5. Said note was regular upon its face, and plaintiff had no knowledge or notice of any defects therein, it was not over due, and plaintiff purchased the same in good faith and for value as aforesaid.

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mit mieding* ←

Affidavit of Leopold Wolf.

6. Defendants paid nothing on account of said note, and received a credit of \$203.03, as the result of foreclosure of conditional sale contract on motor vehicle given to secure said note, leaving an unpaid balance of \$1070.32. 10

7. Interest is due thereon from October 15, 1926.

8. Deponent believes that there is no defense to the above entitled action, and that the answer filed therein by the defendant, Rudolf Bures, is sham or frivolous, and filed only for the purpose of delay. 20

LEOPOLD WOLF.

Sworn and subscribed to

before me, a Notary Public

of New York, at Brooklyn,

New York, this day of December, 1927.

Benjamin F. Cardozo,

Notary Public.

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**AFFIDAVIT OF DEFENDANT-
APPELLANT.**

10

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT COMPANY,
INC., a corporation,

Plaintiff,

vs.

HARRY HEYMAN and RUDOLPH
BURES,

Defendants.

*Action at Law.
Affidavit of
Defendant-
Appellant.*

20

State of New Jersey, }
County of Hudson. } ss.:

MICHAEL WALDY, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a resident of the State of New Jersey residing at #4376 Boulevard, Union City, N. J.

2. On or about the first of September, 1926, I was a member of the firm of Michael Waldy and Rudolph Bures trading as Velie Motor Sales Company, dealers in the sale of Velie cars.

3. On or about the time mentioned above, I sold a Velie Coupe to the defendant, Harry Heyman. This car belonged to the W. A. G. Motor Corporation of New York and at that time a Star car belonging to the defendant, Harry Heyman, was taken by the W. A. G. Motor Corporation as part of the consideration of the purchase price of the car.

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Affidavit of Defendant-Appellant.

4. At the time the sale was consummated at the storage warehouse of Heyman Brothers of Jersey City and present there were the following: 10

Michael Waldy, Rudolph Bures, Morris Hirsch, Harry Heyman and a friend of his. I then heard Mr. Hirsch ask Mr. Bures to sign certain papers which he said were customary to be signed by the dealers when the sale of a car took place. However, I never heard him say that it was merely some document which was really customary for dealers to sign. 20

5. I did not receive any consideration, nor did my partner Rudolph Bures for the signing of any of these documents which I am now surprised to find was a note. I am also informed by the office of Levitan & Levitan that Rudolph Bures's name appears on the note as a buyer of the car, but I hereby state that Rudolph Bures did not at that time or any time thereafter buy any Velie car and sign his name therefor on the note sued on by the plaintiff in the above entitled cause. 30

MICHAEL WALDY.

Subscribed and sworn to
before me this 24th day
of October, 1927.

Sigmund Auerbach,
Attorney at Law of
State of New Jersey.

**AFFIDAVIT OF DEFENDANT-
APPELLANT.**

10

BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT COMPANY,
INC., a corporation,

Plaintiff,

vs.

HARRY HEYMAN and RUDOLPH
BURES,

Defendants.

*Action at Law.
Affidavit of
Defendant-
Appellant.*

20

State of New Jersey, }
County of Hudson. } ss.:

RUDOLPH BURES, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am a resident of the State of New Jersey residing at #263 Wilson Avenue, Fairview, N. J.

2. On or about September, 1926, I was a member of the Firm of Michael Waldy and Rudolph Bures, trading as Velie Motor Sales Company, dealers in the sale of Velie cars.

3. On or about the time mentioned above I was requested by Mr. Waldy to accompany him to the storage warehouse of Heyman Brothers of Jersey City, as he informed me that he intended to sell a Velie car. When I arrived there I found the following present:

40 Morris Hirsch, President of the W. A. G. Motor Corporation, Harry Heyman and a friend of his.

Affidavit of Defendant-Appellant.

4. After several conversations, concerning the sale, Morris Hirsch then told me that the sale was consummated and all that was necessary now to have me sign certain papers which he said were customary for dealers to sign whenever making a sale. He never informed me that it was a note that I was to sign. 10

5. I heard nothing further about this until I was surprised by being served with a summons and complaint by the Sheriff of Bergen County in a suit brought by the Colonial Discount Company. 20

6. I have never received any consideration for the note which I am supposed to have signed; I am now informed by Levitan & Levitan that my name appears on the note sued on by the plaintiff as a buyer of a Velie car and do hereby state that at the time nor at any time thereafter did I buy a Velie car and sign a note therefor as sued upon by the plaintiff in the above entitled cause. 30

RUDOLPH BURES.

Subscribed and sworn to before
me this 24th day of October, 1927.

Sigmund Auerbach,
Attorney at Law of
State of New Jersey.

AFFIDAVIT.

10 BERGEN COUNTY CIRCUIT COURT.

COLONIAL DISCOUNT COMPANY, INC., a corporation,	} <i>Plaintiff,</i>	<i>Action at Law.</i> <i>Affidavit.</i>
vs.		
HARRY HEYMAN and RUDOLF BURES,	} <i>Defendants.</i>	

20 State of New Jersey, }
 County of Hudson. } ss.:

RUDOLF BURES, of full age, being duly sworn according to law, upon his oath deposes and says:

1. He is one of the defendants in the above entitled cause.

2. He did not know the other defendant, Harry Heyman, until he was first introduced to him at the storage warehouse of Heyman Brothers, Jersey City, N. J., when the sale of the Velie car took place.

3. At the time of the sale, deponent was shown a batch of papers and asked to sign them as it was necessary for all dealers to sign such papers. He was never informed that it was a note he was signing and had he known it was such, he surely would never have signed it, and particularly for

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Order for Summary Judgment.

this defendant Harry Heyman whom he had never 10
known up to this time.

4. Deponent further says that he was fraudu-
lently induced to sign this note by the false repre-
sentations of several people who never stated to
him that it was a note he was signing but merely
several papers all bunched together.

RUDOLF BURES.

Subscribed and sworn to
before me this 9th day 20
of November, 1927.
Wallace P. Berkowitz,
Attorney at Law of
State of New Jersey.

ORDER FOR SUMMARY JUDGMENT.

(Filed, December 9, 1928.)

BERGEN COUNTY CIRCUIT COURT. 30

COLONIAL DISCOUNT COMPANY, Inc., a corporation, <i>Plaintiff,</i> <i>vs.</i> RUDOLF BURES, Impleaded &c., <i>Defendants.</i>	}	<i>Action at Law. Order for Summary Judgment.</i>
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It appearing by affidavit filed in the above en- 40
titled cause, that the defense made by the

Order for Summary Judgment.

10 amended answer of the defendant, Rudolf Bures,
is sham, and filed only for the purpose of delay,
and the said defendant, after due notice, having
failed to show such facts as entitle him to defend:

It is, on this 5th day of December, 1928, on
motion of Green & Green, Attorneys for Plaintiff,
ORDERED, that the said amended answer be and
the same is hereby stricken out, and that final
judgment be and the same is hereby entered in
favor of the plaintiff, Colonial Discount Co., Inc.,
a corporation, and against the defendant, Rudolf

20 Bures, for the sum of One Thousand Two Hun-
dred Seven Dollars and Sixty-eight Cents
(\$1,207.68), and costs to be taxed.

Let this rule be entered in the minutes.

EDWIN C. CAFFREY,
Circuit Court Judge.

30

40

Notice of Appeal and Grounds.

(Filed March 26, 1930.)

NEW JERSEY SUPREME COURT.

COLONIAL DISCOUNT COMPANY,
Plaintiff-Appellee,

v.

RUDOLPH BURES,
Defendant-Appellant.

10

Action at Law.

To; Green & Green, Esqs., Attorneys of Plaintiff,
or to whom it may concern:

PLEASE TAKE NOTICE that the defendant in the
above entitled cause, appeals to the Court of Errors
and Appeals in the last resort in all causes in New
Jersey from the whole of the judgment entered in
this cause on the following ground, to wit:

20

1. Because the Supreme Court erred in giving
judgment for the plaintiff instead of the defendant,
in that:

a. The defendant, Rudolph Bures, was deprived
of his constitutional right of trial by jury.

30

b. The signature of the defendant, Rudolph
Bures, was fraudulently obtained and such instru-
ment is therefore void.

c. The answer of the defendant, Rudolph Bures,
sets up a sufficient and legal defense.

d. The substitution of instruments constituted
such a fraud as would vitiate the note in the hands
of a holder for value.

40

Rule on Affirmance.

e. The answer of the defendant, Rudolph Bures, raises a material question of fact which should have been submitted to the jury.

10 f. The question of whether or not the Colonial Discount Co., Inc., is a bona fide purchaser was raised and thus should have been submitted to the jury.

Respectfully yours,

LEVITAN & LEVITAN,
Attorneys for Defendant-Appellant.

Rule on Affirmance.

(Filed March 14, 1930.)

20

NEW JERSEY SUPREME COURT.

May Term 1929.

COLONIAL DISCOUNT CO. INC.,
Plaintiff-Respondent,

v.

RUDOLPH BURES,
Defendant-Appellant.

30

On Appeal to
Supreme Court.

This cause having been duly argued at the present term of this court by Abraham Levitan, of counsel for the defendant-appellant and David Green, of counsel for the plaintiff-respondent and the court having considered the same, and finding no error in the record or proceedings in the Bergen County Circuit Court;

40 It is thereupon ordered and adjudged that the judgment of the Bergen County Circuit Court, re-

Opinion.

moved by appeal in this cause, be affirmed with costs; and that the record be remitted to the Bergen County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

Dated March 14, 1930.

10

On motion of
 DAVID GREEN,
 Attorney of Plaintiff-Respondent.

Opinion.

(Filed February 26, 1930.)

NEW JERSEY SUPREME COURT.

20

No. 79, May Term, 1929.

COLONIAL DISCOUNT COMPANY, INC.,
Plaintiff-Respondent,

v.

RUDOLPH BURES,
Defendant-Appellant.

30

On appeal from Bergen County Circuit Court.
 Before—GUMMERE, Chief Justice, and Justices
 KALISCH and CAMPBELL.

For the appellant—LEVITAN & LEVITAN,
 ABRAHAM LEVITAN, of counsel.

For the respondent—GREEN & GREEN, DAVID
 GREEN, of counsel.

Per Curiam: This is an appeal by Rudolph
 Bures, from a summary judgment entered in the

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Opinion.

Bergen County Circuit Court, in favor of the plaintiff-respondent, and against the defendants below, Rudolph Bures, and Harry Heyman.

10 The plaintiff-respondent brought its action in the Bergen County Circuit Court to recover from the defendants below, the sum of \$1,070.32, with interest from October 28, 1926, being the balance due on a promissory note made by the said defendants below, on September 1, 1926, for the sum of \$1,273.35 to the order of W. A. G. Motors Corporation, payable at the office of the Colonial Discount Company, Brooklyn, in eleven equal monthly installments of \$106.11 each, and one installment of \$106.12, said installments being payable one month apart.

20 It appears the note was given simultaneously with the purchase of an automobile, by the defendants below, from the W. A. G. Motors Corporation, and represents the balance due on the purchase price.

An answer was filed by the defendant-appellant, Bures in the action, in which answer he sets up as his first separate defense that the plaintiff is not a holder in due course of the note mentioned and sued upon in the complainant's complaint.

30 In the second separate defense, defendant-appellant sets forth that the note sued upon and mentioned in the plaintiff's complaint, was obtained by fraud and duress. And in the third separate defense he alleges there is no consideration for the note sued upon and mentioned in the complaint.

40 Notice was given by counsel of plaintiff to defendant's counsel to strike out the answer upon the ground that it was frivolous and sham, and for the entry of a summary judgment, and the matter

Opinion.

came on for a hearing before the Circuit Court judge who ordered that the answer be stricken out, whereupon (whether by leave of court or not, it does not appear), the defendant-appellant filed an amended answer. In this answer, after stating, he denies each and every allegation contained in the complaint, he sets up as his first separate defense that he was fraudulently induced to sign the note sued upon and mentioned in the complaint by the false representations of the other defendant, (Heyman) and other people. After setting forth matters which were manifestly hearsay, he says that at the time of the sale he was shown a batch of papers and was asked to sign them, and that he was never informed that it was a note he was signing.

10

It is to be observed that in the first answer filed by the defendant-appellant, to the action, he sets up that the plaintiff was not a holder in due course of the note mentioned in the complainant's complaint; and that the note sued upon was obtained by fraud and duress, and there was no consideration moving to the defendant from the plaintiff for the note sued upon.

20

The defenses set up in the amended answer are apparently inconsistent with the former one stricken out by the Court, in respect to their verity.

30

Notice was given to strike out the amended answer, and for a summary judgment, upon the ground that the answer was sham and frivolous and filed only for the purpose of delay, and this matter coming on to be heard before the Bergen County Circuit Court, on the plaintiff-respondent's motion, supported by affidavits, and opposed by counter-affidavits offered by the defendant-appellant, which latter's affidavits set up, in general

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Opinion.

terms, in which he claimed that he was fraudulently induced to sign the note by the false representations of the co-defendant, Heyman, and other people, who never stated to him that it was a note he was signing but merely several papers all
10 bunched together.

The court decided that the answer was frivolous and filed for the purpose of delay and struck it out, and ordered judgment final in favor of the plaintiff-respondent, against the defendant-appellant.

It is quite clear that the matters set forth, by the defendant-appellant, as his defense, in his counter-affidavits, even though those matter be true in fact, they constituted no bear to the plaintiff-respondent's right to a recovery on the note in
20 question since there was an utter absence of the affirmation of any fact in the defendant-appellant's affidavits that tended to show that the plaintiff-respondent was not a holder of the note sued upon in due course, for a valuable consideration and in good faith and without knowledge of any infirmity in the note.

In view of the fact, that it appeared from the plaintiff-respondent's affidavits that it received the note before the maturity thereof, for a valuable
30 consideration and in good faith, and without knowledge of any infirmity in the note, the only proper course therefore for the court to have pursued which it did was to strike out the answer as frivolous and filed for the purpose of delay, and order final judgment for the plaintiff-respondent.

Judgment is affirmed, with costs.

New Jersey Court of Errors and Appeals

COLONIAL DISCOUNT CO., INC.,
Plaintiff-Respondent,

v.

RUDOLPH BURES,
Defendant-Appellant.

On Appeal.

BRIEF FOR DEFENDANT-APPELLANT.

Facts.

Briefly the facts in this case are as follows:

This is an appeal from the Supreme Court affirming an order of the Bergen County Circuit Court striking out the answer of one of two defendants and entering summary judgment.

This suit was on an instrument purporting to be a promissory note and containing numerous conditions, stipulations and provisos. The plaintiff alleged in its complaint that it was the holder of a promissory note made by this defendant Bures, and one Harry Heyman (p. 5, Case). At the time of the execution of this note two other documents were signed by the defendant, a confidential credit application (p. 6, Case), and a conditional sale agreement (p. 9, Case). All these documents consume about ten pages of the printed case.

Defendant pleaded three separate defenses:

1. That plaintiff is not a holder in due course.
2. The instrument was obtained by fraud.
3. No consideration.

A motion was made to strike out this answer and enter summary judgment. At the argument on the motion, leave was given to file an amended answer (p. 25, Case) setting forth the fraud in detail. The defendant also produced several affidavits setting forth in detail that at the time the instrument was signed he was handed a batch of papers, and when upon inquiry as to what they were, was informed by one Hirsch, the president of the payee in the note, that defendant Bures was obliged to "sign certain papers which he (Hirsch) said were customary to be signed by the dealers when the sale of a car took place."

The trial court disregarded this affidavit and the defenses set forth in the answer and amended answer, and struck them all out and entered summary judgment. The Supreme Court affirmed the decision of the Circuit Court. This appeal is taken to review that judgment.

POINT I.

The signature of the defendant to the note was fraudulently obtained, and such an instrument is therefore void.

Corpus Juris, Volume 8, page 790, discussing the Negotiable Instrument Law, says:

"The Negotiable Instrument Law by providing that a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves precludes, it has been held, the defense of fraud as against a *bona fide* holder; but it seems that the defense of fraud in inducing the execution of a bill or a note without knowledge of the nature of the instrument is not abolished by the statute, but is the same as before."

“Although there are some decisions to the contrary, the great weight of authority holds that, if a person signs a negotiable instrument which differs in its terms in some material respect from the instrument which he intended to sign, or if, intending to sign an instrument of an entirely different character, he places his signature to a negotiable instrument, the mistake as to the terms or character of the instrument being caused by the fraud, deceit, or misrepresentations of another, and not being due to laches or negligence on the part of the signor, the latter is not liable on the instrument, although it has passed into the hands of a *bona fide* holder for value. This is on the ground that the note is illegal in its inception, and is not the note or act of the party sought to be charged. The fraud and circumvention must not, however, relate to the quality, quantity, value or character of the consideration of the contract, but must constitute such a trick or device as induces the giving of the paper under the belief that it is one of a different character. This rule has been applied where one, by fraud, was induced to sign a negotiable instrument under the belief that he was signing a non-negotiable one, or was induced to sign a note for a larger sum than he intended.”

In the case *sub judice* this situation existed. Defendant Bures was asked to sign certain papers. He inquired what they were and was told by Mr. Hirsch, the president of W. A. G. Motors Corporation, the payee in the note, that they were papers which were customary for dealers to sign in consummating a deal. The defendant, being illiterate and relying on the representations, signed the instrument, never knowing it was a note, and never having received any consideration therefor; being under the impression, that they were the papers necessary for the completion of the transaction.

In his text on bills and notes, 4th edition, on pages 355 to 358, Mr. Norton, reiterates the rule:

“Where a person is induced by fraud to sign a bill or note under the belief that he is signing a different instrument, his signature is null and void, and he is not liable thereon, even as against a *bona fide* purchaser for value.”

Daniels in his text on negotiable instruments, Volume 1, 6th Edition, page 1022, Section 5, affirms this rule also as follows:

“The fifth class of cases are those in which some natural infirmity or defect of education has been imposed upon, and the party deceived into signing a note under the impression that it was for a different amount, or was a contract of a different character. Thus, if a note were fraudulently or falsely read to a blind man, and he were to sign it believing it to have been correctly read; or if the party were unable to read, and signed a note, after due inquiry and precaution, under the assurance that it was an agreement of a different kind, we should have a new element entering into the consideration of his liability. In such cases the want of faculties to detect the fraud shields the party from its consequences, and the authorities justly exonerate him.”

Corpus Juris gives an abundance of authority in this country, wherein such an instrument is regarded as a forgery. It says in Volume 8, page 791, note 4:

“An instrument in the form of a negotiable note, signed by a person under circumstances devoid of any negligence on his part and delivered by him in ignorance of its true character and by means of fraud, will be regarded as a *forgery and cannot be enforced even in the hands of a bona fide purchaser*. *Green v. Wilkie*, 98 Iowa 74, 66 NW 1046, 60 Am SR 184, 36 LRA 434 and note (quot *Trambly v.*

Ricard, 130 Mass. 259); Gibbs v. Linabury, 22 Mich. 479, 7 AmR 675; Garlitz v. Runnels County Nat. Bank (Tex. Civ. A.) 152 SW 1151, 1152 (quot Cyc); Griffith v. Kellogg, 39 Wis. 290, 20 AmR 48."

In the present case, in view of the Negotiable Instrument Law, and of the abundant authority cited in *Corpus Juris* and Norton in his text, and Daniels in his treatise, it is clear that the signature on the note in question was made without the authority of the defendant, whose signature it purports to be. Defendant, Bures, never intended to sign that note. All he intended to do was to sell a Velie car and not to purchase one. He had never seen Harry Heyman before in his life, and it is unreasonable to suppose that a person would execute a note for another, whom he had never seen before, when the only purpose for the meeting was to sell, and not to buy, a car.

Furthermore defendant is an illiterate person. He could neither read nor write, except sign his name. He inquired the nature of the instrument, before he signed, and having trust and confidence in the answer he received, he signed it, thinking it was merely a document necessary to complete the transaction. He did not intend to sign a note, and it is strongly urged that this signature is to be regarded as a forgery, and as such it comes within Section 23 of the Negotiable Instrument Law, and is therefore void even in the hands of a holder in due course (N. I. L., Sec. 23).

Here, although the plaintiff swears that he is a *bona fide* holder for value, the fact that the defendant pleads and also makes an affidavit that he never intended to sign a note, and that he did not know that a note had been signed after he put his name on some papers, precludes the possibility of any third party becoming a *bona fide*

holder in due course. In other words, the defense of fraud in this case is similar to that of forgery, and is a real defense, which can be invoked against any holder whether *bona fide* or otherwise. It is distinguished from a personal defense which can only be invoked between the immediate parties, and not against a *bona fide* holder in due course.

In the case *sub judice*, there being no note, just as much as there is no note in the forgery case, there can not be a *bona fide* holder thereof, that is, there cannot be a *bona fide* holder of something which does not exist.

POINT II.

The Circuit Court erred in striking out the answer and entering summary judgment, because defendant's allegation of fraud and substantiation thereof, by his affidavits, raised a question of fact for a jury.

The defendant presented to the Court substantial proof in the form of three affidavits, setting up fraud in the execution of the note. Michael Waldy who was present at the transaction where the alleged note was executed in his affidavit says (p. 31, lines 14-18, Case):

"I then heard Mr. Hirsch ask Mr. Bures to sign certain papers which he said were customary to be signed by the dealers when the sale of a car took place."

Rudolph Bures the defendant in one affidavit says (p. 33, State of Case, Paragraph 4, lines 10-16).

"After several conversations, concerning the sale, Morris Hirsch then told me that the sale was consummated and all that was necessary

now to have me sign certain papers which he said were customary for dealers to sign whenever making a sale. He never informed me that it was a note that I was to sign."

And in another affidavit says (p. 34, State of Case, Paragraph 3, lines 32-37).

"At the time of the sale, deponent was shown a batch of papers and asked to sign them as it was necessary for all dealers to sign such papers. He was never informed that it was a note he was signing."

Norton on bills and notes, 4th edition, page 462, says:

"Cases where the defense is fraud or illegality of consideration are distinguished from the defenses first mentioned in that their proof by the defendant changes the presumption that the holder is one in good faith and for value, and throws the burden of proving these facts in the first instance upon the plaintiff. It being shown that the bill or note, or the transfer thereof, is tainted with fraud or illegality, the assumption is that the holder is a partaker in the fraud or illegality, and he must prove that he is not."

The defendant having pleaded the fraudulent execution of the note in his answer (second separate defense, p. 16, Case), and having further substantiated that plea in his affidavits above quoted (pp. 30, 32, 34, Case), the very existence of the note is thus questioned.

Plaintiff is thus questioned and the burden of going forward or producing evidence that he is a *bona fide* holder in due course passes to him; which, if it were not raised by the defendant in his defense of fraud, is conclusively presumed.

This doctrine is supported by Section 59 of the Uniform Negotiable Instrument Law, C. S., page 3741, which is as follows:

“Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some persons under whom he claims acquired the title as a holder in due course.”

All these questions of fact are fundamentally for the jury to pass upon, and the Circuit Court erred in striking out the answer, and entering summary judgment.

POINT III.

The Supreme Court erred in affirming the judgment of the Circuit Court.

On page 41, Case, the Supreme Court in its opinion states that he (defendant) was fraudulently induced to sign the note sued upon and mentioned in the complaint by the false representations of the other defendant (Heyman) and other people. None of the defendant's affidavits make this allegation. On the contrary the affidavits expressly state that the defendant was induced to sign these papers by Morris Hirsch who was the President of the W. A. G. Motors Corporation (p. 6, Case). The only reference to Harry Heyman by the defendant, appears on page 34 of the Case, Paragraph 3 of the defendant's affidavit, where he says:

“He was never informed that it was a note he was signing and had he known it was such, he surely would never have signed it, and particularly for this defendant Harry Heyman whom he had never known up to this time.”

The only reference here to Harry Heyman is of an argumentative nature, and is of little force in the affidavit.

On page 33, paragraph 4, of defendant's affidavit he swears:

"Mr. Hirsch then told me that the sale was consummated and all that was necessary now to have me sign certain papers which he said were customary for dealers to sign whenever making a sale. He never informed me that it was a note that I was to sign."

The Supreme Court in its opinion on page 41, Case, line 30, says:

"The defenses set up in the amended answer are apparently inconsistent with the former one stricken out by the Court, in respect to their verity."

The allegations to which the Supreme Court has reference are the second separate defense (p. 16, Case, line 20).

"Defendant as and for his second separate defense alleges that the note sued upon and mentioned in the plaintiff's complaint was obtained by fraud and duress."

And in the amended answer on page 25, Case, defendant alleges that he was fraudulently induced to sign the note, similarly to the second separate defense in the answer, and then proceeds in his amended answer to allege in detail how the fraud arose. There is no inconsistency in the pleadings here as the Supreme Court states, and it is respectfully urged that the only difference between the answer and the amended answer is that the answer alleges the fraud generally, while the amended answer alleges the same fraud particularly. In no part of the pleadings or affidavits is the question of verity of the defendant's pleadings or affidavits raised. The only question of verity is raised between the plaintiff's affidavits and that of the defendant's, and under all the authorities where the

defendant's affidavits establish a valid *prima facie* defense on its face, regardless of the plaintiff's allegations which are general in the instant case, the trial court has no alternative but to leave the question of the veracity of the respective contentions between plaintiff and the defendant for the decision of a jury. The specific definite allegations of the defendant are set forth on page 33, Case, line 10:

“Morris Hirsch, President of the W. A. G. Motors Corporation then told me that the sale was consummated (apparently referring to the sale of the automobile from the W. A. G. Motors Corporation, of which Morris Hirsch was President, to Harry Heyman, the purchaser) * * * and all that was necessary now to have him sign certain papers which he said were customary for dealers to sign whenever making a sale.”

The defendant being the dealer, and Harry Heyman, the co-defendant in this case, being the purchaser, the defendant was led to believe that the papers which he signed for the benefit of the W. A. G. Motors Corporation represented by Morris Hirsch, its president, were some papers necessary to complete the sale. These allegations in the defendant's affidavit clearly establish a *prima facie* case of fraud and misrepresentation, if true, and make any instrument signed under these circumstances void; but the question of whether or not proof consistent with these allegations is true or not, should finally be left for a jury, and it is not the province of any trial court to strike out pleadings establishing such a definite denial.

The Court in its opinion on page 42, Case, lines 15-27, intimated that even if defendant-appellant's allegations in his affidavit were true, they would not bar a recovery on the note, because of an utter absence of the affirmation that plaintiff was not a

holder in due course for valuable consideration. This part of the opinion is contrary to law. The principle is well established that where a defense of fraud is interposed, such as in the instant case, plaintiff cannot avail himself of the failure to offer direct proof that he is a *bona fide* holder for valuable consideration in due course. That is, when the question of fraud becomes an issue in the case, the presumption that plaintiff is a *bona fide* holder ceases to exist, and that question becomes a matter of proof by the plaintiff and a jury question.

In the case of *De Jonge & Co. v. Woodport Hotel & Land Co.*, 77 N. J. L., page 233 (72 Atl. 439), in discussing Section 59 of the Negotiable Instrument Laws, the Chief Justice says as follows:

“By force of section 59 of the negotiable instrument act of April 4, 1902 (P. L. p. 594), every holder of a promissory note is deemed *prima facie* to be a holder in due course: *i. e.*, among other things, that he took the note in good faith, and for value, without notice of any infirmity in the instrument, or defect in the title of the person negotiating it. But that section further provides that, when it is shown that the title of the person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course.”

The Supreme Court therefore, it is respectfully urged, incorrectly stated the law in its opinion on page 42, Case, lines 15 to 27, and it did not apply the correct principles to the case at bar.

POINT IV.

The defendant, Rudolph Bures, was deprived of his constitutional right of trial by jury.

The seventh amendment of the United States Constitution and of Article 1, Paragraph 7, of the New Jersey Constitution, both guarantee to every person the right of trial by jury in civil cases. Section 133 of the Practice Act permits the presiding judge or justice to strike out pleadings as sham or frivolous.

Justice VAN SYCKEL, speaking for the Court of Errors and Appeals, in *Coykendall v. Robinson*, 39 Law, page 98, a case strongly relied upon by the plaintiff-respondent in the Supreme Court, says on page 101:

“When a defendant, on a rule to show cause why his plea be not stricken out, or, on application by him to set aside a judgment entered over his plea, shows, by his own affidavit or other testimony, that he has a defense, stating, specifically, the grounds of it, a question of fact is presented to be passed upon, *and he cannot be deprived of the benefit of a trial in the ordinary mode.* In that if he is denied a trial by jury, he will be entitled to review the action of the Court by which his legal rights are impaired.”

An unwarranted striking out of a defendant's answer would be an unjust deprivation of his constitutional right of trial by jury.

In the case *sub judice*, defendant's affidavits set forth sufficient facts showing a valid defense and entitling him to defend.

On page 33 of the State of Case, defendant Rudolph Bures in his affidavit states:

“Morris Hirsch then told me that the sale was consummated and all that was necessary now to have me sign certain papers, which he said were customary for dealers to sign whenever making a sale. He never informed me that it was a note that I was to sign.”

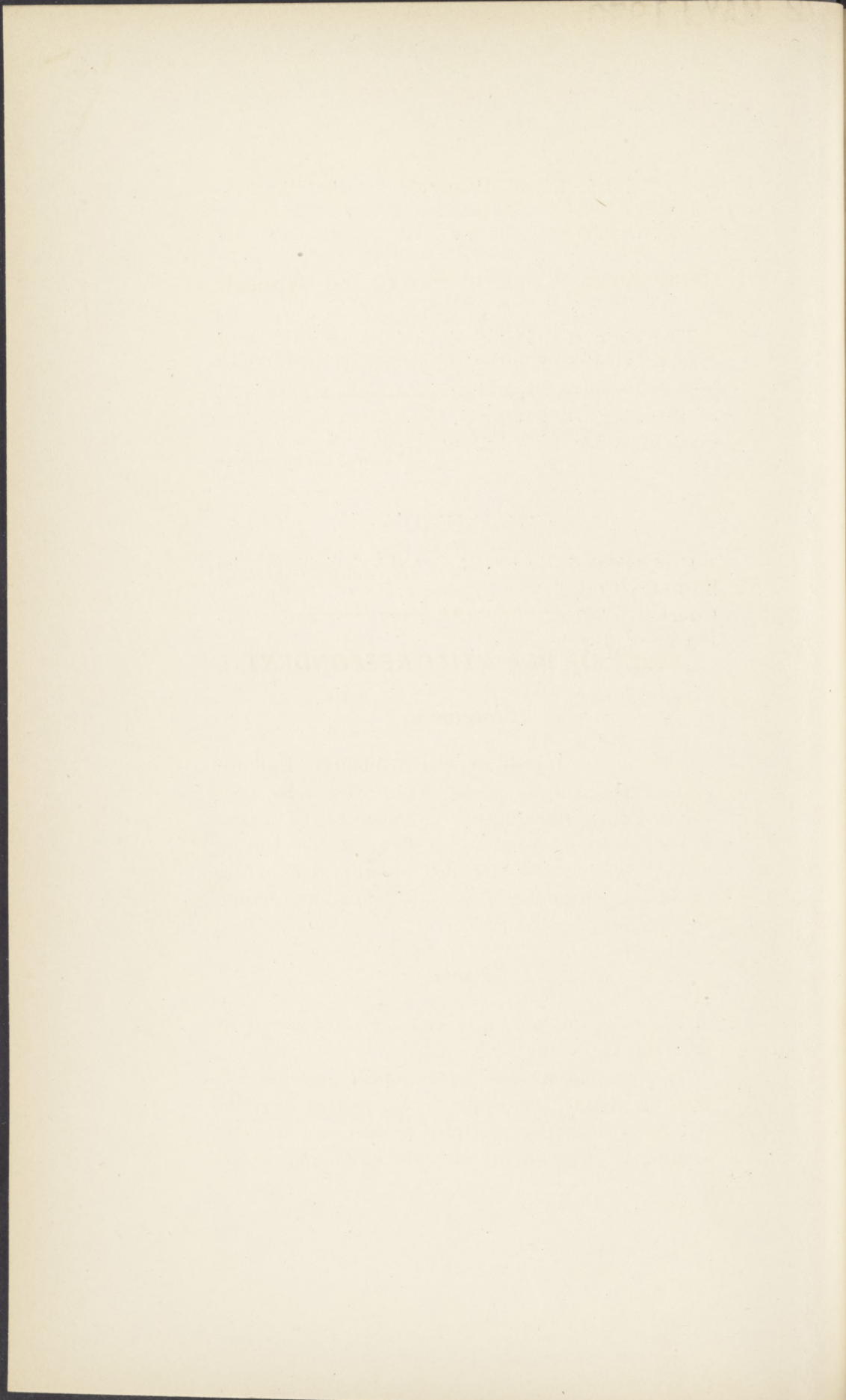
This statement is not denied by plaintiff, and therefore raises a question of fact which should have been passed upon by a jury. The withdrawal of this question from a jury is depriving the defendant of his constitutional right to a jury trial.

CONCLUSION.

It is respectfully urged that the decision of the Supreme Court affirming the order of the Circuit Court striking out the amended answer and entering summary judgment, should be reversed and the cause remanded to the Circuit Court, and a trial by jury be granted to the defendant.

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Attorneys for Defendant-Appellant.

ABRAHAM LEVITAN,
Of Counsel.



New Jersey Court of Errors and Appeals.

Action at Law.

On Appeal from New Jersey Supreme Court.

COLONIAL DISCOUNT Co., INC.,
Plaintiff-Respondent,

VS.

RUDOLPH BURES,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT.

Statement.

This is an appeal by the defendant, Rudolph Bures, from the judgment of the New Jersey Supreme Court, affirming the judgment of the Bergen County Circuit Court, based upon the Circuit Court striking out amended answer filed by the defendant, Rudolph Bures, as sham and entering summary judgment.

Facts.

The facts are not fully and correctly stated by defendant-appellant.

The uncontroverted facts appear in affidavits filed by plaintiff in support of its motion to strike out the answer and amended answer and to enter summary judgment (Case, pp. 17-23 and 26-29)

and in affidavits filed by defendant in opposition to the motions (Case, pp. 30-35) and may be briefly summarized as follows:

On September 1st, 1926, defendant, Rudolph Bures (hereinafter referred to as "defendant") and Harry Heyman agreed to buy a Velie automobile, Serial #151360, Motor #41884, and equipment, from the W. A. G. Motors Corporation (hereinafter referred to as "dealer"), for \$1,695 and executed a conditional sales contract (Case, pp. 8-14) to said dealer, wherein they agreed to pay \$565 in cash on or before delivery, and the balance of \$1,273.35 in 11 equal monthly installments of \$106.11 each, and the twelfth installment of \$106.12 according to the tenor of promissory note, signed by defendant and Harry Heyman, at the same time (Case, pp. 5-6).

On or about September 1, 1926, said dealer sold said contract and note to Colonial Discount Co., Inc. (hereinafter referred to as "plaintiff"), in due course.

Plaintiff purchased said note from dealer for value before maturity and in the usual course of business and also all right, title and interest of said dealer in and to said contract (Case, pp. 22 and 28).

Defendant paid nothing on said note, and received a credit of \$203.03 as a result of foreclosure of conditional sales contract given to secure said note (Case, pp. 19-20 and 22-29).

Defendant filed an answer (Case, pp. 15 and 16) denying the allegations of complaint and alleged that plaintiff was not the holder in due course of the note, that note sued upon was obtained by fraud and duress and that no consideration was given for the note sued upon.

Plaintiff made an application to strike out said

answer and said answer was struck out but leave was given to defendant to file an amended answer.

Thereafter defendant filed an amended answer (Case, pp. 24 and 25) in which he abandoned his previous defenses but merely alleged that the note sued upon was obtained by fraud and duress in that he was shown a batch of papers and was asked to sign them and was not informed that he was signing a note. Defendant does not show that he was unable, by a slight exercise of diligence, to ascertain that he was signing a note.

There was no evidence in defendant's affidavits which showed an agency relationship between the plaintiff and the dealer and/or that any knowledge or notice was brought home to plaintiff of alleged fraud practised upon the defendant or of any fraudulent representations.

Defendant, in his brief, page 4 bottom, injects for the first time that he was illiterate. There was no evidence of alleged illiteracy in defendant's affidavits and same is being raised for the first time in this Court and improperly so (*Titus v. Pennsylvania R. R. Company*, 87 N. J. L. 157).

On the above set of facts, the Circuit Court struck out the amended answer filed by the defendant as sham and entered summary judgment in favor of the plaintiff and against the defendant.

The New Jersey Supreme Court, consisting of Chief Justice Gummere, and Justices Kalisch and Campbell, affirmed the judgment of the Bergen County Circuit Court in a *per curiam* opinion.

THE NEW JERSEY SUPREME COURT
PROPERLY AFFIRMED THE JUDGMENT
OF THE BERGEN COUNTY CIRCUIT COURT
IN STRIKING OUT AMENDED ANSWER
FILED BY DEFENDANT, RUDOLPH BURES.

Law.

POINT I.

There was no proof before the Circuit Court upon which the Court could find that defendant set forth sufficient facts entitling him to defend the action.

Michael Waldy, a business partner of defendant, in his affidavit at Case, page 31, ll. 14-20, states the following:

“ * * * I then heard Mr. Hirsch ask Mr. Bures to *sign certain* papers which he said were customary, to be signed by the dealers when the sale of a car took place. However, I never heard him say that it was merely some document which was really customary for dealers to sign.”

Affidavit of defendant in part (Case, p. 33, ll. 10-21) is as follows:

“After several conversations, concerning the sale, Morris Hirsch then told me that the sale was consummated and all that was necessary now to have me sign certain papers which he said were customary for dealers to sign whenever making a sale. He never informed me that it was a note that I was to sign.”

Affidavit of defendant (Case, p. 34, ll. 33-40; Case, p. 35, ll. 10-18), part of which is as follows:

“At the time of the sale, deponent was

shown a batch of papers and asked to sign them as it was necessary for all dealers to sign such papers. He was never informed that it was a note he was signing and had he known it was such, he surely would never have signed it, and particularly for this defendant Harry Heyman, whom he had never known up to this time.

Deponent further says that *he was fraudulently induced to sign this note by the false representations of several people who never stated to him that it was a note he was signing but merely several papers all bunched together.*" (Italics ours.)

This was the entire proof submitted to the Circuit Court on behalf of the defendant and same consists entirely of conclusions and facts which do not dispute the fact that plaintiff is a holder in due course but merely endeavor to show that one Morris Hirsch, an officer of dealer corporation, practiced an alleged fraud upon this defendant. This is not the type of proof required under our cases. (*Truax* ads. *Pennsylvania R. R. Co.*, 56 N. J. L. 278; *Githens v. Mount*, 64 Id. 166, at p. 168; *Jaudel v. Schoelzke*, 95 Id. 171, at p. 177.)

It is of interest to note that nowhere in the affidavits is there any intimation that Morris Hirsch or the other people referred to were connected with plaintiff in any way or that the above facts were brought home to the plaintiff.

POINT II.

W. A. G. Motors Corporation was not the agent of plaintiff for any purpose and defense of fraud, even if proved, cannot be imputed to the plaintiff.

There is no evidence in this case of agency or that knowledge or notice of alleged fraud, if any, was brought home to plaintiff.

The Court of Errors and Appeals in *Rice v. Barrington*, 75 N. J. L. 806, at page 807, states as follows:

“* * * Proof of circumstances calculated merely to arouse suspicion will not defeat recovery on a negotiable note taken for value before maturity. *Bad faith, i. e., fraud, not merely suspicious circumstances, must be brought home to a holder for value whose rights accrued before maturity in order to defeat his recovery on a negotiable note upon the ground of fraud in its inception or between the parties to it.*” (Italics ours.)

Defendant throughout his brief endeavors to inject that he was illiterate. The evidence in affidavits filed by defendant in this case is entirely silent as to said illiteracy, and same is improperly raised for the first time in this Court. (*Titus v. Pennsylvania Railroad Company*, 87 N. J. L. 157; *Shaw v. Bender*, 90 N. J. L. 147.)

Even if there were circumstances sufficient to put a holder for value on inquiry, said circum-

stances should not defeat the holder from recovering. (*Davis v. Clark*, 85 N. J. L. 696; *Montgomery Garage Co. v. Manufacturers, etc.*, 94 N. J. L. 152; *Merchants' Securities Corporation v. Snyder*, 148 Atl. 773, not officially reported.)

Defendant cites Norton's Textbook, on Bills and Notes, Daniels' Textbook on Negotiable Instruments and Corpus Juris, to show that if a person is fraudulently induced to sign bill or note under belief that he is signing a different instrument, his signature is void and he is not liable thereon even against a *bona fide* purchaser for value, provided, that in so signing he acted without negligence. It is of interest to note that no New Jersey cases are cited.

In the case *sub judice*, this defendant was clearly negligent in affixing his signature. It is not enough that he executed the instrument when he thought and believed that he was executing an entirely different one. Assuming for the purpose of argument that defendant's contention that he was illiterate was properly before the Court, which we contend was not so, and that he could not read the instrument, he should have requested trusted persons (one of those present being his business partner, Michael Waldy), to read the same to him, word for word, or explain same to him. This was not done.

Mr. Justice Garrison, speaking for this Court in *Second National Bank of Reading v. Hewitt*, 59 N. J. L. 57, at page 58, approving the case of *Hamilton v. Vought*, 34 N. J. L. 187, states as follows:

“* * * It was held that negotiable paper, fraudulent in its inception, is not

invalid in the hands of one taking it for value, before maturity, unless there be actual fraud on his part."

The defendant was grossly negligent if he signed note thinking same another paper, and the finding of the trial Judge must be assumed to have found defendant guilty of such negligence. *Coykendall v. Robinson*, 39 N. J. L. 98.

Case *sub judice* is practically on all fours with case of *Commercial Credit Corporation v. Boyko*, 103 N. J. L. 620, as to facts and proof adduced with regard to note sued upon.

Mr. Justice Kalisch, speaking for this Court, at page 622, says:

"The testimony adduced, on behalf of the defendant to establish that the note in question was tainted, with fraud, proceeded solely from him. His testimony is utterly barren of any fact or circumstance tending to show the plaintiff was not a holder in due course * * *."

Appellant, in Point III of his brief, refers to statements in the Supreme Court which, even if true, do not affect the final determination of the matter.

Appellant further cites the case of *De Jonge & Co. v. Woodport Hotel & Land Co.*, 77 N. J. L., page 233, and cites the following excerpt from said opinion:

"By force of Section 59 of the negotiable instrument act of April 4, 1902 (P. L., p. 594), every holder of a promissory note is

deemed *prima facie* to be a holder in due course: *i. e.*, among other things, that he took the note in good faith, and for value, without notice of any infirmity in the instrument, or defect in the title of the person negotiating it. But that section further provides that, when it is shown that the title of the person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course."

Assuming, for the purpose of argument, that appellant showed the title of the person who negotiated the instrument to be defective, plaintiff, the holder of note, sustained its burden by showing that it purchased the note in question from the W. A. G. Motors Corporation for value before maturity and in the usual course of business and without knowledge or notice of any defect therein (Case, p. 28, ll. 30-40 and Case, p. 22, ll. 19-30).

Nowhere in appellant's brief is there anything to show or deny that plaintiff purchased the note as above set forth and is therefore not a holder in due course.

In view of the above, the statement of the Supreme Court (Case, p. 42, ll. 15-27) is a correct statement of the law applicable to case *sub judice*.

POINT III.

Defendant was not deprived of his constitutional right of trial by jury.

In the case of *Coykendall v. Robinson*, 39 N. J. L. 98, Mr. Justice Van Syckel, speaking for this Court, at page 4, stated as follows:

“* * * Section 133 of the Practice Act is not, in terms, an infringement of this constitutional provision. It is limited in its exercise to frivolous plea—that is, pleas manifestly immaterial or inapplicable to the case—and sham pleas, which are false pleas. In these cases, the defendant has failed to set up a legal defense; he has presented no issue to be tried by a jury, there existing, in fact, nothing to try. It is struck out as a sham plea, and therefore, in this argument, it must be conceded to be a false plea.

The constitution was not intended to introduce trial by jury in cases where it did not exist before, but merely to preserve it inviolate in cases where it existed at the time the constitution was adopted. *McGear v. Woodruff*, 4 Vroom 213.

The one hundred and thirty-third section of our practice act confers no new power. At common law, the judges repeatedly exercised, in a great variety of cases, the power to strike out sham pleas.

“* * * No reason can be assigned why a defendant should be permitted to shelter himself from the power of the court to strike out a false plea, by taking refuge under the general issue.

It is clear that the right, which a defendant had at common law, to have the issue of fact tried by a jury, was subject and subordinate to the power of the court to strike out a false plea.

This practice having been fully established in the common law, no invasion was committed of the right of jury trial by enacting it in the form of a statute. Notwithstanding the exercise of the right to strike out, jury trial is preserved and upheld inviolate as it existed when the constitution was adopted."

Mr. Justice Bergen speaking for this Court, in *Eisele & King v. Raphael*, 90 N. J. L. 219, citing the *Coykendall* case, *supra*, says that:

"The order of the judge in this case declares that the answer filed is frivolous and sham, and that the defendant failed to show such facts as he deemed sufficient to entitle him to defend. *The finding of the judge must be assumed to be true until the contrary appears, and, as it does not appear in this case, the finding must be taken as correct.*

Striking out a sham or frivolous plea is not an infringement of the right of trial by jury. A plea of general issue, although it denies the entire claim of the plaintiff, and apparently, raises a question of fact, is not protected for that reason against a motion to strike out as sham or frivolous." (Italics ours.)

Defendant, in his Supreme Court brief, intimated that the Court in striking out the answer

and amended answer not only did not use discretion but abused the discretion that was placed in him. No facts are given to this Court to show failure of discretion or abuse of discretion. The answer, amended answer and supporting affidavits clearly do not set up a defense to the action instituted by plaintiff herein.

Nowhere in appellant's affidavits is there anything to show that knowledge or notice of the alleged conversations between the defendant and Morris Hirsch was brought home to plaintiff before it purchased the note upon which this suit was commenced.

Summary.

Plaintiff is the holder for value of promissory note and purchased same before it was due and without notice of any infirmity in the instrument. Defendant's proof of fraud merely concerns the W. A. G. Motors Corporation, the company which negotiated the instrument to plaintiff. No proof of any fraud whatsoever on the part of the W. A. G. Motors Corporation was brought home to plaintiff before it purchased the note and the affidavits are barren of any evidence whatsoever to show that said knowledge or notice was brought home to plaintiff at that time.

CONCLUSION.

The respondent therefore respectfully submits that the New Jersey Supreme Court properly affirmed the judgment of the Bergen County Circuit Court in striking out amended answer as sham and entering summary judgment, and that the judgment of the New Jersey Supreme Court should be affirmed with costs.

Respectfully submitted,

GREEN & GREEN,
Counsel for Plaintiff-Respondent.

DAVID GREEN,
Of Counsel.

