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NOTRE DAME LAW REPORTER

APRIL, 1920

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STATE OF INDIANA
UNIVERSITY OF NOTRE DAME } ss

Be it remembered: That the Notre Dame Law Reporter will be published at Notre Dame, Indiana, quarterly during the scholastic year, for \$2.00 per year or 50c per copy; that application has been made to enter the Reporter as second class matter at the P. O. of Notre Dame, Indiana; and that application for copyright of the publication is pending.

NOTRE DAME LAW REPORTER ASSOCIATION
Notre Dame, Indiana.

FOREWORD

For a time so long "that the memory of man runneth not to the contrary" it hath been a custom to print a foreword upon the launching of every new publication, legal as well as literary. We are but rendering obedience to this time-honored custom, defined by Blackstone as law, when we present this foreword upon the launching of our good legal ship, which we hereby christen the Notre Dame Law Reporter.

In view of the existing law school publications, reviews and journals of the leading law schools of the country, all of which are similar in character, scope and purpose, it might be supposed that our publication is to be patterned upon these. But such is not the fact. These law reviews and journals, in their number, excellence and thoroughness, already completely supply the need and demand for such publications. The Reporter would be merely supplying cumulative evidence of this class of legal publications, and the court will not grant us a trial for this purpose. Some minor features of the generally adopted form of law school publication will be incorporated, but in its important major part the Notre Dame Law Reporter will constitute a new and novel departure in law school journalism. We trust, however, that it may not be subject to demurrer on account of such departure.

The Reporter, which is to be published quarterly during the scholastic year, will be primarily a student publication—of and for and by the law student body. Its second feature, however, will be no less important than the first—that devoted to the interests of the law alumni. The purpose of these two departments in the Reporter is to bring together in fact as they are already united in spirit the law school alumni and the law school students—to bring into active co-operation the law school triumphant and the law school militant.

The student department will consist of four sections. The court section will contain the decisions of the Supreme Court of Notre Dame based on records, assignments of error, and briefs filed therein. Selected briefs also will be published. The complete record of the Notre Dame Circuit Court will appear—the pleadings, issues tendered, trial pro-

cedure, verdict, motions, judgment and record for appeal. There will also be reported the proceedings of the Junior Moot Court and Criminal Practice Court.

Under the title "Only Our Own Opinion" will appear the special law papers and legal comments of the editorial staff of the Reporter. The "Case and Comment" section will present a synopsis of the recent decisions of the appellate courts and terse briefs on the most important and practical propositions of the law.

Law School News will have one division relating to the Law School itself,—its faculty, courses, courts, library, projects and bulletins; and another pertaining to the law students themselves,—their activities, social and personal.

The department of the Reporter devoted to the Alumni of the Law School will have three features: a Contributing Sections in which will be published the specially prepared legal briefs and law treatises contributed by the law graduates of Notre Dame; a News Section for reporting the activities of the law Alumni, professional and personal; and an Alumni Directory calculated to bring all Notre Dame lawyers into business and professional relations for their mutual benefit.

We are not unmindful of the character and importance of our project, which must be weighed and found worthy or wanting as the representative of the School of Law of the University. We do not, however, shrink from the responsibility, nor will we shirk the continuing task that the launching of the Reporter entails. We are conscious of the infirmities that our first issue of necessity must display, but we ask kindly consideration for our lofty purpose, and seek refuge from just criticism in the time-worn but once delectable reminder that everything improves with age.

With an abiding faith in the earnest co-operation of the students of the College of Law of today and tomorrow and the proud and loyal alumni of the old school, we begin the career of the Notre Dame Law Reporter by fondly dedicating it to those same Students and Alumni.

EDITOR-IN-CHIEF.

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SUPREME COURT OF NOTRE DAME.

HUNTER v. ELAM

(No. 1)

Sale—Contract to Sell—Potential Existence—Conditions—Sale of Mare for Breeding—Construction of Contract—Interrogatories—Instructions.

1. A contract by which S agrees to the service of his mare by a stallion of H's selection and, if a colt is foaled, to keep, care for and make it fit for H's purpose in driving the road, when H is to get the colt and settle with S, is a contract for the sale of a thing not having a potential existence and, therefore, is not a present sale, but like the sale of future goods constitutes only a contract to sell, which does not pass title in the colt.

2. Answers by the jury to interrogatories submitted to the effect that S refused an offer of \$200 for a colt to be foaled from his mare, but did accept the proposition that H should pay the service fee for the subsequent breeding of S's mare and, as part of the consideration, should pay S \$40 whether a colt was foaled or not, the terms of the contract being in all other respects as stated above, do not change the subject matter from the sale of the colt to the sale of the services of S's mare, so as to vest title to the colt in H on account of his special property in S's mare.

3. Where S while in possession of the colt under the terms of his contract with H, sells and delivers the colt to the defendant, it is not error to instruct the jury that if the defendant purchases the colt in good faith, for a valuation consideration and without notice of H's existing contract with S or his claim to the colt, defendant would acquire title free from H's claim under his contract with S. H's only remedy in such case is an action for damages against S for breach of contract.

4. Legal effect must be given to entire contract and not merely to a part.

Action in replevin by William Hunter against John Elam. From a judgment for defendant, plaintiff appeals. *Affirmed.*

M. Edward Doran and Edward C. McMahon for appellant.

Humphrey L. Leslie and Jerome P. Martin for appellee.

VURPILLAT, J. Appellant brought action against the appellee in the Notre Dame Circuit Court to secure possession of a certain colt. The case was submitted for trial upon the complaint and answer in general denial. A jury trial resulted in a gene-

ral verdict for the defendant. The jury also returned answers to interrogatories.

Appellant filed a motion for judgment on the answers to the interrogatories, *non obstante veredicto*, which was overruled. A motion for a new trial was also overruled, and judgment on the general verdict was rendered from which this appeal is prosecuted.

The errors assigned for the reversal of the judgment are the overruling of the motion for judgment on the answers to the interrogatories notwithstanding the general verdict, overruling the motion for a new trial and that the verdict is contrary to the law and evidence.

The plaintiff and the defendant entered into separate agreements with one Perry Smith, by the terms of which each, under his respective agreement, claims to be the owner and entitled to the possession of the colt described in complaint. It is undisputed that at the time of the contract between Smith and the appellee, Elam, Smith was in actual possession of the colt and represented to Elam that he owned the colt and would sell it. Elam thereupon made an offer to Smith of two hundred dollars for the purchase of the colt which Smith unconditionally accepted, thereby effecting a valid contract of sale. This contract, so formed, was immediately executed by the parties by the performance of the concurrent conditions of sale, Elam, the appellee, paying to Smith the two hundred dollars and Smith delivering to Elam the colt.

These facts operate in law to constitute a sale, or what is sometimes

called "an executed contract of sale," which transfers to the vendee or purchaser the title to the thing sold. 2 Bl. Comm. 446; 2 Kent. Comm. (13th Ed.) 468; Benj. on Sales (7th Am. Ed.) I; Sales Act, I. It is also undisputed that the appellee was an innocent purchaser for value and without notice of appellant's right or claim to the colt.

It is contended by the appellant, however, that Smith did not own the colt at the time of its sale and delivery to the appellee, Elam. That Smith had in fact sold and conveyed his ownership of the colt to appellant by a prior contract of sale with him.

If the seller does not own the thing sold then he cannot convey title to it, for it is a familiar principle of law and equity that one cannot convey a better title than he himself has. Tiffany on Sales 27; Anson on Contracts 292. And it can make no difference in such case that the buyer is an innocent purchaser. Sales Act, Sec. 23; Andrews v. Cox 42 Ark. 473-48 Am. Rep. 68; Bates v. Smith 83 Mich. 347-47 N. W. 249; Kitchell v. Vanader 1 Blackf. (Ind.) 356. If Smith had no title then appellee could acquire none by his purchase.

But in this case the burden is upon appellant to establish his own ownership and right of possession of the colt at the time of bringing his action, and he must recover, if at all, upon the strength of his own title and not upon the weakness of that of the appellee. Davis v. Warfield *et al* 38 Ind. 461; Ferguson v. Day, Sheriff 6 Ind. App. 138. This appeal, therefore, must be determined upon the validity and legal effect of appellant's contract with Perry Smith. What terms and conditions the parties agreed upon are matters of fact for

the jury to determine from the evidence. But the construction of the contract, its legal effect and the rights and obligations of the parties thereunder are all matters of law for the court to determine. Anson on Contracts 314; 24 Am. & Eng. Encyc. of Law page 1047.

The following instruction to the jury given by the trial court of its own motion is important at this point on both the law and the facts of the case. We give the instruction in full, being Court's Instruction No. 8: "The court instructs you that a thing having no actual or potential existence at the time of the formation of a contract of sale cannot be the subject matter of such sale. If you should find that the plaintiff, William Hunter, and Perry Smith entered into an agreement and that the terms of such agreement were that Smith was to subjected his certain mare to be bred to a certain stallion of Hunter's selection; that Hunter was to pay the service fee; that, if a colt should be foaled from such service it should be kept, cared for and made fit for plaintiff's use, that of a physician for driving the road, when the plaintiff should call for the colt, and, upon settlement with Smith under their contract, take the colt; and if you further find that plaintiff's claim of ownership and right of possession to said colt is based solely upon such a contract so found by you from the evidence, then, the court instructs you, such colt had neither an actual nor a potential existence at the time of the said contract, and no ownership or right of possession to the colt in question vested in the plaintiff by such contract; and this is so in legal effect even if you find that part of the consideration agreed by Hunter to be

paid to Smith and actually paid was for the use of Smith's mare whether the colt was foaled or not."

We consider this a correct statement of the law. Tiffany on Sales 45; Benj. on Sales (4th Ed.) Sec. 182, note; 24 Am. & Eng. Encyc. of Law 1042; Bates vs. Smith 83 Mich. 347-47 N. W. 249; Battle Creek Valley Bank v. First Natl. Bank 62 Neb. 825-88 N. W. 145; Schoobert v. DeMotte (Cal.) 44 Pac. 487; Townsend Brick Co. v. Allen 62 Kan. 311-62 Pac. 1008-56 L. R. A. 124; Purcell's Admr. v. Mather 35 Ala. 570-76 Am. Dec. 307; Low v. Pew 108 Mass. 247-11 Am. Rep. 357; Rochester Distilling Co. (N. Y.) 37 N. E. 632; 9 Bush (Ky.) 318-15 Am. Rep. 711. Speaking of potential existence the Supreme Court of Michigan says: "Potential existence means merely that a thing may be at some time; actual existence that it now is. In the legal sense things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence." Dickey v. Waldo 97 Mich. 255-56 N. W. 608; Tiffany on Sales 44.

The jury by answers to interrogatories found specially the facts that Smith refused an offer of appellant of \$200 for a colt to be bred from Smith's mare, and then accepted \$40 for the service of the mare. Appellant contends that these facts entitle him to a judgment for the colt, notwithstanding the general verdict; that these facts establish the subject matter of the contract to be the ser-

vices of the mare and therefore to pass title in the colt to him.

In support of this contention appellant cites the case of McCarthy v. Blevins 5 Yerg. (Tenn.) 195-26 Am. Dec. 262. Although the opinion of the court in this case does contain a dictum to the effect that the sale of the services of a mare for breeding purposes conveys title to the colt foaled, this dictum was unnecessary to the decision of the case, and the decision itself is generally regarded as sustaining the rule that a thing not having a potential existence cannot be the subject-matter of a sale. The Supreme Court of California, in Schoobert v. DeMotte, *supra*, holding that the mortgagee of sheep is not entitled to a lien on their increase, begotten after the execution of the mortgage, has this to say of the McCarthy v. Blevins case: "The rule (that the owner of the dam is the owner of the offspring) has also been stated in many other cases in which the question was neither involved nor decided," citing, among others, McCarthy v. Blevins, *supra*. The decision in McCarthy v. Blevins is that a colt sold during the period of gestation passes title to the purchaser because the colt has a potential existence at the time of the sale. Tiffany so regards the case, for he cites it thus: "McCarthy v. Blevins 26 Am. Dec. 262 (during gestation)". Tiffany on Sales 48. The same construction is given the decision by the Supreme Court of Maine in the following language: "It is well settled that the owner of personal property having a potential existence may sell it. (Authorities cited). And within this principle, the owner of a mare may, during gestation, sell her future offspring, which will vest in the vendee

when parturition takes place. *McCarthy v. Blevins*, 5 Yerg. 195." *Sawyer v. Gerrish*, (Me.) 35 Am. Rep. 323.

In the case of animals the common-law maxim *partus sequitur ventrum* applies, and generally the owner of the dam is the owner of the offspring, before birth and after. 2 Bl Comm. 390; 1 Parsons on Contracts 523; 2 Cyc. of Law & Proc. 309. Thus the owner of a dam in foal may sell the colt and reserve the mare, or sell the dam and reserve the colt. *Andrews v. Cox*. 42 Ark. 473-48 Am. Rep. 473.

That one may sell the services of his mare for breeding purposes and thereby convey title to the colt is correct as an abstract proposition of law. *Maise v. Bowman*, 19 S. W. 589; *Hull v. Hull*, 40 Am. Rep. 165. In such a sale the subject-matter is not the colt but the special property in the mare, and the purchaser, because he is the owner of the dam during the time of the contract of sale, is the owner of the offspring.

The defect in appellant's contention is that the facts found specially by the jury are not the only facts in the case and do not furnish all the elements of appellant's contract with Smith. It is quite reasonable to infer from the jury's general verdict, which includes all the facts, the existence of the other facts and elements of contract stated in the trial court's instruction, No. 8, *supra*. Indeed the trial court seems to have had in mind the very facts found specially by the jury, for the jury are instructed that if they find the elements of the contract as stated in the instruction, the appellant would have no title or right of possession to the colt, even if the jury find that part

of the consideration to be paid by appellant to Smith, and actually paid, was for the use of Smith's mare whether the colt was foaled or not. To sustain appellant's motion for judgment on the answers to the interrogatories, only those which serve his purpose, and give no consideration or legal effect to the other facts and elements of the contract as found by the jury's general verdict would be to violate the first rule of the construction of contracts, namely: "An agreement ought to receive that construction which will best effectuate the intention of the parties *to be collected from the whole of the agreement*." Anson on Contracts 330. The contract between the appellant and Smith must be construed as a whole. The terms and conditions as to the breeding and foaling of the colt from Smith's mare and also the conditions that Smith was to keep, care for, and make the colt fit for appellant's use, and that appellant was to call for it and settle with Smith, all relate to the same subject-matter, were agreed upon at the same time and as part of one transaction and must be construed as forming but one contract. 17 Am. & Eng. Encyc. of Law 4; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581-60 Am. St. Rep. 711; *Field v. Leiter*, 118 Ill. 17-6 N. E. 877; *Berridge v. Glassey*, 112 Pa. St. 442-56 Am. Rep. 322.

The facts found specially by the jury are in complete accord with their general verdict. Construed with the general verdict, as they must be, both establish a contract by which Smith agreed to the service of his mare by a stallion of appellant's selection and, if a colt should be foaled, to keep, care for and make it fit for appellant's purpose in driving the road, when

appellant is to get the colt and settle with Smith; the appellant, however, obligating himself to pay the service fee and, as part consideration, to pay Smith \$40 for the service of the mare whether a colt is foaled or not.

There was, therefore, no error in overruling appellant's motion for judgment on the answers to the interrogatories. It is only where such answers are so inconsistent with the general verdict that they cannot be harmonized, and the facts specially found operate under the law to entitle the party in whose favor they are returned, to the judgment, that such a motion may be sustained. See the Civil Codes of all the States. Thornton's Ann. Civil Code, Vol. I, pg. 959; Work's Practice & Pl., Vol. I, pg. 560; Woolen's Trial Procd., Vol. 2, pg. 985. Every reasonable presumption must be indulged in favor of the general verdict. 22 Am. & Eng. Encyc. of Pld. & Prs. 959, citing cases from many states.

One may contract to sell the offspring of his animals, though they have neither actual nor potential existence. Hull v. Hull, 48 Conn. 250-40 Am. Rep. 165. This, however, does not constitute a sale but merely a contract to sell, and, though it be in the form of a present sale, it conveys no present title to the purchaser, Tiffany on Sales 47. Furthermore, even if appellant's contract were for a colt having a potential existence, it must be construed as a mere executory contract of sale—contract to sell—not passing title, for the reason that there are conditions to be performed; there was something to be done to put the article sold in a deliverable state. Smith was to keep the colt, raise it and make it fit for appellant's use, and not till then was

appellant to get the colt and settle with Smith. Tiffany on Sales 126; Benj. on Sales 263, Sec. 318; Strous v. Ross, 25 Ind. 300; Restad v. Engemoen, 65 Minn. 148-67 N. W. 1146. In the case of Rourke v. Bullens, 8 Gray (Mass.) 549, plaintiff purchased a hog of defendant and left it with defendant upon an agreement that defendant should fatten it until plaintiff called for it when he would settle for it according to the market price; it was held that the contract was purely executory and did not pass property to the plaintiff. See Benj. on Sales, page 301, Sec. 349. Marble v. Moore, 102 Mass. 443; Restad v. Engemoen, *supra*.

In support of his motion for a new trial, appellant complains of court's instruction number eleven, given to the jury by the court of its own motion. The instruction is as follows: If you find from the evidence that defendant, Elam, and said Smith contracted for the sale of the colt in question; that Elam was an innocent purchaser of said colt, paying therefor to said Smith the sum of two hundred dollars; that said Smith was then and there in the open, notorious and exclusive possession of the colt, claiming ownership, and so representing himself to Elam at the time; that Elam inquired of said Smith as to his ownership of the colt and the sale thereof; and you further find that Elam, the defendant, at the time of purchase of the colt and payment therefor had no notice whatever of *any executory contract* between Hunter and Smith for said colt, or of any claim by Hunter of any right or interest in said colt; and you further find from the evidence that defendant, Elam, had no knowledge whatever that should put a reasonably pru-

dent man upon inquiry, then, I instruct you, the defendant, Elam, became the owner of the colt in suit, regardless of any rights and obligations existing under said contract between plaintiff and Smith relative to the colt, and your verdict should be for the defendant." This instruction correctly states the elements necessary to constitute one a *bona fide* purchaser. Pomeroy's Equity, Sec. 745; Eaton's Equity, pg. 158. The instruction also correctly applies the doctrine of *bona fide* purchaser to the facts of the case. It tells the jury that if the appellee, Elam, contracted with Smith for the sale of the colt and paid the purchase price therefor (a contract of sale transferring title) and was a *bona fide* purchaser as defined in the instruction, having "no notice whatever of any *executory contract between Hunter and Smith for said colt*" (a mere contract to sell, not passing title to Hunter but leaving title in Smith), then, as between Hunter and appellee, Elam, appellee would take title free from the claims of appellant Hunter under his contract with Smith.

Furthermore, this instruction must be construed with the other instructions of the court in the case. The court, in the two preceding instructions, defined for the jury, executed and executory contracts of sale, and instructed them that if they found that Smith had actually or constructively transferred title in the colt to appellant, before appellee's contract of purchase with Smith, then they should find for appellant; but, if they found that title to the colt was not intended to be transferred to appellant, and that his contract with Smith was only a contract to sell, then Smith retained title to the colt

with power to sell and convey to an innocent purchaser.

Appellant's attack upon instruction eleven, *supra*, is based on the erroneous assumption, that it instructs the jury that title may be founded upon the doctrine of innocent purchaser, without any regard to the law that a vendor must have title to convey, and the following cases which he cites support this assumption: Bullard v. Burgett, 40 N. Y. 314; Andrews v. Cox, 48 Am. Rep. 68; Faucett v. Osborn, 83 Am. Dec. 278; Kitchell v. Vanader, 1 Blackf. (Ind.) 356.

All these cases support the rule stated in the early part of this opinion that if the seller has no title he can convey none; not even to an innocent purchaser. In appellant's case, however, the jury found that Smith had title to the colt which he could convey to Elam, the appellee, because appellant had not acquired title from Smith by his prior contract. The instruction complained of correctly stated the law of the case and there was no error in overruling appellant's motion for a new trial.

Even if the instruction were erroneous, it is harmless. It tends only to weaken the appellee's title, while the appellant must recover upon the strength of his own title. Since the appellant has established no title in himself, he cannot recover whether appellee has title or not, and whether the instruction is erroneous or not. It is a well established rule of appellate practice that on appeal from a judgment in replevin the court will not reverse the judgment for immaterial and harmless errors. Branch v. Wiseman, 51 Ind. 1; Williams v. Hoehle, 95 Wis. 510-70 N. W. 556; 13 Am. & Eng. Encyc. of Pl. & Pr. 613. In Branch v. Wiseman, *supra*,

the court says: "The appellant also complains of certain instructions given and refused by the court. Up on a casual reading, we do not perceive that they are erroneous, but from the evidence, which is all before us, it is very clear that the appellant had no right to recover, and therefore very plain that the instruction had not injured him."

Finding no error in the record, the judgment of the trial court is hereby affirmed.

SCHULTZ v. PAUL

(No. 2)

Tortious Assault and Battery—Complaint—Sufficiency—Allegation of Intent to Injure—When Necessary—Servant's Tort—Verdict for Master Contrary to Law—Course of Employment—Master's Business—Master Present, Instructs Servant—Not Relieved—Refusing Instruction—Error—Verdict Excessive.

1. A complaint or declaration which charges a tortious assault and battery against defendants who were at the time tenants on plaintiff's farm, but also alleges by way of inducement that plaintiff went upon the farm to remove a fence, does not make plaintiff a trespasser and lay his action in his own violation of the law, so as to make it insufficient as stating a cause of action.

2. To make such complaint or declaration insufficient as a cause of action it must appear, not only that plaintiff has violated the law, but that such violation was the proximate or contributing cause of the injury complained of, or that such injury was the result of some unlawful act in which both plaintiff and defendant participated at the time.

3. Where it appears from the pleading that the assault and battery complained of is unlawful, it is not necessary to allege that defendant intended to commit the act or inflict the injury. It is only where it affirmatively appears from the pleading that the assault and battery was justifiable, or was not in itself unlawful, that an allegation of intention to do the injury is essential to the sufficiency of the pleading.

4. For instructions tendered, held sufficient and insufficient, see opinion.

5. Where a servant, while acting in the course of his employment and with a view to his master's interest, engages in an altercation with another, and as part of the same transaction commits assault and battery, the master will be held liable, the court refusing to determine as a matter of

law at what point the course of the master's employment ends and the purely personal responsibility of the servant begins.

6. Where both master and servant are at the time jointly engaged in an altercation with the master's landlord to prevent the removal of a fence in dispute between them, and the servant commits an assault and battery, the master will be held liable, notwithstanding he gave instruction to the servant at the time not to strike a blow.

7. It is error of law for which a new trial should be granted to refuse a properly tendered instruction that the master is not relieved from liability for the servant's assault and battery merely because at the time, he instructed the servant not to strike the injured party.

8. On the foregoing facts, a verdict which exonerates the master from liability while finding against the servant, is contrary to law as to the master and the judgment as to him should be reversed.

9. A judgment for \$5000 is excessive which is rendered against a youth of eighteen years who is the unemancipated son of a tenant farmer of small means and who, upon severe provocation strikes one blow thereby permanently injuring and rendering useless the right arm, but not otherwise incapacitating the injured party, such injured party at the time being a bookkeeper, thirty-eight years of age and earning \$150 a month.

Action in tort for \$5000 damages for assault and battery brought by Fred Schultz against Hale Paul and William Paul. From a judgment for \$5000 against the defendant, Hale Paul, said defendant appeals. *Affirmed on condition* that plaintiff enter remittitur for \$2000, otherwise reversed.

Judgment against plaintiff in favor of defendant, William Paul from which plaintiff appears. *Reversed.*

Arthur B. Hunter and Harry Richwine for Hale Paul and William Paul.

Edwin A. Fredrickson and George C. Murphy for Fred Schultz.

VURPILLAT, J. Plaintiff, Fred Schultz, went upon his farm to remove a fence and, while so doing, was struck upon the head by defendant, Hale Paul, in the presence of William Paul, co-defendant. The complaint is in two paragraphs; the first alleging assault and battery by Hale Paul as the servant of the co-defendant, Wil-

liam Paul; the amended third paragraph alleging the same assault and battery by Hale Paul and charging the co-defendant with connivance in its commission. Separate and several demurrers were overruled and proper exceptions taken. Defendants filed answer in three paragraphs: first, general denial; second, *son assault demesne*; third, defence of property. Plaintiff filed reply of traverse *de injuria* to each of the second and third paragraphs of answer. Trial by jury resulted in a general verdict for plaintiff in the sum of \$5000 against the defendant, Hale Paul, from which said defendant appeals; and against plaintiff in favor of defendant, William Paul, from which plaintiff appeals.

The appellant, Hale Paul, attacks the sufficiency of each paragraph of complaint upon the same general grounds. First, it is said that facts are alleged which constitute plaintiff a trespasser and therefore make necessary the allegation that the means used to eject him were unlawful or unreasonable. Appellant cites 28 Am. & Eng. Encyc. of Law (2nd Ed.) 574 with a reference to its citation of cases. The only authoritative point made here is that a tenant in possession may maintain trespass against the landlord *who unlawfully* invades the possession. Both paragraphs of complain allege that plaintiff was the owner of the farm and the appellant and his co-defendant the occupants thereof. The first paragraph also alleges a lease of the farm by plaintiff to the defendant, William Paul, and that, at the time complained of he went upon the farm. The second paragraph also alleges that at the time complained of, plaintiff went upon the farm for the purpose of re-

moving a fence. These are all the allegations of the complaint that might tend affirmatively to establish plaintiff's character as a trespasser at the time of the alleged assault and battery.

These facts fall far short of showing that plaintiff was a trespasser, or that, as landlord, he unlawfully invaded the possession of the tenant, the defendant, William Paul. For ought that appears in the complaint, plaintiff may have gone upon the farm at the time complained of, and for the purpose of removing a fence, in right of his contract of lease with the tenant defendant, or with the permission of the tenant, or as a licensee. But assuming that facts are alleged in complaint which establish illegal conduct of plaintiff himself, it must appear that such illegal conduct was the proximate or contributing cause of the injury complained of. *Hall v. Corcoran*, 107 Mass. 251-9 Am. Rep 30; *Koepkae v. Peper*, 155 Iowa 687-136 N. W. 902-41 L. R. A. (N. S.) 773; *Gilmore v. Fuller*, 198 Ill. 130-65 N. E. 84-60 L. R. A. (N. S.) 326. In *Hall v. Corcoran*, *supra*, it was said by the Supreme Court of Massachusetts: "Whether the form of action is in contract or tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law in which the plaintiff has taken part." Thus, where the plaintiff and defendant participated in a charivari party made illegal by the criminal code of Illinois, and plaintiff was shot and seriously injured by reason of the alleged carelessness of the defendant, it was held as a matter of law that plaintiff had no right of action *Gilmore v. Fuller*, *supra*. See also *Higgins v. Minaghan*, 78 Wis. 602-

47 N. W. 941-11 L. R. A. 138-23 Am. St. Rep. 428. Where the parties are *in pari delicto*, that is, in equal fault, neither is in a position to ask relief of the court from a situation caused by his own wrong doing, whether it be his illegal contract or his tortious act. Anson on Contracts (4th Ed.) 262; Chapin on Torts 237! Hall v. Corcoran, *supra*.

But where the illegal conduct of the plaintiff, whether participated in by defendant or not, is not itself the proximate or contributing cause of the injury inflicted upon plaintiff by defendant, the plaintiff may recover, notwithstanding such illegal conduct. In Welch v. Wesson, 6 Gray (Mass.) 505, sustaining a judgment for plaintiff for the willful running down and breaking of his sleigh by the defendant, though plaintiff and defendant were at the time racing illegally for a purse, it is said by the court: "the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another." "The distinction," says the same court in another case, "is between that which directly or proximately produces or helps to produce a result as an efficient cause, and that which is a necessary condition or attendant circumstance." Newcomb v. Boston Protective Dept. 146 Mass. 596 (604)-16 N. E. 555-4 Am. St. Rep. 354.

The paragraphs of complaint do not show any illegal conduct of plaintiff which might be the proximate or contributing cause of the injury complained of and they are therefore not, for that reason, insufficient.

The second ground of attack upon the paragraphs of complaint is that

they do not allege that in the commission of the assault and battery, the appellant intended to cause the injury. This may be considered with the third cause assigned for the insufficiency of the paragraphs, namely: that, since an assault and battery is a crime, all the elements constituting assault and battery must be alleged in the complaint.

Precisely because assault and battery is an unlawful act, unless the facts specially plead show otherwise, it is not necessary to allege that the consequent injuries inflicted by the defendant were intentional. And precisely because this is not a criminal prosecution for assault and battery, but is a civil action for the tort, or private wrong, it is not necessary to allege and prove the crime. In 2 Am. & Eng. Encyc. of Law 953 it is said: "To constitute an indictable assault and battery there must be an intent, express or implied, to do injury to another. But one may be liable in a civil action for assault and battery where there was an entire absence of intent to do any injury, the ground of liability being that the assault was committed in pursuance of an unlawful act or was the result of negligence." In the following cases judgments for damages were sustained on the theory of assault and battery where there existed no intention to do the injury: a man for colliding with another while riding a bicycle on the sidewalk in violation of a city ordinance, Mercer v. Corbin, 117 Ind. 450-3 L. R. A. 221; a lad for kicking another on the shin during school, Vosbury v. Putney, 80 Wis. 523-50 N. W. 403-14 L. R. A. 227; a sewing machine company for the act of its agent who, in reclaiming a machine, tipped it and caused the purchaser

to be thrown and injured, *Singer Sewing Mach. Co. v. Phipps*, 49 Ind. App. 116; a woman for an assault and battery committed by her husband as her agent upon another woman, *Shane v. Lyon* (Mass.) 51 N. E. 976. The case of *Scott v. Shepherd*, familiarly known as the "Squib Case," is an illustration of the civil liability for assault and battery where no criminal intent exists. In the case of *Kirkwood v. Miller*, (Tenn.) 5 Speed. 455-73 Am. Dec. 134, for the killing of a slave in fear of a general revolt, the court said: "That the same evidence which would excuse the defendant from criminal responsibility would relieve them from civil liability, is not true as a general rule," and further, "that criminal purpose and intent, express or implied, required to constitute crime, is not in all cases essential to an action for injuries to person or property."

The cases cited by counsel for appellant, instead of supporting his contention, rather sustain the pleading and the verdict in the case. In *Kline v. Kline*, 158 Ind. 602, sustaining a judgment for damages founded on an assault by threats of murder and arson, the court says: "Even if we were to grant for the sake of the argument, that there was not an assault within the meaning of the criminal statute, yet there was such an assault as clearly subjected the offender to a civil action at common-law." The case of *Newall v. Witcher*, 53 Vt. 589-38 Am. Rep. 703, does not hold that an assault must be criminal to sustain a judgment in the civil action. It merely condemns the conduct of the defendant as unlawful in any event; and, as tending to establish its unlawful character, says that,

if perpetrated, the act would be criminal. The cases of *Gilmore v. Fuller*, *supra*, *Vosberg v. Putney*, *supra*, and *Raefeldt v. Koenig*, (Wis.) 140 N. W. 56, all cited by appellant, support the rule that, where the facts specially plead show that the act complained of is not in itself unlawful, then there must appear the allegation that the act was done with an intention to inflict the injury. In appellant's case, however, no facts are plead in either paragraph of complaint giving an innocent or justifiable character to the assault and battery, which is in itself unlawful.

The case of *Gilmore v. Fuller*, *supra*, seems to lend support to appellant's contention that intention to do the injury must be alleged because assault and battery which is a crime is charged. In this case the court held that because there was no allegation or proof that the injury inflicted by the defendant was intentional, the trial court erred in refusing to instruct the jury to find for defendant on the first and second counts of the declaration. Although *assault and battery* is clearly charged in these counts, the court says "*an assault* is charged" and then quotes Greenleaf's statement of the rule of law applicable to mere criminal assault, as follows: "The intention to do harm is of the essence of an assault." 2 Greenl. Ev. (16th Ed.) Sec. 83. The court here makes no distinction between assault and assault and battery, and also fails to distinguish between civil and criminal actions. These distinctions are vital.

In the case of *Vosberg v. Putney*, *supra*, in which precisely the same issue was presented, the Supreme Court of Wisconsin says: "The jury having found that the defendant, in

touching the plaintiff, did not intend to do him any harm, the defendant maintains that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. (16th Ed.) Sec. 83, the rule that "The intention to do harm is of the essence of an assault." "Such is the rule no doubt," says the court, "in actions or prosecutions for mere *assaults*. But this is an action to recover damages for an alleged *assault and battery*" (Our italics). Holding that this rule does not apply in the case (and for the same reason it does not apply in the other case) the Wisconsin Court's decision is contrary to that in the case of *Gilmore v. Fuller*.

In reversing a conviction for assault and battery with intent to kill for refusing to instruct the jury that, to convict, they must find that the shooting was intentional, the Supreme Court of Alabama, in the case of *McGee v. State*, 58 So. 1008, says: "In civil as distinguished from criminal actions, an intent to injure is not essential to the liability of the persons committing the assault and battery." Citing *Carlton v. Henry*, *supra*, the Alabama Court continues: "In fact we think that, at times, courts have fallen into error in applying or attempting to apply, the rules applicable only to civil actions for assault and battery, or trespass to the person, to the facts in criminal prosecutions. In a *criminal prosecution* for an assault and battery, except as hereinafter shown, the intent to injure is one of the essential elements of the offence; in *civil actions* the intent, while pertinent and

relevant, is not essential." (Our italics).

Both *Greenleaf on Ev.* and *Hilliard on Torts*, which are cited as authority for the holding in the case of *Gilmore v. Fuller*, show the misapplication of the rule of intent in mere assault to an action for injuries by unlawful assault and battery. Neither does the case of *Paxton v. Boyer*, 67 Ill. 132-16 Am. Rep. 615, support the holding. In that case the plaintiff could not recover because the assault charged was committed by the defendant in the exercise of his lawful right of self-defence, and in such case, only wanton infliction of injuries by the defendant will entitle plaintiff to recover. And so in the case of *Gilmore v. Fuller* itself, the plaintiff could not recover; not because the rule of simple assault applies, that "intention to do the harm is of the essence of an assault," but because both plaintiff and defendant were at the time of the injury complained of, engaged in an unlawful act.

To make the case of *Gilmore v. Fuller*, *supra*, conform in principle and precedent to the great weight of authority, we think the decision must be restricted to a holding that where both plaintiff and defendant participate in the commission of the same illegal act, plaintiff cannot recover for injuries inflicted upon him by the defendant "unless the defendant acted wantonly." That this is perhaps what the court intended to hold is indicated by a quotation of the court from *Beach on Contributory Negligence* (3rd Ed.) Sec. 47, in support of the other branch of the case. The quotation is as follows: "Where the plaintiff is obliged to lay the foundation of his action in his own violation

of the law he cannot recover. And where the illegal act also contributes to produce the injury of which he complains, he has no action unless the defendant acted wantonly."

The right of personal security is one of the absolute rights of the individual, and a violation of such right is always actionable at common-law whether the act be criminal or not. 2 Bl. Comm. 119; Cooley on Torts 29. "Responsibility for the result of a wrongdoer's act or omission does not depend on whether he intended to produce it." Chapin on Torts 63. Nor is it necessary to the sufficiency of the declaration or complaint for tort to allege all the elements of the crime which such tort might also constitute. *Benson v. Bain*, 99 Ind. 156, citing 2 Work's Pr. 645; 2 Chitty Pl. (13th Am. Ed.) 852; Bullen & Leak Prec. 411; Oliver Prec. 719; 1 Estee Pl. 560. See also *Schlosser v. Griffith*, 125 Ind. 431.

There was no error in the trial court's ruling on the separate and several demurrer to the first and amended third paragraphs of complaint. The same reasons and authorities which sustain the complaint support the verdict on the law as to the case of the appellant Hale Paul.

The answers to the interrogatories are in accord with the general verdict and the court therefore committed no error in overruling appellant's motion for judgment thereon. See *Hunter v. Elam* reported in this issue of the Reporter.

As cause for a new trial appellant alleges error of the court in refusing his instruction No. 1. This instruction was correctly refused, because it assumes that the appellant was lawfully acting in self-defence. Furthermore the matter of this instruction

was fully covered by court's instruction No. 6.

Instructions numbered seven and ten, tendered by the plaintiff and given by the court over appellant's objection, are attacked as erroneous. Considering these two instructions together as they should be considered because they relate to the single subject-matter of compensatory damages, and then viewing them in the light of all the instructions given to the jury, they may fairly be construed as instructing the jury that, if they find for the plaintiff, they should award him such compensatory damages, the elements of which are correctly stated in number ten, as in their sound judgment, under all the circumstances in the case, they deemed sufficient to compensate plaintiff for the loss sustained, not exceeding the sum demanded. We do not think these instructions are open to the objection that they are calculated to direct the jury either as to the elements or the amount of damages to be awarded.

Having found no error of law in the record that might have effected the substantial rights of the appellant or unduly influenced the jury, we are not disposed to disturb the verdict and its affirmance by the trial court, except to sustain appellant's contention assigned as a cause for new trial, that the damages assessed by the jury are excessive. Three considerations have prompted us to render this decision reducing the award of damages. First the youth and station in life of the appellant and his ability to pay the judgment. This feature of the case may not have been considered by the jury and trial court. The record, however, discloses it and it is a very proper circumstance to be considered as a measure of damage.

Row v. Moses, (S. C.) 67 Am. Dec. 560 and note. Appellant is a youth of eighteen years, the unemancipated son of a tenant farmer having little of the world's goods. A five thousand dollar judgment imposed upon him in his situation in life would be inflicting a grievous and permanent injury much in excess of any damage sustained by the plaintiff, even if we concede that plaintiff's injury is permanent. The second consideration is that the assault and battery was induced by the severe provocation of plaintiff. It is a mitigating circumstance, at least, that plaintiff's action was arbitrary in going upon the tenant's farm, taking the law into his own hands, and persistently and, in spite of repeated warnings given him by both defendants, trying to destroy the fence that kept the tenant's cows in the clover and from the corn. This provocation was sufficiently exasperating to coerce the appellant to strike the one blow with a near-by stick that felled the plaintiff, but, however provoking in fact, is not sufficient provocation in law to bar plaintiff's right of recovery for the assault and battery committed. The third consideration is the character of plaintiff's injury as a permanent one. Upon no other element could such an assessment of damages be made as would necessitate exhausting plaintiff's demand for five thousand dollars. The evidence discloses that plaintiff's left arm and hand are unimpaired and his mind unaffected. He may be permanently injured but he is not wholly incapacitated. Waiving aside the possibility of recovery through an operation which he may not legally be compelled to undergo to effect a cure, it is quite within the range of possi-

bility, as courts may judicially know, for defendant to become mightier with the pen in his left hand than he ever was with his right on the pen. Plaintiff's age of thirty-eight years and his earning power of \$150 per month are considered. We cannot in justice countenance a judgment in this case for more than three thousand dollars. For cases on reducing verdicts see *Rowe v. Moses, supra*; *Elliott v. Sawyer*, (Me.) 77 Atl. 782; *Gunderson v. Northwestern Elevator Co.*, (Minn.) 69 N. W. 694; *Mark v. Fink*, 147 N. W. 279. As to duty of injured party to undergo operation, see *Stewart Dry Goods Co. v. Boone*, (Ky.) 202 S. W. 489; *Loban v. Wabash Ry. Co.*, (Mo.) 141 S. W. 440; *Birmingham Ry. L. & P. Co. v. Anderson*, (Ala.) 50 So. 1021.

The plaintiff, appealing from the judgment against him in favor of the defendant, William Paul, assigns as error for reversal of such judgment, the overruling of his motion for a new trial and that the verdict is contrary to law. Plaintiff's first paragraph of complaint against the defendant William Paul is upon the theory of master and servant, and his amended third paragraph, upon the theory of connivance, counseling and urging his co-defendant, Hale Paul, to commit the assault and battery alleged.

On the connivance theory of liability, Judge Cooley makes the following comprehensive statement of the law: "All persons who command, instigate, promote, encourage, advise, countenance, co-operate, aid or abet the commission of a trespass by another, or who approve of it after it is done for their benefit, are co-trespassers with the person committing the trespass, and are each liable as principals to the same extent and in

the same manner as if they had performed the wrongful act themselves." Cooley on Torts 133; Chapin on Torts 230; Chitty Pl. 208; Greenl. Ev. Sec. 41.

Hale Paul is the minor son of the co-defendant, William Paul, and at the time of committing the assault and battery on plaintiff, and for a long time prior thereto, was residing with his father and working for him in the operation of the farm. The farm was owned by the plaintiff and was occupied by William Paul as tenant. The defendants had constructed a temporary wire fence between a clover field and a corn field so as to enable him to pasture their cows on the clover and keep them from the corn. Plaintiff, on the occasion complained of, went to the farm to remove this fence, taking with him tools for the purpose. On arriving at the farm he entered the clover field from the highway and began immediately to remove the wire from the fence. Both defendants were at the time engaged in plowing corn in the adjoining field. The son, Hale Paul, first to observe plaintiff at the fence, left his plow and rushed to plaintiff, shouting as he ran, "Shultz, damn you, let that fence alone." He repeated these words upon arriving at the fence and added, "or I'll make you." At this point the father, William Paul, leaving his plow also came hurriedly to the place and also shouted, "Schultz, you let that fence alone." Plaintiff utterly ignored the defendants and their warnings, and thereupon the son, Hale Paul, picked up a heavy stick and once more said to plaintiff, "Damn you, Schultz, let that fence alone or I'll make you." Then William Paul told the son not to strike plaintiff. Plaintiff continued

to pull staples and loosen the wire, and then Hale Paul swung the club over the top of the fence and struck plaintiff on the left side of the head felling him to the ground. The jury in their answers to interrogatories found that plaintiff used no threatening language and assumed no menacing attitude toward Hale Paul as testified by defendants. The foregoing facts were virtually admitted by defendants in testimony.

Do the facts as here stated establish the liability of the defendant William Paul, upon either or both theories of complaint. The cases are numerous and interesting upon both these propositions. To dwell at length on many of them would be to make the opinion of great strength. We must, however, in view of the importance of the issues involved in the case, state in substance, the operative facts and the decisions of a few analogous cases.

In *Willi v. Lucas*, (Mo.) 19 S. W. 726, defendant Lucas, a liveryman was hired by Willi (plaintiff's husband) to overtake plaintiff on the road. Three times defendant drove his team ahead of plaintiff, the last time so that she could not pass. When asked to permit plaintiff of pass, defendant said, "Shut your damn mouth. I'm driving this team according to orders." Then, while defendant sat in his buggy, to use the language of the court, "in such a position that he could not have seen plaintiff without looking out from the side of the buggy, the back curtain being down and the hind end of the buggy being towards (plaintiff)," Willi got out of defendant's buggy, went back to his wife's buggy and shot her. A nonsuit of the wife's action against Lucas was reversed.

In *Hilmes vs. Stroebel*, 59 Wis. 74-17 N. W. 539, for assault and battery the case against the co-defendants of Stroebel was nonsuited. These defendants accompanied Stroebel and prevented the proprietor of the place from interfering with Stroebel's assault upon plaintiff. They also made certain remarks indicating hostility to plaintiff, but in no manner took part in the assault and battery itself. Case reversed for error of the trial court in entering nonsuit.

In *Reed v. Peck et al.*, (Mo.) 63 S. W. 734, it appears that a street in front of plaintiff's house was graded without an ordinance authorizing it. Action for trespass against those who did the work and the mayor and the street committeemen. On appeal from judgment for plaintiff the court said, "The grading of the street was, undoubtedly, done without lawful authority; was a trespass. There was no ordinance providing for such grading. And, while the work was actually performed by the street commissioner, there was, it seems, evidence tending to prove that Mayor Guitar and Street Committeemen, Peck and Watson, were present from time to time superintending and encouraging the work. The judgment was affirmed.

In *Moir v. Hopkins*, 16 Ill. 313-63 Am. Dec. 312 the defendant was held liable where his agent directed a servant to "go and get" Hopkin's team, meaning with Hopkin's consent, and the servant got the team without seeking such consent, and in its use killed one of the horses.

There is sufficient evidence in this record to have sustained a verdict against the defendant, William Paul, on the connivance theory, and to have justified a reversal of the judgment

if the trial court had entered a nonsuit. The added relation of master and servant strengthens this theory of liability.

That the relation of master and servant existed between the defendants at the time of the assault and battery committed by defendant Hale Paul, is admitted by the defendants themselves as witnesses on the trial. To this relation applies the doctrine of *respondeat superior*. Chapin on Torts 211. Since the judgment as to Hale Paul, the servant, is sustained, and since the relation of master and servant is established by the record admissions of the defendants themselves, there remains to be determined only whether the assault and battery of the servant was committed in the course of the servant's employment and with a view of the master's interest. If so, then the defendant, William Paul, as master, is liable and the verdict exonerating him is contrary to law.

There are many cases holding the master liable for the assault and battery of the servant, although the master was not present, in no way authorized or justified or participated in it, and although he expressly instructed his servant not to commit it. *Palmeri v. Manhattan Ry. Co.* 133 N. Y. 261-30 N. E. 1001-16 L. R. A. 136-28 Am. Rep. 632; *McClung v. Dearborn*, 134 Pa. St. 396-19 Atl. 698-8 L. R. A. 204-19 Am. St. Rep. 708; *Singer Sewing Mach. Co. v. Phipps* 49 Ind. App. 116. See note to *Richie v. Waller*, 27 L. R. A. 161.

That the servant, Hale Paul, was acting in the course of his employment in the commission of the assault and battery upon the plaintiff is clearly decided by the Kentucky Court of Appeals, in the case of *New Ellers-*

lie Fishing Club v. Stewart, 93 S. W. 598-9 L. R. A. (N. S.) 475. The issues of the two cases are the same. Proctor was employed by the fishing club to prevent persons from fishing in their ponds who had not the privilege to do so. Thinking that plaintiff had not such privilege, Proctor engaged in an altercation with him to prevent his fishing and in so doing cut him with a knife. In deciding the case the court said: "It is difficult to define with accuracy the point at which the master's liability for the acts of his servant ends; but under the facts of this case, Proctor, when he attempted to prevent appellee from fishing, and when the altercation between them commenced, was clearly acting within the scope of his employment, and the assault and battery complained of was merely a continuation of the first act. There was no appreciable length of time between them. Everything that was done happened on the premises in the control of the fishing club, and where Proctor had authority as its agent. Where the agent begins a quarrel while acting within the scope of his agency, and immediately follows it up by a violent assault, the master will be liable, as the law under the circumstances will not undertake to say when, in the course of the assault he ceased to act as agent and acted upon his own responsibility." Another case in point here is Dickson v. Waldron, 135 Ind. 524-34 N. E. 506-35 N. E. 1-24 L. R. A. 483-41 Am. St. Rep. 440.

That the master, William Paul, is liable for his servant's assault and battery upon the plaintiff, despite his instruction given to the servant at the time, not to strike the plaintiff, is clearly decided by the case of Grant

v. Singer Sewing Machine Co., 190 Mass. 489-77 N. E. 480-6 L. R. A. 567, and also by the case of Borden v. Felch, 109 Mass. 154. In the first case Sexton, as general agent for the company, together with one Andrews whom he had hired to recover a sewing machine, went to the home of plaintiff who had contracted for the purchase of the machine. Seeing that trouble was about to ensue, Sexton said to Andrews: "Mr. Andrews, you need not proceed any further. I will send and replevin the sewing machine." Despite this admonition or instruction to Andrews, he committed the assault and battery upon the plaintiff for which the court affirmed a judgment against the Sewing Machine Co. The court says: "It is settled that the defendant would be liable for force used by Andrews as a means of retaking the machine even if he had been told not to use force. (Cases cited). The defendant's liability does not depend upon his having been authorized expressly or impliedly to use force, but upon his having used force as a means of doing what he was employed to do (Citing cases)." The case of Borden v. Felch, *supra*, is also in point. In that case as in this there was an altercation between two adverse claimants to right in land. The servant of one, despite the instruction given him by the master at the time, committed assault and battery upon the plaintiff for which the master was held liable. C. J. Watkins, in the case of Duggins v. Watson, 15 Ark. 127, says: "The only safe rule of law is that the master is liable for the tortious act of his servant engaged in his employment, though done willfully, without orders or even against orders. See note 35 Am. Dec. 192.

The facts in this case, upon the admission of the defendants themselves are stronger than the operative facts of the cases cited, and there is no escape from the conclusion that the verdict in favor of the master is clearly contrary to law. The verdict is contrary to law also for the reason that the trial court refused to give to the jury plaintiff's instruction No. 6. By this instruction the jury were instructed that the master, William Paul, would be liable for the act of the servant, Hale Paul, in this case "even though William Paul expressly ordered Hale Paul not to commit the assault." This instruction correctly stated the law, as we have found the law to be, was applicable to the facts of the case, was not covered in any of the court's instructions, its giving or failure to give would directly affect the verdict, and therefore, its rejection by the trial court was such error as makes the verdict contrary to law. *Robinson v. Chandler*, 56 Ind. 575; *Cline v. Lindsey*, 110 Ind. 337; *Healey v. Johnson* (Iowa), 103

N. W. 92; *Lewis v. Schultz*, 98 Iowa 341-67 N. W. 266. The refusal to give the instruction was also such error as entitled plaintiff to a new trial.

For the reason that the verdict in favor of the defendant, William Paul, is contrary to law, and for the reason that the trial court erred in overruling plaintiff's motion for a new trial the judgment against plaintiff in favor of William Paul must be reversed and such judgment is hereby reversed with instruction to sustain plaintiff's motion for a new trial as to defendant, William Paul.

If the plaintiff will file a remittitur for the sum of two thousand dollars within ten days after the filing of the certified opinion of this court in the lower court, this judgment against the appellant, Hale Paul, is hereby affirmed; otherwise, it is reversed with instruction to grant a new trial to Hale Paul.

The cause is hereby remanded for further proceeding not inconsistent with this opinion.

BRIEF OF M. EDWARD DORAN IN CASE OF HUNTER v. ELAM.

In the Supreme Court of Notre Dame

William Hunter, Appellant,

vs.

John Elam, Appellee.

Appealed from the Notre Dame
Circuit Court.

Brief for the Appellant.

By Michael Edward Doran.

NATURE OF ACTION.

A certain Perry Smith was the owner of a fine Hambletonian mare which William Hunter, the Appellant here, hired for the purpose of breeding. The mare was left with Smith, it being agreed that if a foal should result Smith would keep and train it for the appellant. A colt was foaled and Smith kept and trained it pursuant to the agreement. About the time the colt was ready for the appellant's purpose, Smith sold it to the appellee, John Elam. When the appellant learned of the sale he went to Elam and demanded that the colt be given to him. Elam refused; whereupon Hunter instituted this action in replevin. The jury returned a verdict for the appellee and the appellant now prosecutes his appeal to this court.

WHAT THE ISSUES WERE.

The complaint was in one paragraph alleging that the plaintiff was the owner and lawfully entitled to the immediate possession of the colt in question; that the plaintiff made a demand on the defendant which was

refused, and that he now sues for possession.

The defendant demurred to the complaint.

The defendant filed an answer in two paragraphs, the first in general denial, and the second alleging that he was a 'bona fide' purchaser.

The plaintiff demurred to the second paragraph of the answer.

Trial was had by jury and both parties submitted interrogatories.

The plaintiff made a motion for judgment '*non obstante venedicto*,' based on the replies given by the jury to his interrogatories.

The plaintiff filed his motion for a new trial based on the following grounds: (1) The verdict is contrary to law. (2) The court erred in giving of its own motion, over plaintiff's objection, instruction number eleven. (3) The special finding of facts as revealed by the answer to the plaintiff's interrogatories, are inconsistent with the verdict.

HOW THE ISSUES WERE DE- CIDED AND WHAT THE JUDGMENT WAS.

The jury which tried the cause returned the following verdict:

State of Indiana,

County of St. Joseph, SS:

In the Notre Dame Circuit Court.

September term, 1919.

William Hunter

v.

Verdict.

John Elam.

We, the jury, find for the defendant, and against the plaintiff.

Emmett A. Rohyans,

Foreman.

The defendant's demurrer to the complaint was overruled, to which ruling defendant excepted. The plaintiff's demurrer to the defendant's second paragraph of answer was sustained, and the defendant excepted to the ruling. The motion of the plaintiff for a judgment '*non obstante veredicto*' based on the jury's replies to plaintiff's interrogatories was overruled, to which ruling exception was taken by the plaintiff. The court overruled the plaintiff's motion for a new trial and the plaintiff excepted to the ruling.

The court then entered the following judgment: "The jury having returned a finding for the defendant, it is therefor ordered, adjudged, and decreed by the court that the plaintiff take nothing by this action and that the defendant recover of and from the plaintiff his cost laid out, expended, and taxed at forty-three dollars and ten cents (\$43.10), all of which is finally and fully ordered, adjudged, and decreed by the court."

ERRORS RELIED ON FOR REVERSAL.

(1) The verdict is contrary to the law.

(2) The verdict is contrary to the replies given by the jury to the appellant's interrogatories.

(3) The court erred in overruling the appellant's motion for a new trial.

CONDENSED STATEMENT OF THE EVIDENCE.

William Hunter, the plaintiff, who was called as the first witness in his own behalf, testified as follows that: he was a South Bend physician and that on September 5th, 1916, he called at the home of one Perry Smith to

attend the latter's wife; after leaving the house he noticed a mare in a nearby field, and he told Smith he would give him one hundred dollars for a colt from her; Smith replied that he did not think the mare would produce a colt, so he would not take the chance of paying for breeding, because prior attempts had failed; he then offered to give Smith forty dollars for the services of the mare for breeding and then pay the stallion fee if Smith would breed the mare to a horse of his selection; Smith accepted this offer. Hunter told Smith he would want him to keep the colt if it were foaled and train it until it was ready for his services; when he would call for it and pay what these duties were reasonably worth; Smith agreed to do this; he then went to the home of Mr. Walsh and arranged for the use of his stallion in breeding it to Smith's mare; he paid Mr. Walsh a fee of ten dollars; he saw the colt shortly after it was foaled and at frequent intervals thereafter; when he learned of the alleged sale of the colt by Smith to Elam, he went to Elam and told him he was the owner of the colt and demanded that it be given to him; Elam refused, so he instituted this action.

See bill of exceptions No. 1; record page —.

Perry Smith was the next witness called for the plaintiff. He testified to the agreement between Hunter and himself in the same terms as was disclosed by Dr. Hunter's testimony. He said, that he accepted the forty dollars for the services of the mare because he was certain to get this amount, whereas if he took one hundred dollars for a colt, a colt might not be foaled and he would lose by the transaction; that he bred the

mare to Walsh's stallion; that he did not pay the fee to Walsh; that the colt was foaled on August 10th, 1917; that he ktp, fed, and cared for the colt until July 5th, 1919; that the colt at that time was trained and fit for driving purposes; that on July 5th, 1919, the defendant, Elam offered him two hundred dollars for the colt; that he accepted the offer; that he received the two hundred dollars from Elam in cash and that Elam then took the colt away with him; that he had never seen Elam before July 5th, 1919; that he told Elam that he was the owner of the colt.

See bill of exceptions, No. 1, Page —.

The next witness for the plaintiff, Mr. Walsh, testified that he was a farmer; that he was the owner of a stallion; that he had been paid ten dollars by William Hunter for the services of his stallion in breeding Smith's mare; the mare was bred on September 7th, 1916.

See bill of exceptions, Record page —.

The first witness called for the defendant was John Elam. He testified that he was an insurance broker:—he had passed the farm of Perry Smith on July 5th, 1919;—he saw a colt in the pasture—Perry Smith told him that he was the owner of it;—he offered Smith two hundred dollars for the colt;—Smith accepted, and he (Elam) thereupon paid him two hundred dollars in cash; then took the colt to his home in South Bend; prior to July 5th, 1919, he had never seen Perry Smith which is the subject of this action; he did not investigate, but relied solely on Smith's averment of ownership and the fact that Smith had possession; that William Hunter

called at his home and demanded the colt and he refused this demand.

See bill of exceptions, No. 1, Record page —.

The next witness called by the defendant was Clifford O'Sullivan. He testified that:—he was a lawyer practicing in South Bend; he was with John Elam when he purchased the colt in question from Perry Smith; that Smith said he was the owner of the colt; Elam gave Smith two hundred dollars for the colt and Elam then took it home with him; that he had never seen Perry Smith before this day.

See bill of exceptions, No. 1, Record Page —.

POINTS AND AUTHORITIES.

The appellant claims that the contract between him and Perry Smith was an agreement for the sale of the services of the mare for breeding, and thus title to the colt has always reposed in the appellant.

McCarthy v. Blevins, 26 Am. Dec. 262.

Maize v. Bowman, 19 S. W. 589.

The possession of the colt by Perry Smith coupled with his claim of ownership did not give him such a right in the colt as to enable him to pass a good title to a 'bona fide' purchaser for value.

Ballard v. Burgett, 40 N. Y. 314.

Andrews v. Cox, 48 Am. Rep. 68.

Fawcett v. Osborn, 83 Am. Dec. 278

Kitchell v. Vanadar, 1 Black. 356 (Ind.)

ARGUMENT.

The real grounds upon which this appeal is based are points of law which are as follows: (1) Was the contract between Smith and Hunter

an agreement for the sale of a thing having neither an actual nor a potential existence? (2) Was the court's instruction number eleven, given over the appellant's objection, a correct statement of the law? Let us consider these questions and by reviewing the authorities determine whether justice has been rendered to the appellant in the court below.

The appellant herein maintains, and the evidence of Perry Smith and William Hunter shows that the appellant gave forty dollars (\$40.00) for the use of the mare for breeding. Review for a moment the appellant's interrogatories submitted in the court below and see if the answers given to them by the jury do not substantiate our contention.

(Question) Did William Hunter offer Perry Smith one hundred dollars for a colt from his mare?

(Answer) Yes. Emmet A. Royhans, Foreman.

(Question) If William Hunter did make this offer was it not accepted by Perry Smith?

(Answer) No. Emmett A. Royhans, Foreman.

(Question) Did William Hunter offer Perry Smith forty dollars for the services of his mare for breeding?

(Answer) Yes. Emmett A. Royhans, Foreman.

(Question) If William Hunter did make this offer was it accepted?

(Answer) Yes. Emmet A. Royhans, Foreman.

Now just what did this contract of forty dollars for the services of the mare for breeding mean? Simply this, that William Hunter was legally bound to pay Perry Smith the sum of forty dollars regardless of whether a foal resulted from the breeding or not; but if a foal should result then it would be the property of William Hunter. This agreement was not for the sale of the colt and thus not under

the rule applicable to the sale of a thing having neither an actual nor a potential existence, but it was a contract for the use of the mare for a certain definite purpose. Can any more logical interpretation be placed upon this agreement? If you hold that the second offer of William Hunter was for a colt, then you are holding the fact that Perry Smith refused one hundred dollars for a colt but accepted an offer of forty dollars for it; this would be absurd.

In sustaining these contentions we wish to consider the case of *McCarthy v. Blevins*, 26 AM. Dec. 262.

A party named Rogers bred his horse to a certain Butler's mare with the understanding that, if a colt should result, it should belong to one Pleasant Blevins, an infant. A colt was foaled and the defendant below McCarthy, purchased it and the mare from Butler. Blevins, by his next friend, brought this action against McCarthy to recover the colt. The defendant insisted that no title vested by the contract between Butler and Rogers, no colt being in existence; that no right can be communicated to property of which the bargainor has no title in possession, actually or potentially. The court in the course of its decision said: "In horse growing districts, mares of distinguished reputation are constantly let in effect to breed from, the owner of the mare agreeing to take so much for the chance of a colt for one season, he retaining in his possession the mare because too valuable to be trusted with another. That the foal in such cases, when dropped, is the property of the hirer of the mare has never been the subject of doubt. Had Blevins taken the mare into his possession, paying so much per annum for her use generally, then he would have been authorized to use her as a brood mare, and to retain the foal. The feeding and attention by the owner could make no difference; it was generally

a hiring. On this foot the plaintiff is entitled to recover. Rogers hired his mare for Blevins for the season of gestation, for her use in breeding; he was to use her in this particular way; still Blevins is entitled to the increase as if she had been hired for the year generally, with the use unrestricted."

We have seen fit to set out this case at length because it so clearly points out the fact that a contract for the services of a mare for breeding is a thing distinct and apart from an agreement for the purchase of the expected foal, and thus does not come under the rule applicable to the sale of a thing having neither an actual nor a potential existence. The reasoning and principals expounded in the above case are supported by the Kentucky decision of *Maize v. Bowman*, 19 S.W. 589, in which the court held that the sale of the services of a mare for the purpose of breeding is not an agreement to sell something which is not 'in esse', and therefor void, but a valid agreement for the use of the mare for a special purpose.

Since it is logically established that the appellant hired the breeding right to the mare, we maintain that upon reason as well as upon authority, the title to the foal from the time of conception until the present day has been vested in the appellant, unaffected by the transaction between Perry Smith and the appellee, John Elam.

Let us examine the court's instruction number eleven given over the appellant's objection which deals with the doctrine of bona fide purchaser. The instruction is as follows:

"If you find from the evidence that the defendant, Elam, and the said Smith contracted for the sale of the colt in question; that Elam was an innocent purchaser of the said colt,

paying therefor to the said Smith the sum of two hundred dollars; that Smith was then and there in the open, notorious exclusive possession of the colt, claiming ownership and so representing himself to Elam at the time; that Elam inquired of the said Smith as to his ownership of the colt and the sale thereof; and you further find that Elam the defendant at the time of the purchase of the colt and payment therefor had no notice of any executory contract between Hunter and Smith for said colt, or of any claim by Hunter of any right or interest in said colt; and you further find from the evidence that the defendant Elam had no knowledge whatever that should put a reasonably prudent man upon inquiry, then, I instruct you, the defendant, Elam, became the owner of the colt in suit, regardless of any rights and obligations existing under said contract between plaintiff and Smith relative to the colt, and your verdict should be for the defendant."

It is our firm belief that this instruction of the court is clearly erroneous and was the prime cause of a verdict being returned against the appellant herein. We do not deny that Smith was in open, notorious possession, and we further admit that he claimed ownership when he sold it to the appellee; but does this serve to vest a valid title in Elam?

To hold so would establish a rule which would disrupt the business usages and social customs of our modern life. It can be safely said that one-fourth of all personal property is not in the hands, and thus under the control, of the owner, but is entrusted to the care of others. Is it practical then to establish a pernicious rule that a bailee may trans-

mit a valid title simply because he has possession? We are aware that an owner who intrusts property to another and then so conducts himself as to lead third persons to believe that the possessor is also the owner, may be estopped to deny title in his bailee. But in this case the appellee purchased the colt relying solely on the representations of Smith that he was the owner. He admits that he never saw Smith before and that he did not make any inquiries regarding Smith's title from any other person. This is a case where the doctrine of 'caveat emptor' must be applied. The appellee has not introduced a scintilla of evidence to show that the appellant ever did anything to estop him from claiming the colt, nor has he by any means shown that Perry Smith had such a right to the colt as would enable him to transfer a valid

title. The instruction is the only one which touches on the theory of 'bona fide' purchaser and it stands unsupported by any other announcing the doctrine that the possession of a vendor or bailee coupled with his claim of ownership is sufficient to vest the legal title in a 'bona fide' vendee. This is clearly contrary to the views of the authorities.

Ballard v. Burgess, Supra.
Andrews v. Cox, Supra.
Fawcett v. Osborne, Supra.

The court, therefor, erred in overruling the appellant's motion for a new trial.

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

Respectfully submitted.

BRIEF OF HUMPHREY L. LESLIE IN CASE OF HUNTER V. ELAM.

In the Supreme Court of Notre Dame

William Hunter, Appellant

vs.

John Elam, Appellee

Brief for the Appellee.

Appeal from the Notre Dame Circuit Court.

RECORD.

The appellant's counsel's statement of the record is substantially correct.

EVIDENCE.

The evidence as set out by the appellant's counsel is partially correct, but the important details of the testimony are garbled and in some in-

stances, mis-stated. We will consider briefly the testimony given by each of the witnesses.

The record will show that Dr. Hunter did not state on the stand that he offered forty dollars for the use of the mare during the period of gestation, but that the agreement was that Smith was to allow his mare to be bred to a stallion of Hunter's choosing. He further testified that he was, under the agreement, obligated to pay the money regardless of whether she became with foal or not, and that Smith gave no other consideration than the mere allowing of his mare to be bred. The word 'services' was used to refer only to the mere breeding of the mare. The rest of the appellant's testimony as set out by his counsel is substantially correct.

Smith agreed to train and raise the colt, should it be foaled, so that it would be suitable for the Doctor's use.

The next witness which the appellant discusses is Perry Smith. We quite agree that his testimony substantiated that of Dr. Hunter, but that he testified that he sold the services of the mare both we and the record deny. He stated that he was to receive forty dollars for allowing his mare to be bred to a stallion of the appellant's choosing; that he was to train and raise the colt should one result and that he did this. We wish to call attention to the fact that he stated that the forty dollars he was to receive for allowing his mare to be bred has never been paid nor even offered to him. His testimony was that he had always, up to the time of the sale of the colt to Elam, had open and notorious possession thereof, and that he had stated to the appellee that he was the owner of the animal. The appellant's statement regarding further testimony of this witness we will not discuss.

The statements of the owner of the stallion are immaterial to the case and call for no comment.

The testimony of the appellee is, with the exception of one statement correctly summarized. Elam did not testify that he did not investigate the ownership of the colt before purchasing it. On the contrary he stated that he took note of the indicia of ownership which Smith possessed and that he inquired, as any judicious man would, if the said Smith was the owner of the animal, to which he was told that he was.

The evidence of Mr. O'Sullivan, the second witness for the defense, is correctly given.

POINTS AND AUTHORITIES.

The appellee contends that, if there was a sale consummated between Hunter and Smith, it was a sale of something which had neither an actual nor a potential existence.

A thing having neither an actual nor a potential existence cannot be the subject matter of valid sale.

Benjamin on Sales, 78.

2 Kent's Commentaries, 8th Ed. 604, Side page 468.

Bates v. Smith, 47 N. W. 249.

Battle Creek Valley Nat. Bank v 1st Nat. Bank. 56 L. R. A. 124.

Purcell's Administrator v. Mather, 76 Am. Dec. 307.

Low v. Pew, 11 Am. Rep. 357.

Rochester Distilling Co. v. Rasey 37 N. E. 632.

Hutchinson v. Ford, 15 Am. Rep. 711.

"Where a purchaser of goods permits his vendor to remain in possession, a subsequent bona fide purchaser from such vendor, without any notice of the original sale, being put in possession, obtains a good title as against the prior purchaser."

Cullom v. Guillot, 18 La. Annotated 608.

Shaw v. Levy, 17 Serg & R. 99.

"Where a vendor of personal property is allowed by his vendee to remain in the possession of the property and thus to give to the world a colorable appearance of continued ownership, the title of a subsequent bona fide purchaser from such vendor will be upheld as against the first vendee." American & English Encyc. 1164.

"Where an owner of property, designedly or by negligence, intrusts another with the title, or the indicia of ownership of personal property, and the other sells the property to a bona fide purchaser, such purchaser

will be protected in his title as against the owner, upon the principle that where one of two innocent parties must suffer for the wrong of a third person, the loss should fall upon the one who by his act, created the circumstances which permitted the fraud to be perpetrated."

American & English Encyc. 1165.
Bates v. Smith, 47 N. W. 249.

"Most of the general exceptions to the general rule that a bona fide purchaser gets no better title than his vendor arise from the fact that the real owner has voluntarily clothed such vendor with apparent ownership or authority to sell."

Williams v. Merle, 25 Am. Dec. 604.
(notes)

Saltus v. Everett, 20 Wendell 278.

"Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of the trade, of the common understanding of the world, usually accompanies the right and authority of disposal, or has given the external indicia of the right of disposal, a sale to an innocent purchaser divests the true owner's title." Willingham's Sons v. McGuffin, 90 S. E. 356.

ARGUMENT.

The appellant proposes but two questions for consideration, namely, "Was the contract between Smith and Hunter an agreement for the sale of a thing having neither actual nor potential existence?" and "Was the appellee such a bona fide purchaser as to give him good title to the animal in question, granting that Hunter was the owner of the colt at the time of the appellee purchasing the same?"

It is contended by the appellant that the agreement between Smith and Hunter was not one for the sale

of the colt yet to be foaled, but a contract for the services of the mare for breeding. They base their contention on an interrogatory submitted by them to the jury and the answer returned thereto. They would have us believe that the services thus stipulated for were to be for a period of gestation, and of such a nature that the result of such period of gestation would be their property. Their assertion is erroneous. We grant that the agreement was for the services of the mare for breeding, but to say that those services were to continue through a prolonged period is erroneous. We contend, and the evidence will bear out our contention, that Dr. Hunter agreed to pay Smith the sum of forty dollars for the mere allowing of his mare to be bred to a stallion of the appellant's choosing, and for the training of that foal which should result therefrom in such a manner as to render it suitable for a doctor's use. We presume that the intention of the parties was that after the colt should be foaled a contract for its sale might be consummated between the parties.

Even the appellant does not allege that Dr. Hunter testified that the services stipulated for in the agreement were to be other than for the mere breeding. Did Hunter testify that the contract was that the colt, if it should result, was to be his? Most emphatically, he did not! And yet the appellant would have us believe that a mere contract to allow a mare to be bred is a contract for services which endure for the period of gestation and is of such a nature as to give title to the foal of the mare!

The case of McCarthy v. Blevins, 26 Am. Dec. 262, is cited by the appellant to support his contention.

We do not deny that this case is a correct application of the law, but that it is in point on the case in hand we refuse to grant. *McCarthy v. Blevins* is a case where there was an actual existence of the subject matter, a potential existence, and this being true, the court correctly decided that the original vendee was entitled to possession. (*Sawyer v. Garrish*, 35 Am. Rep. 323, citing *McCarthy v. Blevins* as a case of potential existence.)

It is the belief of the appellee that if any claim on the ownership of the animal in question can be set forth by the appellant, a perusal of the evidence will show that that claim must be founded on an attempt to sell the colt not yet foaled or conceived. Heretofore we have granted, for the sake of argument, that the contract between Smith and Dr. Hunter was one for services, but it is our belief that the evidence showed rather an outright sale of the animal. If this is the case, then, since the appellant does not dispute the law that a thing having neither an actual or potential existence cannot be the subject matter of valid sale, there is no cause for us to enter into discussion on that point. The court will note the authorities which have been cited to sustain this point of law.

We come now to the second question proposed by the appellant: "Was the appellee such a bona fide purchaser as to give him good title to the animal in question, granting that Hunter was the purchaser or owner of the colt at the time of the appellee purchasing the same?" This learned court will decide that he was. From every angle from which the case may be viewed instruction number eleven as tendered by the trial court must be held correct. There is only a half-

hearted attempt on the part of the appellant's to deny the correctness of the instruction. They would have us believe that the evidence as disclosed by the record does not justify it. In brief we will set out the law on the various lights in which the case may be viewed.

Let us believe for the moment that Dr. Hunter was actually a purchaser of the colt and that his contract therefor was valid. Granting this, he can not now set up his title to the colt to deprive John Elam of the same. Where a purchaser of goods permits his vendor to remain in possession, a subsequent bona fide purchaser from such vendor, without notice of the original sale, being put in possession, obtains a good title as against the prior purchaser.

American & English Encyc. 1164.
Cullom v. Guillot, *Supra*.
Shaw v. Levy, *Supra*.

It is admitted by the appellant that Elam was a bona fide purchaser without notice. He was put in possession of the colt and still retains possession. Can his right to continue in the ownership of the animal be disturbed under this rule of law and under these conditions? We think not.

The second angle from which the bona fide purchaser theory of the case may be viewed is from the standpoint that Dr. Hunter was the owner of the animal and allowed the possession and indicia of ownership to repose in the witness Smith. That Smith was in open and notorious possession, that he himself stated that he was the owner, that to all outward appearances he was in fact the title holder, was brought out by the evidence. The court knows that in the purchasing of horses from farmers, common vendors thereof, possession and statement as to ownership are all

that are usually relied upon. The appellee had no notice of any sort that would put a reasonably prudent man on his guard. He had faith, as customary in the purchasing of horses from farmers, in the indicia of ownership held by Smith. He paid full value for the animal. He is entitled to continue in uninterrupted ownership thereof. "Where an owner of property, designedly or by negligence intrusts another with the title, or indicia of ownership of personal property, and the other sells the property to a bona fide purchaser, such bona fide purchaser will be protected in his title as against the owner on the principle that where one of two innocent parties must suffer for the wrong of a third person, the loss should fall upon the one who by his act created the circumstances which permitted the fraud to be perpetrated."

American & English Cyc. 1165.
Bates v. Smith, 47 N. W. 249.

Williams V. Merle, 25 Am. Dec. 604. (notes)

Saltus v. Everett, 20 Wendell 278.
Willingham's Sons v. McGuffin, 90 S. E. 356.

Here we may rest our case and feel assured that we have proven to the court's satisfaction that the judgment of the lower court was correct, that instruction number eleven submitted to the jury was a correct statement of the law applicable to our case.

In concluding, the appellee believes that he is entitled to the judgment on two distinct theories, first, that whatever contract existed between Hunter and Smith, the former took no title to the colt for which replevin is sought; secondly, that, granting that Dr. Hunter did have an interest in the animal at the time of its purchase by Elam, the latter is entitled to possession and ownership thereof as a bona fide purchaser for value.

We respectfully submit that the judgment of the court below should be, in all things, affirmed.

NOTRE DAME CIRCUIT COURT

Record of Cases.

(Lawrence B. Stephan)

CAUSE NO. 1.

William Smith
vs.
Frank Brown

Arthur B. Hunter,
Thomas V. Truder,
Attorneys for Plaintiff.
Harry P. Nester,
Lawrence S. Stephan,
Attorneys for Defendant.

Action on a negotiable instrument given to plaintiff by defendant, which is due and unpaid. Demand \$116.25.

Complaint in one paragraph.

Plaintiff files amended complaint.

Defendant files answer, in one paragraph, in confession and avoidance, alleging failure of consideration.

Plaintiff files reply in general denial.

Cause submitted to the court, jury being waived, and trial had.

Harry P. Nester opens argument for defense and is followed by Arthur B. Hunter for the plaintiff, and Thomas V. Truder closes for the plaintiff while Lawrence S. Stephan concludes the argument for the defense.

Judgment rendered in favor of plaintiff in the sum of \$106.25, principal and interest, together with attorneys' fees of \$20.00 and costs, which judgment is entered without relief from valuation or appraisal laws.

CAUSE NO. 2.

Henry Lang
vs.
Frank Cramer

Richard B. Swift,
Clement B. Mulholland,
Attorneys for Plaintiff.
Humphrey L. Leslie,
M. Edward Doran,
Attorneys for Defendant.

Plaintiff brings action on an account to which defendant claims as set-off, compensation for services rendered. Demand \$65.00.

Complaint in one paragraph, action on an open account.

Defendant files answer in three paragraphs; (1) General Denial; (2) Payment; (3) Set-Off.

Plaintiff files reply of general denial, to each of the paragraphs numbered (2) and (3) of the defendant's answer.

Judgment rendered in favor of plaintiff and against defendant's second and third paragraphs of answer.

CAUSE NO. 3.

John Sullivan
vs.
Harry Dorman

Francis J. Murphy,
Francis J. Clohessy,
Attorneys for Plaintiff.
Edward C. Donnelly,
Delbert D. Smith,
Attorneys for Defendant.

Action on a promissory note. Demand \$500.00.

Complaint on negotiable promissory note in one paragraph, said note being due and unpaid.

Defendant files answer in two paragraphs: (1) general denial and (2) *non est factum*.

Plaintiff files reply to the second paragraph of answer, reply being in general denial.

Cause submitted to the court, jury being waived, and trial had.

Judgment in favor of plaintiff in the sum of \$50.000 for which judgment is entered without relief from valuation or appraisal laws.

CAUSE NO. 4.

John Hamilton

vs.

Charles Simpson

Sherwood Dixon,

Robert E. McGlynn,

Attorneys for Plaintiff.

Leo J. Hassenauer,

Clifford P. O'Sullivan,

Attorneys for Defendant.

This is an action on a contract for the sale of certain hogs valued at \$83.50, which defendant refused to accept.

Plaintiff files declaration and praecipe.

Defendant files plea to the jurisdiction, alleging improper service.

Plaintiff admits plea.

Defendant waives service and files plea in abatement, as to defect in the name of the plaintiff, which is sustained.

Plaintiff files amended declaration.

Defendant files plea in two counts:

(1) general denial; (2) breach of warranty.

Plaintiff files general demurrer to count (2) of defendant's plea, which is overruled, and plaintiff takes exception.

Plaintiff files replication in two counts: (1) Similiter to paragraph one of plea and (2) general issue to second count of plea.

Defendant files similiter.

Cause at issue, jury waived, and trial had.

Judgment for plaintiff in the sum of \$83.50.

CAUSE NO. 5.

Fred Schultz

vs.

Hale Paul and

William Paul

Edwin A. Frederickson,

George L. Murphy,

Attorneys for Plaintiff.

Arthur B. Hunter,

Harry A. Richwine,

Attorneys for Defendants.

Action for damages occasioned by the removal of a fence on the land of plaintiff, landlord, erected there by defendant William Paul, tenant, and plaintiff was assaulted by Hale Paul the son of William Paul while in the act of removing such fence. Demand \$5000.00.

Complaint in three paragraphs: (1) theory of master and servant relation between father and son; (2) conspiracy; (3) that father counseled and directed the son to commit assault and battery.

Defendants file separate and several demurrer.

Demurrer sustained in behalf of each defendant to the second and

third paragraphs of complaint, and leave taken to amend.

Plaintiff files amended third paragraph of complaint.

Defendants file separate demurrer to the amended third paragraph which is overruled and defendants separately except.

Defendants file answer in three paragraphs: (1) general denial; (2) *son assault demesne*; (3) defence of property.

Plaintiff files reply to the second and third paragraphs of answer, the reply being traverse *de injuria*.

Jury impanelled, cause submitted, and trial had.

Plaintiff tenders twelve instructions in writing, seven of which were indicated as given, and five refused. Defendant tenders two instructions in writing, one of which is indicated as given and one refused. To the giving and refusal to give these tendered instructions plaintiff and defendant properly except.

Defendants tender 25 interrogatories with request that they and each of them be submitted to the jury to be answered and returned with the general verdict. Then court refuses to submit interrogatories Nos. 4, 12, 22, and 23, to which refusal the defendants separately and severally except.

George L. Murphy opens argument for plaintiff and is followed by Harry A. Richwine for the defendants. Arthur B. Hunter concludes the argument for defendants and Edwin A. Frederickson closes for the plaintiff.

The court now instructs the jury in writing and files the instructions numbered from 1 to 19 inclusive and orders that they become part of the record without bill of exceptions.

The jury retire and return into

open court their verdict:—"We the jury, find for the plaintiff as against the defendant Hale Paul and we assess the damages at \$5000. And we further find for the defendant William Paul as against the plaintiff."

The jury also return the interrogatories with their answers thereto.

Hale Paul files separate motion for judgment on the answers to the interrogatories *non obstante veredicto*. Motion overruled to which defendant Hale Paul excepts.

Defendant Hale Paul files motion and twelve causes for a new trial which is overruled and he excepts.

Plaintiff now files motion and four causes for the new trial as against the defendant William Paul which motion the court overrules and the plaintiff excepts.

Judgment on the verdict for plaintiff as against defendant Hale Paul, to which said defendant objects and excepts, and judgment on the verdict for defendant William Paul as against plaintiff to which plaintiff objects and excepts.

Defendant, Hale Paul, prays an appeal to the Supreme Court of Notre Dame, which is granted and ten days in which to file general bill of exceptions. Thirty days granted said defendant to file appeal bond in the sum of \$500.00 with Francis T. Walsh and Jerome Martin as sureties, which sureties are hereby approved by the court.

Plaintiff prays an appeal to the Supreme Court which is granted and ten days given in which to file general bill of exceptions. Thirty days granted plaintiff in which to file appeal bond in the sum of \$200, which bond is hereby approved.

NOTE:—The decision of the case by the Supreme Court of Notre Dame

is elsewhere reported in this number of the Reporter, as also are the arguments to the jury made by Edwin A. Frederickson for the plaintiff and Arthur B. Hunter for the defendant.

CAUSE NO. 6.

William Hunter
vs.
John Elam

Michael E. Doran,
Edward McMahon,
Attorneys for Plaintiff.

Jerome J. Martin,
Humphrey L. Leslie,
Attorneys for Defendant.

This is an action in replevin, to recover a horse alleged to be owned by the plaintiff, in virtue of a contract of sale prior to that by which defendant purchased and secured possession from the the same vendor.

Plaintiff files complaint in one paragraph in replevin.

Defendant files demurrer to complaint, which is overruled and exception taken.

Defendant files answer in two paragraphs: (1) general denial and (2) bona fide purchaser. Demurrer by plaintiff to the second paragraph is sustained, to which defendant excepts.

Plaintiff files reply in two paragraphs to paragraph (2) of answer: (1) general denial; (2) setting up ownership.

Defendant files motion to strike out second paragraph of plaintiff's reply on the ground that it is an argumentative general denial. Motion sustained; second paragraph of reply stricken from the record; plaintiff takes exception to this ruling.

Cause at issue, trial by jury.

Before argument plaintiff tenders instructions, all of which are refused, to which the plaintiff severally excepts as to each instruction tendered and refused. Defendant tenders instructions all of which are refused and the defendant excepts severally to each ruling.

Plaintiff submits interrogatories, as also does the defendant.

Arguments by Ed. McMahon opening for the plaintiff and H. L. Leslie for the defense, while J. J. Martin closes for the defense and M. E. Doran for plaintiff.

Court instructs the jury in writing and orders instructions to be filed and made part of the record without bill of exceptions.

Jury retires and returns into open court this verdict:—"We the jury find for the defendant and against the plaintiff."

Answers to the interrogatories were also returned.

Plaintiff moves for judgment *non obstante veredicto* on the answers to the interrogatories. Motion overruled to which plaintiff excepts.

Plaintiff files motion and ten causes for new trial, which motion is overruled and plaintiff takes exception.

Defendant moves for judgment on the verdict.

Judgment rendered for defendant that the plaintiff take nothing by his action and that defendant recover his costs, to which judgment plaintiff objects and excepts.

Plaintiff prays an appeal to the Supreme Court of Notre Dame. Appeal granted and five days given to file appeal bond in the sum of \$300.00 which bond and sureties on such bond are hereby approved by the court.

Plaintiff is granted ten days to file general bill of exceptions.

NOTE:—The opinion rendered by the Supreme Court of Notre Dame on this case is to be found elsewhere in this Reporter, as also are the briefs submitted on the case by Messrs. Michael E. Doran and Humphrey L. Leslie.

CAUSE NO. 7.

Mary McClelland
vs.
William Meyers

Clement B. Mulholland,
Edwin C. Donnelly,
Attorneys for Plaintiff.
Richard B. Swift,
Thomas V. Truder,
Attorneys for Defendant.

This is an action for personal injuries alleged to have been sustained by the plaintiff, due to the careless and negligent driving of an automobile by the defendant's son. Demand \$1500.00.

Plaintiff files complain in two paragraphs: (1) on the theory of master and servant; (2) on the theory of negligence of master.

Defendant files motion to make more specific which is overruled.

Defendant files several demurrer to complaint alleging (1) failure to specify the relation between plaintiff and defendant; (2) that second paragraph does not state specific act or omission which caused the injury. Court overrules demurrer to each paragraph to which ruling on each paragraph defendant excepts.

Defendant files answer in three paragraphs (1) general denial; (2)

contributory negligence; (3) alleging ordinary and reasonable care.

Plaintiff makes motion to strike out paragraphs two and three of answer, which motion is sustained, and the defendant severally excepts.

Jury impanelled, cause submitted and tried.

Plaintiff tenders four instructions; three instructions given and one refused. Defendant tenders three instructions two of which are given and one given as modified. Defendant excepts to the giving of the plaintiff's instructions numbered 2, 3 and 4, and also takes exception to the ruling on the court in refusing his tendered instruction No. 1. Plaintiff excepts to the giving of each of defendant's instructions.

Plaintiff submits interrogatories numbered one to seven all of which are given. Defendant submits interrogatories numbered one to eleven, the court refusing all but numbers 1 and 11, to which ruling defendant excepts.

Edwin C. Donnelly opened the argument for the plaintiff, followed by Richard B. Swift for the defendant. Thomas V. Truder closes the argument for the defense and Clement B. Mulholland concludes the case for the plaintiff.

The court now instructs the jury in writing and files the instructions, ordering that they be made a part of the record without bill of exceptions.

The jury retire and return into open court the general verdict in favor of plaintiff, fixing damages at the sum of \$750.00.

The jury also return the interrogatories with their answers thereto.

Defendant files motion for new trial, which the court overrules, to which the defendant takes exception.

Judgment rendered in favor of plaintiff in the sum of \$750.00.

Defendant prays an appeal to the Supreme Court of Notre Dame which is granted and five days given in

which to file general bill of exceptions. Thirty days granted said defendant to file appeal bond in the sum of \$1000.00, which bond and sureties thereon is hereby approved.

IN THE NOTRE DAME CIRCUIT COURT

HON. F. J. VULPILLAT, JUDGE

Arguments in the Case of

FRED SCHULTZ V. HALE PAUL AND WILLIAM PAUL

by

EDWIN A. FREDRICKSON, ATTORNEY FOR PLAINTIFF

and

ARTHUR B HUNTER, ATTORNEY FOR DEFENDANTS

FREDRICKSON FOR PLAINTIFF.

Your Honor; Gentlemen of the Jury:

I don't believe that it is necessary for me to argue for any great length of time in behalf of the plaintiff in this case, Mr. Schultz, in view of the fact that certain matters, certain facts, have been brought out in the evidence submitted to you in this cause, which facts, when the law is applied to them as per the instructions that will be given you by this court, leave you with but one course to pursue in arriving at your verdict: Gentlemen of the jury, in my mind you are virtually compelled to find for Mr. Schultz as against both William Paul and Hale Paul, awarding Mr. Schultz the five thousand dollars asked for and not one penny less.

This is an action in damages; an action brought by Mr. Schultz as result of an assault and battery committed upon him by Hale Paul the 5th day of June, 1919, on a farm some two and a half miles west of the city of South Bend. For all the natural and probable consequences of this assault Mr. Hale Paul, under certain circumstances, is liable, which circumstances I believe we have conclusively proven; and for all the natural and probable consequences of this same assault Mr. William Paul, under certain circumstances, is likewise liable, which circumstances I be-

lieve we have likewise proven. Now then, gentlemen of the jury, it has not been necessary in this case for us to prove the assault itself, for both Hale Paul and William Paul, while on the witness stand, admitted the striking of the blow complained of. What then are the defenses offered by these defendants in their hope to escape liability? Well, they are two in number. Hale Paul tells you, first of all, that he struck Fred Schultz in self-defense; and, secondly, that he struck Mr. Schultz in defense of his master's property. Gentlemen of the jury, I ask you is either of these defenses sustained by the evidence?

Before you can conscientiously believe that Hale Paul struck Fred Schultz in self-defense, you must certainly believe that, prior to the assault, Mr. Schultz assumed some sort of a threatening attitude towards Hale Paul; in other words, that Hale Paul had reasonable grounds to fear bodily injury at the hands of Mr. Schultz. But what is the evidence on this point? First of all, the allegation by the Pauls, on the one side, of the fact that Mr. Schultz did assume a threatening attitude, but on the other side, the absolute denial of that fact by Mr. Schultz, with his testimony corroborated by the testimony of Mr. Leslie, an eye witness to the entire transaction. And this is not

the only evidence that must be considered by you relative to this point. This court will instruct you that, in deciding upon any disputed question, you must not rely alone upon the testimony of the various witnesses with reference to that particular question, but that you must consider all the evidence, all the facts and attending circumstances, as brought out by the evidence. And now let us review these other facts. Surely, before you can believe that Mr. Schultz ever offered to inflict bodily harm upon Hale Paul, you must believe one of two things: either that when he went out to that farm he carried in his heart the intention of committing an assault upon Hale Paul, or else that, after reaching the farm, Mr. Schultz was so angered or incensed by the deeds or words of Hale Paul that he was suddenly rendered willing to do Hale Paul personal injury. But does it appear that Fred Schultz sought out Hale Paul upon arriving at the farm as he unquestionably would have done had he intended to assault him? Most certainly not. He proceeded at once to the fence he had gone out to remove, paying not attention to Hale Paul, some hundred feet distant in the corn field. And now just what took place there at that fence? First of all, Hale Paul came running over yelling out, "Mr. Schultz, you leave that fence alone," to which remark Schultz paid no attention. And then what happened?

A little later Hale cried out, "Damn you, Schultz, if you don't stop I'll make you stop," to which remark Schultz again paid no attention, whereupon Hale Paul merely repeated the identical words, "damn you, Schultz, if you don't stop I'll make you stop," whereupon, the Pauls

claim, Mr. Schultz then assumed a threatening attitude. Gentlemen of the jury, without a doubt Hale Paul made use here of some very forcible language, but my theory is, and certainly your conclusion must likewise be, that if these strong words could ever have so roused the anger of Fred Schultz as to incite him to the commission of an assault upon Hale Paul, they would most certainly have had that effect the first time that they were addressed to him. And yet the Pauls would have you believe, in spite of the testimony of Mr. Schultz, backed up by the testimony of Mr. Leslie, and in spite of all these inconsistent circumstances, that Mr. Schultz did assume a threatening attitude.

And here is still another point. Recall, if you will please, the fact as brought out by the testimony of the defendants themselves—and I am very careful to question both Hale Paul and William Paul on this point—the fact that Hale Paul picked up that fence rail some time prior to the time at which the Pauls claim that Fred Schultz assumed a threatening attitude. What did Hale Paul pick up that club for, if not for the very purpose for which it was used only a few moments later, namely, of striking Mr. Schultz upon the head with it with such force and violence as to flatten him to the ground senseless? What did Hale Paul pick up that club for, I ask you, did he want to pick his teeth with it? Recall too, if you will, the manner in which William Paul warned his son not to strike Mr. Schultz, of how upon his arrival at the fence he cried out, "You'd better not strike him, Hale." What if anything do these words indicate, if not, that either the Pauls

had conspired to assault Mr. Schultz, or else that Hale is possessed of a most violent and ungovernable temper? And yet Hale Paul tells you that he struck in self-defense.

And, gentlemen of the jury, even if Hale Paul had actually acted in self-defense, had used force as a means of self-protection, it could not be contended by these defendants that he only used such force as was reasonably or seemingly necessary under the circumstances. It must be remembered that at all times during the affair out there on that farm a five-foot fence was between the two men, that Hale Paul was in the corn field, and that Mr. Schultz was in the clover field, and that a substantial five-foot barrier intervened between them. Certainly the position of Hale Paul was actually and seemingly much less dangerous than it would have been had there been no fence in existence. And it was unquestionably unnecessary for Mr. Hale Paul to reach over that fence and to deal Mr. Schultz a blow so vicious that it leveled him to the ground unconscious. And, gentlemen of the jury, the law does not countenance the use of excessive force by one really acting in defense of either person or property, and this court will so instruct you. I tell you, gentlemen of the jury, that Hale Paul has failed utterly to prove up in this case, either the plea of self-defense or defense of his master's property, such as is recognized by the law.

Now then, relative to the liability of Mr. William Paul; I don't intend to spend much time on that phase of this case. If Hale Paul is liable for this assault, as undoubtedly he is, then William Paul is also liable, for the master is always liable for the

tortious act of his servant committed by such servant while acting within the scope of his employment and in furtherance of his master's business or interests. On the witness stand both Hale Paul and William Paul testified that on the 5th day of June, 1919, and for some time previous thereto Hale Paul was and had been in the employ of his father, acting as his servant and assisting him in the operation of his farm. And both defendants also admitted that at the very time the blow was struck Hale Paul was such servant, acting within the scope of his employment and in furtherance of his master's interests, namely, attempting to prevent the removal of that division fence. And so I say, that I don't feel the necessity of tarrying long upon the proposition of William Paul's liability.

And now just a few words with reference to the damages asked for and I am through. Gentlemen of the jury, surely you must realize that no verdict that you could possibly return could ever right the wrong that has been committed upon Mr. Schultz; that no verdict that you could possibly return could ever place him in the position he was in prior to the 5th day of June, 1919. And surely, therefore, you must feel it your solemn duty to award him such monetary damages as will compensate him as best they can for the loss he has sustained. And now what are the proper elements of his damages? Are they merely the medical and nursing expenses he has incurred, the wages he has already lost, the mental and physical suffering he has endured? Hardly. Dr. Royans has told you that Mr. Schultz is permanently injured, that he is suffering from an

organized thrombus resulting in the permanent paralysis with which he is afflicted; and has told you further that Mr. Schultz will never again be able to do a day's labor. Oh! I am not unmindful, gentlemen of the jury, of what Dr. Allney had to say with regard to paralysis, bloodclots, etc., but I want to tell you that, personally, I haven't very much respect for the medical opinion of a physician who would have me believe that human heads don't vary in shape and size; and who is wont to compare the human blood stream to the lubricating system of an automobile. Why, gentlemen, I have just a little too much regard for the greatest piece of handiwork of God to believe that the human blood stream is but a lubricating system. I wonder what Dr. Allney thinks its purpose is—perhaps a means of oiling the joints. No I am not fearful of the effect of Dr. Allney's testimony. And now if Fred Schultz is permanently paralyzed, as unquestionably he is, and incapable of ever doing another day's labor, what additional loss has he sustained as result of this tortious assault? Simply the complete loss of all such earnings as he might have made in the future; and now when one stops to consider that, as per the testimony of Mr. Schultz himself and of Mr. O'Hara, his employer, Mr. Schultz had for some time previous to 5th day of June, 1919, been earning a salary of one hundred and fifty dollars per month; and that, as per the testimony of Mr. Doran and as per the American Table of Mortality, Mr. Schultz has expectation of life amounting to some twenty-four years, one needn't be possessed of exceptional mathematical ability to figure out that the present value of

such a salary most certainly amounts to a sum much greater than the five thousand dollars asked for. But, gentlemen of the jury, why should you haggle over the question of damages? Look at Mt. Schultz! What is he today but a mere miserable shadow of his former self, a misery to himself, a misery to his family, a misery to everyone with whom he comes in contact; a man not only deprived of the ability of ever doing another day's labor, but a man deprived of something even more valuable than that—a man deprived of the satisfaction that comes to every man at the conclusion of an honest day's toil. and all as the result of the malicious and tortious assault committed upon him by Hale Paul? Why, gentlemen of the jury, can there be any doubt in your mind of the fact that, if Fred Schultz were to have his choice, he would rather have the health and vigor and physical well-being that were his prior to the 5th day of June 1919. than to have you award him a hundred thousand dollars damages! So now go into the jury room, gentlemen of the jury, and consider the evidence in this case, and consider the law, and then all that I ask of you is that you of your moral consciences. act in accordance with the dictations

HUNTER FOR DEFENDANTS

Your Honor—Gentlemen:

Not only do we believe, as has been ably pointed out by my co-counsel in his argument, that the evidence in this case is clearly in favor of the defendants, separately and jointly, but we are also convinced that the law is clearly in our favor on the issues involved.

There are at least four phases of

the alleged liability of the defendants in this case on the paragraphs of plaintiff's complaint. They may be represented by four questions.

1. Is William Paul liable on the first paragraph of the complaint?

2. Is William Paul liable on the amended third paragraph of the complaint?

3. Is Hale Paul liable on the first paragraph of the complaint?

4. Is Hale Paul liable on the amended third paragraph of the complaint?

It shall be my purpose to treat these four questions.

William Paul is not liable on the plaintiff's allegations in the first paragraph of complaint because: firstly, the mere relationship of parent to child does not make the father liable for any tort committed by his child; secondly, the plaintiff has not shown by a preponderance of the evidence that the son at the time of the assault was working as his father's servant; thirdly, and most important of all, there was no unlawful assault committed by Hale Paul as alleged in the first paragraph. If no such assault was committed, and you have heard the evidence, gentlemen, clearly showing that it was not, then certainly William Paul is not liable on any theory for a tort never committed.

Then, too, William Paul is not liable on the plaintiff's allegations in the third paragraph of complaint because it nowhere appears in the evidence that William Paul did or said anything to induce his son to go to the place where the plaintiff was, or that he aided, abetted, encouraged, or counselled any retaliation, even for the assault which the plaintiff committed before he was downed by a blow from the light stick in the hands

of the boy Hale Paul. Rather it does appear that he at the time counselled his son and called to him not to strike the plaintiff, under and provocation or assault, for the reason that he knew the plaintiff's general reputation for turbulence of character in the community in which the plaintiff resides. If William Paul did not counsel, aid, or abet his son, even to defend himself, certainly plaintiff's failure to prove facts sustaining his third paragraph of complaint releases William Paul from all liability thereon. The learned court will instruct you that every material fact alleged by the plaintiff must be proved by him by a preponderance of the evidence.

But let us get down to the two parties most intimately involved in this case and try to discover what, if any, liability attaches to the defendant Hale Paul from the proof or lack of proof of facts alleged in the plaintiff's first and amended third paragraphs of complaint.

The defendant Hale Paul is charged with the direct commission of an assault and battery in each of these paragraphs. The allegations as to Hale Paul's part in the alleged tort are practically the same in both cases. Suffice it to say that either the second or the third paragraph of answer alleges facts sufficient to free Hale Paul of any liability for any act of his directed against the plaintiff on the fifth of June last.

It is the law and the court will instruct you that not only must the plaintiff prove the operative facts of at least one of his paragraphs of complaint, but he must also meet successfully as to each paragraph the special items of defense set up by each of the defendants in their second and

third paragraphs of answer. The court will instruct you that if you believe that Hale Paul committed an assault and battery on the plaintiff, in the defense of his property rights or in defense of his person, and that at the time Hale Paul was himself without fault and in a place where he had a right to be and that he believed that he would suffer bodily harm at the hands of the plaintiff, and, while so believing, struck the plaintiff, using no more force than was necessary to defend himself against the threatened injury he believed was about to be inflicted upon him, that he struck the plaintiff in the proper and reasonable defense of his property rights, that if you believe either of these states of facts to have existed, then you must find for the defendant Hale Paul. Certainly, gentlemen, both of these justifications, as has been shown in the argument of my co-counsel on the evidence in this case, did exist.

We are not contending that the mere words of the plaintiff at the time just preceding and at the time of the threatened injury to Hale Paul were sufficient provocation or excuse to entitle the defendant Hale Paul to "whale away" and slap the plaintiff over the left ear, but we do contend that even such words strengthened the defendant Hale Paul in his belief, already existing, that he was in danger of bodily harm, and when coupled with the fact that the plaintiff advanced towards him in a menacing attitude and with a spoken threat, that belief became so acute that Hale Paul was absolutely certain, as would any one of you gentlemen have been under like circumstances, that he was in grave and immediate danger of bodily harm.

Remember also that Hale Paul was

in a place where he had a right to be; on a farm leased from the plaintiff by William Paul for a cash rental and on a farm in the crops and stock of which, the plaintiff has shown absolutely no interest; and at a fence on that farm, which fence was plainly a temporary fence, which fence, for some whimsical reason that the plaintiff has not seen fit to allege or disclose, the plaintiff wanted to remove and was arbitrarily removing at the time of the alleged assault on June 5, 1919, and which fence, moreover, was placed there without a word of complaint on his part; that, finally, this fence was at the time the personal property of the occupants of the farm at the time and if the plaintiff had succeeded in accomplishing his evil purpose of tearing down the whole or any part thereof, and carrying any portion of it away, such plaintiff would have been guilty of larceny. Therefore, we say that Hale Paul was free from fault and was in a place where he had a right to be.

Furthermore, Hale Paul used the only reasonable means at hand to defend his person and his property and certainly used no more force than was necessary to defend himself against the threatened injury that he believed was about to be inflicted upon him. This phase of the case has been so ably presented by my colleague in his argument that I need only mention it here.

If the plaintiff really thought that he was entitled to have this fence removed, why did he not seek an appropriate remedy in equity or seek his actual damages in law? The courts have even been open to him for such purpose. He had no right to take the law in his own hands and then be heard to complain if his own

forceful, unlawful means were met by other means, perhaps forceful, but certainly no more so than was actually necessary under the circumstances. Perhaps he knew himself to be in the wrong. Perhaps he had consulted an honest lawyer and that lawyer had told him that it is the general rule of law that when a landowner consents expressly or by implication to the placing of an addition on his land, without an express agreement as to whether it shall become a part of the realty or remain personalty, an agreement will be implied that it is to continue personal property. In any event he showed by the very violent manner in which he dealt with the fence that he realized that it was not a fixture but was severable. He seemed to forget, however, that the right to remove this fence or to refrain from removing the same, rested with his tenants who had put up the fence.

Perhaps you are saying to yourselves, "Oh, well, what have all these propositions to do with the case?"

Gentlemen, I am merely endeavoring in my humble way to present to you the case of the defendant William

Paul and the case of the defendant Hale Paul and convince you, as I have long ago become convinced, that this whole suit is the result of malice. You had the opportunity and duty to watch and compare the demeanor and candor of the plaintiff and the defendants in the court room. You have had every opportunity to note the apparent lack of any of those symptoms or traces of paralysis in the plaintiff from the moment that he left the witness stand. You have had the chance to see before you in his every littleness this plaintiff who threatened to "get even" with these defendants because they saw fit to resist force with force. Doubtless you have already formed an opinion in your own minds which of the witnesses were telling the truth. The learned court will instruct you that you may consider the demeanor of each and every witness on the stand along with all other facts and circumstances in the case. We believe that you will view this case as men and that you will deal justice as men. We know that any act of either defendant was fully justified at the time and we ask of you only simple justice.

JUNIOR MOOT COURT

CAUSE NO. 1.

John Hamilton

vs.

Charles Simpson

Alden J. Cusick and

Joseph H. Flick,

Attorneys for Defendant.

PLAINTIFF'S POINTS AND
AUTHORITIES.

Action for Breach of Contract.
Damages \$100.

Charles Simpson, riding in company with a friend, passed the farm residence of John Hamilton and, seeing a sow and five sucking pigs on the Hamilton farm, stopped, examined them, then drove to the barn yard of Hamilton where he opened negotiations with Hamilton for the purchase of the pigs. As a result of the talk it was agreed by and between them that Simpson was to buy the sow and pigs for the stipulated price of \$83.50 and Hamilton was to sell and deliver them to Simpson the next day at his residence in South Bend, Indiana, and receive payment.

Next day Hamilton brought the sow and pigs to the residence of Simpson in South Bend as agreed, but Simpson refused to accept or receive them or permit Hamilton to deliver them, giving as his reason that he feared the pigs might have the cholera; that he would not consent to accepting delivery of the sow and pigs unless Hamilton would submit them to examination for the purpose of determining whether or not they had cholera, and for the further reason, as Simpson stated, that he did not think he could be forced to take the pigs and sow. Who should recover and why?

George D. O'Brien and,
Donnelly C. Langston,
Attorneys for Plaintiff.

The fact in this case that the hogs are not goods, but are chattels will take the oral contract out of the operation of the Statute of Frauds.

Burrills Law Dictionary: Goods-strictly seems applicable only to inanimate movables, being in this respect less comprehensive than CHATTELS, which include animals. 19 Ill. 584; 133 Ind. 472.

The word CHATTELS is of more than general signification than GOODS. 56 Mo. 58, 20 Mich. 357.

CHATTELS is more comprehensive than GOODS and includes animate as well as inanimate property. 159 Pa. St. 220.

2. Since the oral contract has been taken out of the operation of the Statute of Frauds it is possible to make a constructive delivery of the CHATTEL. Since this is the case title has already passed to the purchaser in this case and the vendor was in the position of bailee after the passing of the title.

Where, by the contract itself, the seller appropriates to the purchaser a specific chattel, and the latter thereby agrees to take that chattel and pay the stipulated price, the parties are then in the same situation as they would be after a delivery of the goods in pursuance of the general contract; the appropriation is equivalent to a delivery and the assent of the purchaser to take the specific chattel and pay the price is equivalent to acceptance. The effect of the contract

therefore is to vest the property in the purchaser. 6 W. Va. 255; 17 L. R. A. (N. S.) 807; 61 S. E. 235 (Rule Stated); Cited in 50 L. R. A. (N. S.) 124.

3. If the purchaser inspects for himself the specific goods sold and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *CAVEAT EMPTOR* applies even though the seller presumes the purpose for which the goods were required. 30 Am. Rep. 639; 64 N. Y. 411; 22 Fed. Rep. 52.

Where the means of knowledge are at hand, and equally available to both parties, and the subject is open to the inspection of both parties alike, there is no implied warranty. 33 La. Ann. 1364.

4. There was no implied warranty that the hogs were sound and the vendee cannot set up the fact that the vendor warranted the hogs.

DEFENDANT'S POINTS AND AUTHORITIES.

I The Contract of Sale in this case is governed by the Statute of Frauds.

Burns Annotated Statutes of Indiana 1908 Vol. III, Sec. 7469: "No contract for the sale of any goods for the price of \$50 or more shall be valid unless the purchaser shall receive part of such property or shall give something in earnest to bind the bargain or in part payment or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby

or by some person thereunto by him lawfully authorized."

The contract in this case is parol and for the sale of goods of more than \$50 in value.

Hogs are "goods" within the meaning of the Statute of Frauds I) *Vawter v. Griffin et al*, 40 Ind. 600—"Webster says: 'Goods, n. p.; movables, household furniture, horses, cattle, utensils'. Raleigh says: 'Syn.: goods comprehend furniture or other moveables or movable estates, as cattle, implements, utensils.'"

2 Words & Phrases Vol. IV, Page 3131: "The words 'goods, wares and merchandise' are equivalent to the term 'personal property' and are intended to include whatever is not embraced by the words 'lands, tenements and hereditaments.'"

3 Cyclopedia of Law & Procedure Vol. XX, Page 1267.

4 *Tigany on Sales*, Page 72.

No acceptance; no part payment; no memorandum in writing to the contract of sale in this case.

1 Mere delivery of goods by the purchaser is not sufficient; he must receive and accept the same. In *Frankie v. Trulove*, 54 N. E. 461 Ind Appellate, it is said: "The receipt of property contemplated by the Statute which will take the contract of sale out of the operation of the Statute the seller cannot by this act of de-involves delivery by the seller, but livery render the contract enforceable against the purchaser without receiving the goods or some part thereof by the purchaser as his property under the contract."

2) *Dehority v. Paxton*, 97 Ind. 253, "The seller must part with his control for the purpose of vesting the right of property in the buyer who must receive with such intent on his

part." See also *Shindler vs. Houston*, 1 N. Y. 261; *Hooker v. Knab*, 26 Wis. 61; *Stone v. Browning*, 51 N. Y. 211; *Johnson v. Cuttle*, 105 Mass. 447.

II. The Damages sought in this case are improperly measured and excessive.

The measure of damages for the breach of an executory contract of sale by the purchaser is the difference between the contract price and the market price of such goods at the time the contract was broken.

In *Singer v. Chaney*, 51 S. W. 813, the Kentucky Court holds: "that where the buyer of logs had a right to inspect them and to reject such as did not meet the requirements of the contract that the title did not pass until the logs were accepted and therefore the measure of damages for the buyers refusal to take and pay for the logs was not the contract price but the difference between the price agreed to be paid for the logs at the time and place of delivery and the sum for which the seller could, by reasonable effort, have sold them after the buyer had refused to accept them." See also: *Acme Food Co. v. Older*, 17 L. S. A. (N. E.) 808; *Dollman v. Studebaker*, 52 Ind. 286.

Judgment for Defendant.

CAUSE NO. 2.

John Kent, by William
Jones, next friend

vs.

The Michigan Central
Railroad Company.

Action for Damages,—\$10,000.

The defendant, in operating its road, carries on its trains, to be used by its servants, certain signal torpedoes, which were apparently harmless, but which in fact were dangerous explosives. That a train of the defendant, carrying such torpedoes was stopped by its servants at a water tank and station in South Bend; that said servants took some of the torpedoes and placed them on the track in an exposed place without any cause or necessity for doing so, but merely for the fun of seeing them explode; that the defendant's train negligently failed to explode all these torpedoes and left them exposed in a public place where people generally were accustomed to pass as well known to the defendant and without objection by the defendant, a place on its right-of-way.

That the plaintiff, John Kent, a boy of ten years, was standing near the station with other boys when this train stopped; that just after the train moved on, another boy of ten years who had been walking along just along behind the train to the knowledge of the servants of the train, saw the unexploded torpedo and picked it up and carried it to where the plaintiff and other boys were standing and showed it to them, not knowing what it was or its dangerous character, some 150 feet from where he picked it up to where he carried it. That this boy handed the torpedo to the plaintiff who also did not know its dangerous character, that plaintiff inspected it and while so doing it exploded and occasioned considerable damages to the plaintiff by reason of personal injuries, for which he now brings this action through his next friend. Should plaintiff recover or not and why?

Walter A. Rice and
George C. Witteried,
Atty's for Plaintiff
Charles P. J. Mooney and
Peter Lish,
Atty's for Defendant

PLAINTIFF'S POINTS AND AUTHORITIES.

I. The case of *Harrimann vs. Pittsburgh, C. & St. L. R. Co.*, 12 N. E. 451, is on all four with the case at bar, the facts are identical with those in this case.

In that case a child of ten years of age was injured by reason of the explosion of a railway torpedo which the servants of the company had placed upon the track at a place near the station and where the public were wont to gather, a playmate of the child picked up the torpedo and while handling it, it exploded, injuring the plaintiff. The court held: That the railway company was liable for the injury caused by the negligence of their employees, who placed the torpedo upon the track at where children were wont to play.

This case is the leading case along this line and the holding of the court in that case has been sustained in the following cases: 78 S. E. 816; 38 S. E. 356; 47 Ohio St. 387; 24 N. E. 658-8 L. R. A. 464; 11 R. C. L. 664-20 R. C. L. 87.

II. Attractive Nuisances — The following case held that anything in the nature of explosives is attractive to children and persons using them must exercise the utmost care in using and handling them, especially if they are liable to be accessible to children. *Mattison vs. Minn. & N. W. R. R. Co.*, 95 Minn. 477; 104 N. W. 443; 70 L. R. A. 503, given in the notes in L. R. A. (N. S.) 19-1128.

III. For a definition of Proximate cause see *Intervening or concurrent causes*, 22, R. C. L. 199.

A railroad company is not relieved from liability to a child injured by an improperly fastened turntable, by the fact that it was put in motion by the playmates of the injured child. 22 R. C. L. 167.

A person is generally held liable for any injury resulting for leaving explosives in a place accessible to children, especially if it is a public place or a place where children are wont to congregate under circumstances which do not make them wilful trespassers.

Wells vs. Gallagher, 144 Ala. 363. 3 L. R. A. (N. S.) 759.

St. Louis R. R. Co. vs. Gaggner, 116 S. W. 948. 52 L. R. A. (N. S.) and notes in 24 L. R. A. (N. S.) 586.

IV. The act of the child causing the explosion is generally held not to be such an intervening cause as will relieve the defendant of liability. See 22 L. R. A. 167.

DEFENDANT'S POINTS AND AUTHORITIES.

I. The act of the trainmen in placing the torpedoes on the track cannot be deemed the act of their master, i. e., the railroad company. See *Sullivan vs. L. & N. R. R. Co.*, 74 S. W. 171; *Morier vs. St. Paul Ry.*, 17 N. W. 952; *Smith vs. N. Y. R. R. Co.*, 78 Hun. 524; *Young vs. South Boston Ice Co.*, 150 Mass. 527; *Birnbaum vs. Philadelphia R. R. Co.*, 94 Atlantic 925; *John vs. Birmingham Realty Co.*, 55 South 801; *Bowley vs. O'Connell*, 27 L. R. A. 173; *Snyder vs. Hannibal, etc., R. R.*, 60 Mo. 413; *Davis vs. Houghtelin*, 14 L. R. A. 737.

II. The act of the child in handling the torpedo to the plaintiff was

such an intervening cause as broke the casual connection between the alleged negligence of the trainmen and the injury to the plaintiff. See *Kinkbeiner vs. Solomon*, 24 L. R. A. (N. S.) 1257.

III. The torpedo is not a dangerous agency. See *Mize vs. L. & N. R. R.*, 16 L. R. A. 1084; *Kleebauer vs. Western Fuse Co.*, 60 L. R. A. 377.

The fact that the person responsible for the intervening act is a child does not affect the case, but, if the act itself is an intervening effective cause, it will break the casual connection. See *Finebeiner vs. Solomon*, 24 L. R. A. (N. S.) 1257; *Otter vs. Cohen*, 1 N. Y. Supp. 430; *Loftus vs. Dehair*, 65 Pac. 379.

The plaintiff is not conclusively presumed to be incapable of contributory negligence. In fact, there is no presumption either way regarding his capacity. See *Terre Haute R. R. Co. vs. Tupperbach*, 9 Ind. App. 422, 36 N. E. 915; *Riderbaur vs. Kansas City R. R.*, 13 S. W. 889; *Elwood vs. Addison*, 26 Ind. App. 23, 59 N. E. 47; *Citizens Street Ry. vs. Stoddard*, 10 Ind. App. 278, 27 N. E. 723.

The defendant is not an insurer of the safety of children because he is the owner of appliances that may appeal to their youthful fancies. See *Lewis vs. C. C. C. & St. L. R. R. Co.*, 84 N. E. 23; *Galveston Ry. vs. Cunie*, 10 L. R. A. 307; *Ballard vs. L. & N.*, 16 L. R. A. 1052; *Fitzmaurice vs. Conn. R. Co.*, 3 L. R. A. 149; *Clark vs. Richmond*, 8 Am. St. Rep. 281; *Daniels vs. N. Y. & N. E. Ry. Co.*, 28 N. E. 283; *Frest vs. Eastern R. R.*, 9 Atl. 190; *Union Stock Yard & Transit Co. vs. Butler*, 92 Ill. App.—; *Ryan vs. Tomar*, 87 N. W. 644.

Judgment for Plaintiff.

CAUSE NO. 3.

John Jones
vs.
Samuel Smith

Action on Note. Demand \$100.

Samuel Smith, defendant, signed and delivered his promissory note payable in Bank for \$100 to Richard Roe. Jones purchased the note from Roe before its maturity, paying valuable consideration therefore.

The facts are that Smith did not think he was signing a note; that he was merely signing an order for medicine and treatment; that Roe so represented and stated to him that the paper he, Smith, signed was an order for medicine; that he could neither read nor write and so stated to Roe at the time of the transaction; that he stated to Roe that he would sign the paper if it was an order for medicine; and that Roe thereupon gave the paper to a stranger who happened to be present at the time who read it and stated that it was an order for medicine; that he was thus misled into signing the paper and except for these facts would never have signed it; that he intended to sign only an order for the medicine he was purchasing at the time. The defendant's wife and son were within the building where this transaction occurred, but were not called and consulted by the defendant at the time. Should the plaintiff recover or not and why?

James L. O'Toole and
Frank M. Franciscovich,
Attorneys for Plaintiff.

Henry W. Fritz and
Hugh Gibbons,
Attorneys for Defendant.

PLAINTIFF'S POINTS AND AUTHORITIES.

1. 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 there or even ad against a bonafide purchaser for value provided that in so doing or signing he acted without negligence.

However this rule does not apply because defendant was negligent—the degree of care is clearly stated in 13 N. W. R. 132.

2. When one of two innocent parties must suffer for the fraud of another the loss shall fall upon the one who enabled the third party to commit the fraud.

This point is brought forward in 29 Iowa 498.

3. The defendant is estopped from maintaining the defense of fraud against the Bonafide holder because of negligence.

This point is illustrated in 77 Cal. 572; 73 Pas. 286. Also 79 Ind. 80, and 29 Ohio 473.

4. The definition of negligence: (Ruling case Law Vol. 10, page 1) Negligence is the lack of diligence, omission of due care, failure to use the efforts or like precaution which an ordinary prudent person would employ in like circumstances.

The degree of diligence required: 13 N. W. R. 892.

5. Fraud in obtaining a note does not affect a bonafide holder—13 Ala. 106.

DEFENDANT'S POINTS AND AUTHORITIES.

I. An illiterate maker of a note and mortgage for \$1,000, who is fraudulently induced to sign them supposing that he is signing a lease and a note for \$100 to a different payee, is not liable on the note even if it is in the hands of an innocent purchaser, unless he was guilty of negligence in making it, since he was

never a party to such a contract. *Green v. Willie*, 36 L. R. A. 435; *Gibbs vs. Linabury*, 22 Mich. 479 Am. Rep. 675; *First Natl. Bank vs. Deal*, 55 Mich. 592; *Webb vs. Carlin*, 78 Ind. 403-51 Mich. 563; 35 Neb. 651; 29 Ohio St. 467-9 Am. Rep. 548.

II. No one can be made a party to a contract without his own consent. *Briggs v. Ewart*, 51 Missouri 245 (11 Am. Rep. 445); *Martin v. Smylee*, 55 Miss. 577; *Corby v. Weddle*, 57 Miss. 452.

III. Although a maker is not liable to read or write, yet if he signs a paper without any attempt to learn the contents he will be guilty of negligence which will preclude his defense of fraud. *Fisher v. VonBehren*, 70 Ind. 19.

IV. Where a party to an instrument undertakes to read it over in the presence of the other party in order that the latter may understand its contents before signing it, the party reading it is morally bound to read it correctly, and the other party has a right to rely upon its being so read and need not examine it himself. *Anderson v. Walker*, 34 Mich. 113. See *Baldwin v. Bucher*, 86 Ind. 221; *William et al. v. Stall*, 79 Ind. 80; *Webb v. Corbin*, 78 Ind. 403.

St. Joseph Loan & Trust Co.
of South Bend, Indiana

vs.

First National Bank of
Chicago, Illinois.

Action for \$1000 Note Collection.

CAUSE NO. 4.

Plaintiff sues to recover the amount of certain checks which it claimed to own and which came into the defend-

ant's hands and which it claims to own, under the following facts:

Plaintiff sent the checks to the Peoria National Bank of Peoria, Illinois, endorsed as follows: "For collection pay to the order of F. G. Bryan, Cashier," Bryan being the cashier of the Peoria National Bank.

The Peoria Bank then sent the checks to the defendant. The defendant and the Peoria Bank at that time and for a long time prior thereto had an agreement by which the two Banks collected all the commercial paper for one another thus sent to them, and instead of remitting the proceeds of the collections just credited the amounts of such collections to their accounts between them.

After sending these checks to the defendant the Peoria Bank became insolvent, heavily indebted to the defendant. Defendant collected these checks and gave credit to the Peoria Bank on its account as usual under their agreement.

Plaintiff sues defendant to recover the amount of the checks. Defendant of contract between itself and the ant insists that there is no privity plaintiff; that plaintiff is a third party and can have no rights under the agreement between the Peoria Bank and itself.

Who should recover and why?

Frank E. Coughlin and
Joseph E. Sanford,
Attorneys for Plaintiff.

Gerald Craugh and
William S. Allen,
Attorneys for Defendant.

PLAINTIFF'S POINTS AND AUTHORITIES.

1. A legal title to commercial paper restrictively endorsed for collection only cannot be acquired from a bank to which it is sent for collection. *Lyons vs. Wisconsin National Bank*, 26 Atl. 520. Title remains in the endorser. *National Butchers and Drovers Bank vs. Hubbell*, 117 N. Y. 384.

2. An endorsement for collection of negotiable paper by the owner is notice to every bank and person into whose custody it may come that the owner has not parted with his title, but merely with possession for the purpose of collection. *National Bank vs. Johnson*, 69 N. W. 49.

3. Title remains with the first owner who restrictively endorses the paper. 3 Fed. 257; 33 Fed. 408; 26 Atl. 520; 19 Fed. 302; 22 N. E. 1031.

DEFENDANT'S POINTS AND AUTHORITIES.

Defendant contends that it is not liable because title to paper passes to the Peoria Bank when sent to it by plaintiff and the Peoria Bank must be looked to for relief. *Plumes County Bank vs. Bank of Rideout S. & Co.*, 47 L. R. A. 552; 131 Pac. 360. Also *Davis vs. Elmira Savings Bank*, 161 U. S. 275; 16 Sup. Ct. Rep. 502.

Judgment for Plaintiff.

ONLY OUR OWN OPINION

"CONSTITUTIONAL PROHIBITION" IS UNCONSTITUTIONAL.
WOMAN'S SUFFRAGE AMENDMENT IS CONSTITUTIONAL.

THE DEFENSE OF RASTUS BROWN*

*Written as part of a mock trial for a negro minstrel, by Francis J. Vurpillat, ex-Judge of the 44th Judicial Circuit of Indiana and a member of the Law Faculty of the University of Notre Dame, Indiana. Published in Case and Comment, January, 1918, issue.

Yo' Hono' and Genmen of dis Jury:

Dar's pore Rastus Brown in de toils of de iaw. And what fo'? Fo' de stealin' of a chicken—fo' de takin' of a chicken. Now listen to de formal charge:

United States of America,
State of Indiana,
County of Nowhere,
Town of Oblivion.

In de Piecè of a Justice Court.

Joe Johnson, de town marshal, and Jim Jackson, de night watch, both being duly sworn, on deir oaths say dat in said county, on de moonlight night of de 24th day of December, one thousand nine hundred sixteen, *Annie Domino*, one Rastus Brown, early and late of said county, did den and dere feloniously and unlawfully steal, take, purloin, pilfer, and carry away of de personal belongings of Mister Wyandotte White one chicken, commonly called a rooster, but uncommonly called Chief Cockscomb, of de fictitious value of five hundred dollars, but of de real value of ten cents a pound, weighin' 3 pounds, bein' 30 cents,—against de peace and dignity of de aforesaid Johnson and Jackson and contrary to de Justinian and Blacks'-tonian codes.

Now, Genmen of dis Jury, Ma Friends, Negroes, Countrymen, lend

me yo' ears; and if yo' have any tears to shed prepare to shed dem now. I come not to bury pore Rastus but to save him. Yo' may think because de testimony shows dat Rastus was caught red'handed—I mean black-handed—in de act; dat he was seen to emerge from Mister White's chicken coop with de aforesaid chicken under his arm; dat he was trailed by de footprints on de sands of time he made from dat chicken coop door to de back door if his chicken; and dat he was caught dere with de aforesaid chicken in his possession; dat dere am no possible defense for pore Rastus under de law. But I say to you, Genmen of de Jury, dere is a defense fo' him. I appeal to you upon de higher, de supreamer, de unwritten law of *dementia Africana*. And if de learned Piece of a Justice should say dat such a law cannot be invoked, I would jus' call yo' attention to de illustrious example of Abraham Lincoln. When Abraham Lincoln was about to issue de famous Emancipation Proclamation freein' all de Negroes in de land from ordinary slavery, de charged him with breakin' de Constitution he had sworn to sustain. But he answered dat he would sustain de Constitution if he had to break it to sustain it. So, Gemmen of dis Jury, when yo' are about to issue your emancipation proclamation freein' pore Rastus from dis criminal servitude and court or anyone else says yo' are doin' violence to de law yo' took oath

to sustain, tell dem in de language of Lincoln dat yo' are goin' to sustain de majesty of de law if yo' have to break it to sustain it. Why dere's no law in de universe but what's broken sometime or udder. Even de law of gravitation and de laws of de planetary system were broken; fo' don't yo' know de Good Book says dat Joshua commanded de sun and de moon to stand still and dey did stand still.

Now I'se goin' to prove to yo' Gemmen of de Jury, dat de nigge' has de right to take de chicken. De chicken and de Negro belong togedder. Dey sustain de most pleasant relations togedder in dis world, and if dere's no chickens in de nigge' heaven den I say to you dere's no heaven fo' de nigge's. Ever since de days of de flood when de ark rested on A-rat and Noah and his sons started de red, white and blue races, and his son Ham started de black race—ever since de days of Ham de egg has gone with it. And jus' as shuah as de Negro is de descendant of Ham, and de chicken is descendant of de egg, and jus' as shuah as ham and eggs go togedder 'mong de white folks so do de nigge' and de chicken go togedder. Why, Gemmen of de Jury,

"Breathes dere de (Negro), with soul so dead

Who never to himself hath said,
This is my own, my native (chicken)?"

Freedom to de Negro without de right to take de chicken would be no freedom at all; for de most natural propensity, de strongest proclivity, de intensest desire, of de Negro is to take de chicken. Abraham Lincoln knew dis when he freed de nigge's, and you know dat freedom was unlimited. So de nigge' has de civil right as well as de natural right to take de chicken.

Now dese am de general principles

upon which dis intelligent jury will surely free dis Negro. But dere are some particular reasons why dey will free him. Why, dis love of de chicken was not only born in pore Rastus but it was bred in him. He was taught to take de chicken at his mudder's knee. One time when little Rastus was only seven years old, de colored minister came to visit de family and he gave Rastus a quarter and told him to buy himself a chicken. But jus' as soon as he minister was gone Rastus' mudder said to him: "Rastus Yo' dun give dat 25-cent piece to yo' mudder and yo' go get dat chicken in de natural way." And I suppose Rastus obeyed de teachin's of his good mudder.

And now we have come to de moonlight night of de 24th of day December when dis awful crime was committed. Pore Rastus had prayed dat de Lord might send him a chicken fo' de Christmas dinner; and yo' may believe me or not, but I will stake my professional reputation and personal reputation on de truthfulness of de story dat, after pore Rastus prayed in vain fo' three days and three nights dat de Lord might send him a chicken, he was about to despair when a ray of light struck him and he heard a small voice say to him: "Rastus, don't yo' know dat de Lord helps dem dat help demselves? Instead of sayin' 'Lord send me a chicken, say 'Lord, send me to a chicken.' " Rastus did, and soon he was on his way dat fateful moonlight night of de 24th of December, happy to think dat he would have a chicken dinner and a Merry Christmas fo' his family. But alas! how different dat pleasant dream from dis awful reality. Dar's pore Rastus in de toils of de law, chained to de ball, broken-hearted

and downcast.. And dere by his side sits his pore widowed wife, cryin' as if her heart would break. And look at de three little, innocent pickaninies, watchfully waiting fo' deir fadder to be free. O how long must dis injustice last; how long is de law's delays?

Gemmen of de Jury, have yo' no hearts? Have yo' no high intelligence and reason to see dat Rastus had no criminal intention in dis case, but dat he was simply moved by dat same dementia dat is de second nature of all us Negroes? Den have de courage of yo' convictions and apply de high, su-

preme, unwritten law of *dementia Africana* and free pore Rastus here and now. Every man on dis jury who says dat Rastus Brown is not guilty rise in his miyht and say aye.

(A unanimous uprising and chorus of ayes by the jury. The court directs the signing of the verdict and tells Rastus he is a free man. Whereupon, Rastus expresses his gratitude thus: "Well, Gemmen, I's shuah glad fo' yo' kindness, and I want yo' all to come to my house some moonlight night, after prayer meeting, fo' a chicken dinner.")

CASE AND COMMENT

NOTE: A lawyer's license is granted the contributors to this section of the Reporter. But case comment and criticism is here made upon the sole responsibility of the contributors.

(By JOHN P. TIERNAN)

In a Maine case, *Stenert & Sons, vs. Reed*, 108 Atl. 334, the court held that where, in a note given for a piano, title was reserved in the seller until note was fully paid, recovery of a judgment thereon did not pass title in piano to buyer in the absence of satisfaction. The decision is absolutely sound in principle and in accord with the intention of the parties. Clearly it is not a case where the doctrine of election of remedies applies, since action on the note is a personal remedy, whereas replevin is proprietary.

In a Vermont case, *Ex-Parte St. Augl*, 108, Atl., 203, the Vermont court held that in habeas corpus to recover custody of infants, damages for their detention are not recoverable since habeas corpus is a proceeding to determine solely the status of the parties affected and not to provide a compensatory remedy to person deprived of their custody. Obviously the proper remedy for such relief would be an action for loss of services.

In an Indiana case, *Christlieb vs. Christlieb*, 125 N. E. 486, the court held that on the particular facts alleged, the marriage could be annulled for fraud. This is the first Indiana decision that determines the sufficiency of fraud that would justify a dissolution of the marital status, holding that it must be such that "affects the essentials and fundamentals" of that relation.

In a Michigan case, *Krolilcos Kazmarek*, 175, N. W., 239, the court held that where a sale is made in violation of the Bulk Sales Statute and is successfully set aside by creditors of the seller, the buyer can recover the price paid in an action against the seller, since there is a failure of consideration and the seller cannot plead his own violation of the statute as a defense. With the greatest deference, it is submitted that this decision is unsound. There is no failure of consideration since title and possession passed to the buyer and the sale was absolutely valid between the original parties as the court itself expressly states. Further, the buyer is making his own violation of the statute the basis of his cause of action and the position of a defendant is the more advantageous where both parties are equally at fault. The statute imposes the duty of observing its mandates not upon one but upon both of the parties and hence where a statute is violated by the plaintiff he does enter with the metaphorical "unclean hands" and should be denied relief from a situation he himself helped to create.

In a South Carolina case, *Wilson vs Palmetto Nat. Bank*, 101 S. E. 841, the court held that a bank is liable for temperate damages for failure to honor a depositor's check. There was no loss shown upon the trial but a substantial award of damages was returned by the jury. Where no loss is shown, the verdict should be limited to nominal damages. The court was certainly conscious of the distinc-

tion between nominal and substantial damages but in its desire to allow the verdict to stand and at the same time do no violence to the principle itself held that "temperate damages" are proper in such a case.

The Georgia case, *Weayherbt vs. Pittman*, 101 S. E., 131, presents several interesting questions. In this case the court held that a note given to attorneys to defend a person charged with crime was based on a sufficient consideration, although the attorneys had previously been assigned by the court to perform this duty. The court further decided that oral ratification of an unauthorized signature to a note was valid. It is to be observed with respect to the first point decided, that there was no statute compelling attorneys to defend a person charged with crime, but the judge referred to it as being a legal obligation arising out of his relation to the court and originating in the common law. Here is dictum, if not decision, that an attorney is under a legal obligation when assigned by the trial court, to defend a person in a criminal prosecution. But he is entitled to no compensation for his services unless a statute expressly provides therefor. There was no such statute in the state. Hence, the court reasoned when such services which the attorneys were legally bound to render, were rendered, it created a moral obligation on part of defendants to pay therefor. This, the court held, was sufficient to validate the note in view of the fact that there is in force a Georgia statute, Civ. Code, 1910, See 4243, expressly provides that 'a good consideration is such as is founded on a strong moral obligation.

7. In *Myers vs. Fortunate*, 108, Atl., 678, the Delaware court holds invalid a city ordinance which provided that no permit shall be granted by the inspector of buildings for the erection of a public garage in the residential section without consent of property owners. The court draws a distinction between an ordinance that confers arbitrary power upon a public official and an ordinance giving such absolute power to a portion of the people, observing that "it cannot be assumed that the official will act arbitrarily or otherwise than in the exercise of a sound discretion." The court is evidently unmindful that all the decisions hold invalid an ordinance giving an official arbitrary power in this class of cases. The distinction made by the court, however, was not necessary to the decision in the case and the majority of cases hold that an ordinance of the variety under consideration is entirely valid. There is a strong judicial tendency to sustain ordinances if it is possible to do so in order to give effective operation to the municipal police power that modern conditions demand.

8. In *State ex rel. Schafer vs. Spokane*, 186 Pac., 64, the Washington court held valid an ordinance prohibiting operation of jitney busses on the public streets without a permit from the City Council. Here is an important decision on a timely question. It holds that a city can not only regulate the industry but prohibit it absolutely within its municipal limits. The court makes a sound distinction between cases in which an ordinance can merely regulate and cases where its police power can be exercised prohibitively. Speaking with reference to the facts in the case the court said:

"But the use to which the appellant purposes putting the streets is not their ordinary or customary use, but a special one. He purposes using them for the transportation of passengers for hire, a use for which they are not primarily constructed. As to such users, we think the power of the municipality is plenary. It devises reform of regulation pertaining to business of this character, even to the *prohibition of the business entirely*.

9. The Supreme Court of Louisiana in *Brown vs. Giullot*, 83 So., 373, rendered an interesting decision. The case was an application for a writ of mandamus by the defendant in a criminal prosecution to recognize the right of one Mundy to represent the relator as his counsel in the trial court. Court issued the writ, holding that the right of a person to practise law can not be questioned collaterally. The principle involved here is of course not decisive of a case where the court inquires into the authority of a person to represent a party as his attorney, this being merely a question of agency, and presupposing the legal right of the person to practise law generally. The unauthorized act of an attorney in representing a client, however gives the court no jurisdiction of the party's person although a few courts hold it to be a mere irregularity.

10. The Texas case of *Richmond vs. Sangster*, 217, S. W., 723, strikes a fatal blow at transient divorces. It presents a flagrant case of perjury and imposition upon the Illinois courts by a party who deserted the domiciliary state and located temporarily in Illinois in order to obtain the decree. The decree was held void for lack of jurisdiction therefore, not only in Illinois but in Texas. It merited no extraterritorial recognition in other states on the principle of comity and could demand no operation by virtue of the full faith and credit clause of the Constitution, citing *Haddock vs. Haddock*, 26 S. W. Rep. 525, and a host of decisions from leading states of the Union. This instructive case, sound in its reasoning, just in its decision and commendable in its doctrine, brings once more to the forefront the subject of foreign divorces. As to how a divorce granted in one state can be rendered conclusive, valid not only as to the merits of the case, but jurisdictionally in other states, is a legal question that is believed to be incapable of solution. But apart from this rigid adherence to principle as is clearly evidenced by the courts in an inexorable demand that jurisdiction is indispensable to the validity of the judgment, the courts render society itself a noble and a lasting service in discouraging the divorces that are scandalizing American life.

LAW SCHOOL NEWS.

NOTRE DAME'S LEGAL RE-
NAISSANCE

(By Delmar J. Edmundson)

It's an ill wind, as the philosophers say so aptly and frequently, that blows nobody good. Several years ago, when an intermittent fire gnawed persistently at the old Chemistry Hall till nothing but the walls remained, it would have taken a keen and optimistic eye to discern a silver lining in that catastrophe. But what at first blush seemed a tomb stone happily proved a stepping stone to better things. A new Chemistry Hall, proof against flame, was erected back of the charred shell of the old, and lo! from that shell emerged the new improved Law College.

In the embryo days of that department the learned but handicapped professors held forth always within the cramped space of one room; legal maxims, thundered into attentive ears, echoed from one wall to another, walls that must have grown weary of the rule in Shelley's Case. Those long, sturdy benches, through generation after generation of law students were victims of the sculptural aspirations of men who had little talent but much energy and sharp knives. Thus if they found Blackstone not to their taste, circumstances were not lacking to encourage an emulation of Praxiteles.

That same room knew many able men, professors who strongly builded the foundations, and students who reared the structure to do Alma Mater proud in forensic circles. Under the circumstances the wonder is that so much was accomplished. Timothy E. Howard, Lucius Hubbard, Colonel

Hoynes—these are the founders, names to be forever honored at Notre Dame, men who, under un auspicious conditions, steered the unwieldy bark to recognition and honor. Though the visible manifestations of their work passed with the old law room their memory remains dear to thousands of alumni in the legal profession.

Erected on the site of the first Chemistry Hall, the new building wherein was established the Hoynes College of Law, stands as a symbol of the new regime. Improvements are manifold; facilities for assimilation of jurisprudence notably increased—a change which works to the consternation of the “snap course” man, who no longer finds a law degree the easiest, but rather one of the hardest to acquire.

The law library constantly grows in size and catholicity. The law faculty is to be increased to a number more readily able to handle the overflow of incipient barristers. The law building contains a fully equipped court room, behind whose bench a Marshall might be honored to sit. Courses in procedural law and court schedule have been inaugurated by the new dean, Judge Vurpillat, which are unique and exceptional in the law schools of the country. These and countless other changes, of which it would be useless to attempt an enumeration, have been made. The scribe may recount the various forward steps that have been taken, but it were almost impossible to describe the new spirit that pervades the department, a spirit of proud contentment and achievement that is, it may be said, an inevitable accompaniment

of the advance in legal paraphernalia and environment. But these changes are not the only ones to be recorded. Those in the personnel of the faculty are of as great an importance.

Judge Francis J. Vurpillat, proclaimed Dean of the College of Law at the beginning of the school year, is a man whose wide experience and scholarly mind eminently fit him for the position. During his long and brilliant career he served in various official capacities, notably as prosecuting attorney of the 44th Judicial Circuit of Indiana for three consecutive terms, and for several years as County Attorney and as City Attorney at Winamac, his native city. In November, 1908, he was elected Judge of the 44th Judicial Circuit and served in that incumbency for six years. In addition to the fame attained in virtue of the fact that he was the youngest circuit judge ever elected in Indiana, Judge Vurpillat gained prominence and favorable comment from the bench and the bar on account of written opinions delivered in cases of unusual importance tried by him, among which were the Kankakee Meander Land case; another case involving the construction and constitutionality of the Fee and Salary Law; and another placing the first construction on the general liquor laws of the state, particularly the local option law and the Proctor Regulation Act, a construction affirmed by the State Supreme Court. Judge Vurpillat was called

to the Law College in 1915 by the Rev. John Cavanaugh, the then president, and since that time has devoted his talents and energies exclusively to the work of acting dean. The leadership of Judge Vurpillat augurs well for the Law College, and much may be expected from his administration.

Colonel William Hoynes is honored as Dean Emeritus of the Law College. For his past services none can fail to pay him admiring reverence; the University is rich indeed in the benison of his genial personality and profound erudition. Next year Colonel Hoynes will give active service as a special lecturer in Legal Ethics and International Law, of which he is a recognized authority.

Assistant Professor James P. Costello, who recently joined the law faculty, received his degree from the Dickinson School of Law in 1898, after fifteen years experience as a teacher in the public schools of Pennsylvania. During the past twenty-two years he has been in active practice at Hazelton, Pennsylvania.

The Law College will continue to boast the invaluable services of Professor John Tiernan, whose astounding display of mnemonics in citing cases is at once the marvel and the despair of students, and of Judge G. A. Farabaugh, who, besides lecturing at Notre Dame, continues to serve as one of the most prominent attorneys before the bar of South Bend.

STUDENT ACTIVITIES.

ALDEN J. CUSICK.

THE NOTRE DAME LAW CLUB.

On Monday evening, February 2nd, in conformity with plans which had been brewing for several years back, all the Lawyers of the University met in a rousing mass meeting and perfected an organization to be known as the Notre Dame Law Club. A constitution previously drafted was read and adopted. The following officers were elected for the year: Alden J. Cusick, President; Harry E. Denny, Vice-President; Francis T. Walsh, Secretary; Clifford E. O'Sullivan, Treasurer; and Hugh E. Gibbons, Sergeant-at-Arms.

The purpose of the organization, quoting from the Constitution, is: "The general diffusion of legal knowledge among the students of the Law School by stimulating study of the law in its broader aspect; and the promotion of a fraternal spirit among its members by providing a medium for social activity." All who are acquainted with the facts will readily see that the perfection of the Notre Dame Law Club supplies a long felt and earnest need of the College of Law which, in point of enrollment and instruction is now acknowledged to rank with the best in the States.

The time has forever passed when the college-bred lawyer of the progressive type can be a mere compendium of legal doctrines and theories which were stored in his brain by the stern tactics of the class room. It is the human heart-to-heart touch of fraternity which really puts the aspirant for an LL. B. sheepskin in a receptive mood and heightens his ambition to know the law. Through the agency of their Club the law students

seek to get in touch with the more practical side of the law, and to that end to hear frequently from men who are now fighting the legal battles of their communities and are therefore in a position to give to the N. D. Lawyers a few of the gems of their experience.

On February 20th the "Club" listened to a very interesting and instructive talk by Mr. Wm. McInerny of South Bend, an old Notre Dame law graduate and contemporary practitioner. Mr. McInerny dwelt on Public Utility Law and it is the unanimous opinion of all who heard him that his speech was "great." During the remainder of the term the Law Club will hear from other well known attorneys. And among those who have already accepted invitations to speak are Mr. Farabough of South Bend, one of Indiana's real lawyers, and Mr. P. H. Martin of Green Bay, Wisconsin, a criminal lawyer of wide repute.

The Law Club supplies another great need of the College lawyer, the opportunity for fraternizing. Through the instrumentality of smokers, banquets and other social functions the magic warmth of fraternity will be infused into every man. The Notre Dame Lawyer of the future need never be forced to an embarrassing admission that he is not acquainted with his classmates or junior associates in the course. And what's more he can boast of a friendship of brother students from nearly every state in the Union, for enrollment records show that twenty-eight states are now represented in the College of Law and reports emanating

from the office of Dean Francis J. Vurpillat give good basis for the prophecy that the time is not far distant when each of the forty-eight states will have one or more representatives. The value of so-called "mixing" between men from every section of the country; between men all working toward a common goal cannot be overestimated, and particularly so when applied to the law school and the legal profession. In the social activities of the Club two smokers have already gone into history. A big all-lawyers banquet is booked for an early date. A committee, under chairmanship of Leo Hassenaer, reports that indications point to one of the most elaborate and enjoyable social events of the year when the Notre Dame Law Club gathers 'round the festive board. Several Chicago lawyers of prominence have been invited to speak on this occasion.

Let no man accuse the Notre Dame Lawyers of being dead or inert. They pull together with a spirit which it would do others well to imitate. The snappy co-operation and good fellowship in evidence at every meeting is a worthy inspiration. They are as one in active interest and support of the two-fold aim of their organization: to get in touch with the practical side of the law; and through social activity, to fuse the hearts of all the law men into a common bond of friendship. Look for inspiration on the Notre Dame Law Club. It will surprise you.

SENIOR LAW CLASS.

On October 15th the last three year law class to leave the portals of the Notre Dame Law School organized

and elected the following officers to represent them for the year: President, Edw. Doran of South Bend, Ind.; Vice-President, Clifford O'Sullivan of Chicago, Ill.; Secretary, H. L. Leslie of Waverly, Ia.; Treasurer, Maurice Smith of Manketo, Ill.; and Sergeant-at-Arms, George L. Murphy of St. Cloud, Minn. On but a few occasions indeed, has the Law School had cause to boast of a graduating class with the "snap" and talent of that which leaves the halls of the Gold and Blue this coming June. Its members have been prominent in every activity of the campus and have made a record which should be a fitting goal for subsequent "grads" to attain.

On two occasions during the present school year have the members of the class drunk the rich wine of good-fellowship over the banquet board, first in November and again just prior to the Christmas vacation. On each occasion the walls of Kable's parlors echoed with the convivial laughter of a class which, though scattered in fact will ever be united in fond recollection of the few sweet and profitable years at Notre Dame in companionship of the "boys" of '20. The above banquets were enjoyed by senior lawyers exclusively. But on Sunday, Feb. 15th, they also participated with the seniors of the other courses in a big all-senior feast in the Rotary Room of the Oliver Hotel. And not the least of the many never-to-be-forgotten high spots of this event was the masterly oration of President Doran on "Sunshine vs Moonshine."

The Senior Law Class of '20 has four representatives on the all-senior Ball Committee. They are Clifford

O'Sullivan, chairman; Delbert Smith, charge of the Senior Ball which is Clement Mulholland and Norman the biggest social event on the Uni-Barry. This committee has full university calendar.

ALUMNI DEPARTMENT

SALUTATION.

This time, just a few words from an old alumnus of the Law School of Notre Dame, who is now a member of the faculty, will grace the Contributing Section of the Department of the Reporter devoted to the Alumni. These words are briefly in salutation to the dear old boys of the olden days of the old school. Every one of you may feel assured that you are remembered, thought of and loved by the good institution that continues to move majestically in and out on the tide of time, year after year.

We sincerely wish we might present to every one of you, by mail, a copy of this, the first number of the Notre Dame Law Reporter. It would do your heart good, we know, to receive it. You would be elated at the opportunity which is afforded the Alumnus to reach out and grasp the extended hand of the student of the Law School of today, in a pledge of mutual helpfulness made possible by the legal voyages of the Reporter, just now so auspiciously launched upon its career.

The "Foreword" prints the complete prospectus of the publication. It offers the two departments,—that of the students and that of the alumni. Every law alumnus will profit by the work of the student body and the faculty of the old school registered in the Reporter every quarter; and the students, in return will greatly appreciate the good will support and contributed articles, papers, briefs, and practical talks of

the Notre Dame lawyers who are now in the real trenches of legal warfare.

No appeal is made for an endowment, now so common among the great institutions of the country and so loyally and generously responded to by the proud alumni of the respective institutions. But a simple plea is made to every law alumnus to become one link in the chain of hearts that bind about the old Law School of Notre Dame, that they may, with one mighty beat, put the school to the fore in standard and reputation, and thereby make it possible for the school in turn to put them all more prominently to the front as boasted men of the Law School of N. D. U.

Dear, old Boy: be a subscriber, be a contributor, be a consistent reader, be a reporter, be a booster, be a real, live, loving alumnus of the good, old school. Send us the news pertaining to the professional, political and personal activities of yourself and any other alumnus, for the News Section. Send us your correct professional address, individual or firm name, for the Legal Directory. And send us now and then a treatise on the law, legal brief, case comment or humorous what-not that may be appreciated by us all, students and alumni. Let us hear from you in comment, favorable or unfavorable, about the first issue of The Notre Dame Law Reporter.

Good-bye and good luck,

"Dear Old Pal of Mine."

FRANCIS J. VURPILLAT,
Class '91.