

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.