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# NOTRE DAME LAW REPORTER

JUNE, 1920

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UNITED STATES OF AMERICA }  
UNIVERSITY OF NOTRE DAME } ss

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NOTRE DAME LAW REPORTER ASSOCIATION  
Notre Dame, Indiana.

## SUPREME COURT OF NOTRE DAME

MEYERS v. McCLELLAND.

No. 3.

**Tort—Personal Injury—Automobile, Collision with Horse and Buggy—Negligence—Contributory Negligence—Refusing Instruction, Error Made Harmless by Answers to Interrogatories.**

1. Where there is a general verdict for plaintiff on a complaint or declaration stating two causes of action and there is no way of determining upon which cause of action the verdict is based, it is error for which a new trial should be granted to refuse a properly tendered instruction for defendant applying to either cause of action.

2. But where answers to interrogatories in the record are such as would entitle plaintiff to a judgment on a particular cause of action stated, the general verdict will be sustained as based by the jury on such cause of action, and the refusal to give an instruction applying to another stated cause of action will be regarded as harmless error.

3. One is liable for the damages occasioned by driving his automobile at such speed around the corner of intersecting city streets as to enter on the left side of such intersecting street and not to turn to the right till too late to avert a collision with a horse and buggy properly driven on that side of the street in the opposite direction. In such case negligence is predicated upon four distinct violations of legal duty, namely: 1st, failure to travel on the right side of the street; 2nd, failure to turn to the right until too late to avert the injury; 3rd, failure to keep the automobile in control so as to slacken its speed or stop it if necessary to avoid the collision; and 4th, failure generally to exercise that degree of care and caution commensurate with the increased danger and duty incident to travel at the intersection of two public thoroughfares in the City of South Bend.

4. In such case a verdict will not be disturbed on the ground of alleged contributory negligence of plaintiff in quickly turning her horse to the right in an effort to avert the collision, where it appears that this is just what a reasonably prudent person would have done in the circumstances, or that such act of plaintiff was induced by the imminent peril and fear in which she was put by defendant's negligence as the proximate cause.

Action in tort for personal injuries by Mary McClelland against William Meyers. From a judgment for plaintiff, defendant appeals.

Richard B. Swift and Thomas V. Truder for Appellant.

Charles B. Mulholland and Edwin C. Donnelly for Appellee.

VURPILLAT, J. Appellant's automobile, driven by his son, collided with the buggy of the appellee in which she and her young daughter were riding, and for the damages occasioned thereby the appellee brought action against the appellant in the Notre Dame Circuit Court. The complaint is in two paragraphs, the first of which alleges in substance the following operative facts: that on August 26, 1919, plaintiff, with her young daughter, was driving lawfully and carefully along South Bend Avenue in the City of South Bend; that at that time the defendant's son was driving defendant's automobile under the employment and direction of defendant; that defendant's son carelessly and negligently drove and managed said automobile in front of plaintiff's horse and buggy so as with great force and violence to drive it against the buggy of plaintiff, thereby throwing plaintiff and her daughter out upon the hard pavement, by reason of which plaintiff and her daughter were injured and rendered sick and disabled for six and eight weeks respectively; that plaintiff was, as the time of the collision, driving on the right side of the street in the direction of her travel; that said collision and damages were caused by the careless and negligent conduct of defendant's son while acting for the defendant, and without any fault or negligence on the part of the plaintiff. The second paragraph alleges the same state of facts, but charges the conduct of the defendant's son to have been willful and malicious.

Defendant answered in general denial addressed to each paragraph of complaint, and the issues thus formed were submitted to the jury for

trial. A general verdict was returned for the plaintiff, assessing her damages at seven hundred and fifty dollars. Appellant's motion for new trial was overruled and judgment rendered on the verdict.

Appellant assigns as error for reversal of the judgment, the overruling of the motion for new trial, that the verdict is not supported by the evidence and is contrary to the evidence and the law.

Appellant assigns as error of the trial court for which a new trial should have been granted, the court's refusal to give to the jury defendant's instruction number three which was properly tendered. The instruction reads as follows: "If you find that the defendant had knowledge of the situation requiring the exercise of ordinary care and diligence to avert the injury; that he had ability to and could have avoided the resulting injury by the exercise of ordinary care and diligence; and that he did all within his power to avoid and avert the collision, then your verdict should be for the defendant."

This instruction is substantially correct in its statement of the law applicable to the second paragraph of complaint. Wantonness is the conscious failure by one charged with a duty to exercise due care in the discharge of that duty. *Ellis v. Birmingham Waterworks (Ala.)* 65 So. 805; 29 Cyc. 509. The test for determining whether there was wanton and malicious infliction of the injury complained of is the concurrence in the case of these three elements, namely: defendant's knowledge of the situation requiring the exercise of ordinary care and diligence to avert the injury; defendant's ability

to avoid the injury by the exercise of ordinary care and diligence in the use of the means at hand; and defendant's omission to exercise such care and diligence to avert the injury which, to the ordinary mind, must apparently result from such omission. Unless all three of these elements concurred in evidence there could be no recovery *upon the second paragraph of complaint*. And ordinarily the appellant would have been entitled to the giving of the instruction tendered.

Refusal to give a proper instruction tendered by a party is ground for a new trial. *Pennsylvania Co. v. Miller*, 35 Ohio St., 541—35 Am. Dec. 630; *Berlin v. Oglesby* 65 Ind. 308; *Maloy v. Bennett* 15 Fed. 371; unless the matter is contained in other instructions *Chicago etc. Ry. Co. v. Ryan* 165 Ill. 88-46 N. E. 208; *Cox v. Chicago Ry. Co.* 95 Iowa 54-64 N. W. 450; *Cleveland etc. Ry. Co. v. Harrington* 131 Ind. 426-30 N. E. 37; or is not applicable to the evidence or the issues in the case. *Illinois Steel Co. v. McFadden* 196 Ill. 344-63 N. E. 671; *McGovern v. Interurban Ry. Co.* 136 Iowa 13-111 N. W. 412-13 L. R. A. (NS) 476; *Clowdes v. Fresco Flume etc. Co.* 118 Cal. 315-50 Pac. 373. Appellant's instruction was applicable to the issues tendered on the second paragraph of complaint, and appears not to have been covered by any other instructions. It would seem therefore that appellant was entitled to the giving of the instruction.

Where there is a general verdict for plaintiff on a complaint or declaration stating two causes of action, and there is no way of determining upon which cause of action the verdict is based, a refusal to give a

proper instruction for the defendant as to either cause of action is ground for a new trial. *Pennsylvania Co. v. Miller, supra.* And the judgment in such case must be reversed for such error, just as in the case where the verdict is based on a complaint of two or more paragraphs, one of which is bad on demurrer. *The Belt Ry. & Stock Yards Co. v. Mann* 107 Ind. 89-7 N. E. 893. In the appellant's case, however, the jury returned answers to interrogatories so clearly establishing the right of the plaintiff, appellee, to recover upon her first paragraph of complaint, that, had the general been for the appellant, appellee would have been entitled to the judgment on such interrogatories *non obstante veredicto*. These interrogatories show conclusively that the general verdict is based on the first paragraph of complaint, and therefore they render harmless any error that might have been committed in refusing the tendered instruction. Furthermore, we think the instruction is defective. It states elements of fact which, if found, would relieve defendant from liability only on the second paragraph of complaint, but it directs the jury to return a verdict for the defendant regardless of plaintiff's right to recover on the first paragraph of complaint. There was no error in refusing the tendered instruction, or in overruling the motion for a new trial for that cause. *Wellston Coas Co. v. Smith* 65 Ohio St. 70-61 N. E. 143-55 L. R. A. 99; *Chicago & St. L. Ry. Co. v. Champion* 9 Ind. App. 510-36 N. E. 221; *Ryle v. McCormack Harvester Co.* 108 Wis. 81-84 N. W. 18-51 L. R. A. 906 *Bagley v. Smith* 10 N. Y. 489-61 Am. Dec. 756.

It remains to be determined wheth-

er the verdict of the jury on the first paragraph of complaint is contrary to the law and the evidence. The issues tendered by the general denial to this paragraph are the negligence of the defendant and the contributory negligence of the plaintiff. Upon these issues the plaintiff has the burden of proving the negligence charged against the defendant. And, although in most jurisdictions the plaintiff is required to allege in his complaint or declaration his own freedom from contributory negligence, in the courts of England, the Federal courts and the courts of the majority of the States, the rule is that the burden of proof rests upon the defendant to affirmatively establish as a defense the contributory negligence of the plaintiff. In Conn., Ill., Iowa, Main, Mass., Mich., N. H., N. Y. and Vermont, the exceptional rule obtains that the plaintiff, to recover, must establish his own freedom from contributory negligence as well as prove the negligence of defendant. As to the burden of proof in negligence cases see 8 Encyc. of Evidence 852; 7 Am. & Eng. Encyc. of Law (2nd Ed.) 453; Beach on Con. Neg. (2nd Ed.) Ch. 15; 3 Elliot, on Evidence Sec. 2500.

Although the issues of negligence and contributory negligence ordinarily present questions of fact for the jury to determine, these must be considered and determined in the light of the law. The advent of the automobile did not change the law of the American highway, nor did it modify the general rules of the law of negligence.

Negligence exists where one fails to exercise due care towards another as required by law, the party to whom the duty is owing being thereby dam-

aged. Chapin on Torts 499; Cooley on Torts 279; 29 Cyc. 415 *et seq.*; 5 Words & Phrases 4743-4793. There can be no fixed rule of law for determining negligence in all cases. The degree of care exacted by the law in each case must depend upon the conditions and circumstances of the particular case. Penn. Ry. Co. v. Coon III Pa. 430-440—3 Atl. 234; Jacksonville, T. & K. Ry. Co. v. Peninsular Land Co. 27. Fla. 157-17 L. R. A. 33. Negligence is the absence of care according to circumstances. O'Toole v. Pittsburgh & L. Ry. Co. 158 Pa. St. 99-22 L. R. A. 606.

What are the duties imposed by the law of the American highway which a failure to observe may constitute negligence and entail liability for the resultant damages. The first rule of the English common law of the highway is thus stated in an old rhyme:

"'Tis a law of the road,  
Though a paradox quite,  
If you keep to the left,  
You'll always be right."

The rule in America is the opposite and may be stated in rhyme as an American parody to the English paradox, thus:

'Tis the law of our road,  
Not a paradox quite  
Like the English turn left,  
For we always turn right.

A prose statement of the rule in this country is that travelers proceeding in opposite directions when meeting must turn to the right. Elliott on Roads & Streets 620. Tyler v. Nelson 109 Mich. 37-66 N. W. 671; State v. Unwine 75 N. J. L.

500-68 Atl. 110; Luedtka v. Jeofrey 89 Wis. 136-61 N. W. 292. And it has been held that this duty to turn to the right applies to persons who meet each other at any part of the highway, whether at a crossing or elsewhere. Cook Brewing Co. v. Ball 22 Ind. App. 656-52 N. E. 1002; Molin v. Wark 113 Minn. 190-129 N. W. 383. And as a general rule each traveler must give half the road. Walkup v. May 9 Ind. App. 409-36 N. E. 917. But it is the right of the traveler to occupy any part of the track on the right side of the way that he may choose. Brooks v. Hart 14 N. H. 307; Quinn v. O'Keefe 41 N. Y. Supp. 116. Each party has the right to assume that the other will obey the law, will turn to the right and will exercise ordinary care and prudence, and, so assuming, may determine his own action accordingly. Bager v. Zimmerman (Iowa) 161 N. W. 479; Vanderhorst Brew. Co. v. Amrine 98 Md. 406-56 Atl. 833; Angell v. Lewis 20 R. I. 391-39 Atl. 521-38 Am. St. Rep. 881; Ballard v. Collins 63 Wash. 493-115 Pac. 1050

The driver of an automobile and the driver of a horse, whether on the country road or on the city street whether at the intersection of city streets or elsewhere, are both required to exercise such reasonable care, prudence and diligence as the circumstances demand, commensurate with the existing danger. Babbitt, Law of Motor Vehicles, 272; Campbell v. Walver (Del.) 78 Atl. 601; Cumberland Telephone Co. v. Yeiser (Kv.) 131 S. W. 1049; Arlington v. Horner (Kan.) 129 Pac. 1159; Indiana Springs Co. v. Brown 165 Ind. 465-1 L. R. A. (N. S.) 238-74 N. E. 615-6 Annotated Cc. 656-18 Am. Neg. Rep. 392; Russ v.

Strickland (Ark.) 197 S. W. 709. The duty of the automobilist to drive his car in a careful and prudent manner implies that his car should be equipped with brakes and so operated as to control the speed of the car and stop it, if need be, to avoid collision. *Irving v. Judge* 81 Conn. 492-71 Atl. 572; *Owens v. Iowa Co.* (Iowa) 169 N. W. 388.

In the light of the foregoing propositions of law let us consider the facts of the case upon which the jury based their finding of negligence against the appellant. At the time appellant's automobile, operated by his son, collided with appellee's buggy, the appellee was driving west in South Bend Avenue on the right side of the avenue, about seventy-five feet from the intersection of St. Louis Blvd. Appellant's automobile, coming north in St. Louis Blvd., turned east into South Bend Avenue. The appellee, Mary McClelland, said that she first saw the automobile when it turned the corner; that the car was traveling at a high rate of speed and coming directly towards her; that at the time she saw the car she was on her right side of the street with her buggy four feet from the curbing; that as soon as she became aware of the approach of the car towards her she turned her horse farther to the right; that when the collision occurred the right front wheel of the buggy was against the curbing and her horse was upon the parking beyond the curbing. The testimony of Grace McClelland, appellee's daughter, corroborated that of her mother in substance. And, as showing the point where the collision took place and the position of the buggy and the occupants after the collision, these two witnesses were corrobor-

ated by the testimony of Mr. Anderson and Dr. Berteling.

Appellant's son, who drove the car, admitted that appellee's buggy was at all times on the right side of South Bend Avenue on which she was traveling; that he did not make an effort to turn his car to the right till he was within a few feet from appellee; that when appellee turned her horse farther to the right, the sudden turn cramped the buggy and caused the rear end to swerve towards the path of the automobile; that the abrupt turn of his car on the wet and slippery street caused the rear of the car to skid and collide with appellee's buggy on its rear wheel. This is substantially the testimony of the two workmen who accompanied appellant's son in the car.

This evidence establishes four distinct violations of legal duty on the part of the appellant towards the appellee: First, failing to travel on the right side or half of South Bend Avenue; second, failure to turn his car to the right, as he had ample time and space to do, till it was too late to avert the collision; third, failure to keep his automobile in control, to slacken its speed, to stop it if necessary, and to prevent its skidding and colliding; and fourth, failure generally to exercise the increased care and caution commensurate with the increased duty and danger incident to travel and turning at the intersection of these two public thoroughfares of the City of South Bend. The general verdict is sustained by the record in its finding of negligence against the appellant. Appellant's counsel rather tacitly admit this negligence, for the burden of their briefs is to sustain the charge of contributory negligence against

appellee. It is said by the court in *Ruter v Foy* 46 Iowa 132, that when the defendant seeks to establish contributory negligence of the plaintiff as a defense, in so doing, he virtually admits his own negligence.

Burroughs on; Negligence, page 509, says: "Contributory negligence is such negligence on the part of the plaintiff as to proximately cause the injury complained of, superceding the prior wrongful conduct of the defendant and rendering him incapable of averting its consequences. Plaintiff cannot maintain an action for injuries caused by negligence of defendant if his own negligence contributed in any degree to produce the result complained of, unless the defendant having knowledge of the plaintiff's negligence, fails to use ordinary care to avert the consequences; or the contributory negligence of plaintiff is caused by the sudden peril and terror in the situation wherein he has been placed." See also *Cooley on Torts* 679; *Chapin on Torts* 541; *Nave et al v Flack* 90 Ind. 205.

As a general rule contributory negligence is a question of fact for the jury to determine. *Berry, Automobiles* 151-152; 7 *Am. & Eng. Encyc. of Law* (2nd. Ed.) 456; 29 *Cyc.* 630; *Mathieson v Burlington, etc. Ry. Co.* 125 Iowa 90-100 N. W. 51-16 *Am. Rep.* 321; *Christie v Elliott* 216 111. 31-74 N. E. 1035-1 *L. R. A.* (NS) 245-108 *Am. St. Rep.* 196.

The jury, by their general verdict and their answers to the interrogatories, exonerated the plaintiff from the charge of contributory negligence. Following are the interrogatories and answers bearing on this issue: "1. When the collision occurred, was the plaintiff's horse and buggy on her right side of the street?

Ans. Yes." "4. Was the plaintiff at any time on her left side of the street,—at the time of the collision, or during the period immediately preceding it? Ans. No." "5 Did the defendant's son show negligence in failing to turn to the right before he got within a few feet of plaintiff's carriage? Ans. Yes."

The record discloses that plaintiff was at all times conforming to the law by traveling on the right side of the street, and by driving in a careful and prudent manner, having regard for the safety of herself and her daughter and doing all that a reasonably prudent person could have done to avoid the collision. Appellant's contention is that plaintiff, by turning her horse to the right and thereby, as he alleges, causing her buggy to swerve somewhat towards the path of the automobile, approximately contributed to the injury. Instead of constituting an act of contributory negligence, this conduct of plaintiff shows a compliance with the law of the road which required her to turn to the right, and it is just what a prudent person would have done to avert a collision made imminent and unavoidable by the negligent and reckless conduct of the appellant's son in his palpable violation of the law in at least three particulars, already adverted to. But if plaintiff's act be regarded as proximately contributing to her injury it was obviously induced by the danger and fear of the situation into which she was placed by the negligence of the defendant.

We cite here three cases, the first two of which bear striking analogy in their facts to the appellant's case all three of them being particularly applicable to the issue of contribu-



tory negligence, and all of them sustaining verdicts and judgments for the injured parties. *Molin v Wark* 113 Minn. 190-129 N. W. 383-41 L. R. A. (NS) 346; *Irven v Judge* 81 Conn. 492-71 Atl. 572; *McIntire v Orner* 166 Ind. 57-76 N. E. 750-4 L. R. A. (NS) 1130-117 Am. St. Rep. 359.

There is no error in the record and the judgment of the trial court is therefore affirmed.

### WILSON v BIDDLE ET AL.

(No. 4)

**Alleged Tort—Refusal of Principal and His Agents to Convey Land—Contract—Offer and Acceptance—Communication of Acceptance by Principal to His Agents—Acceptance of Another's Subsequent Offer—Peremptory Instruction Directing Verdict for Defendants—Constitutional Right of Trial by Jury.**

1. S., the owner of real estate in Indiana resided in Illinois. His agents, B. & W., residing in Indiana, had authority to secure a purchaser. They wrote to W., suggesting that S.'s property was selling on certain terms, stated. W. wired to B. & W.: "Accept proposition, bases your letter." B. & W. replied by letter, disclaiming any authority to make offer, but submitted W.'s proposition to S. for acceptance. S. replied to B. & W., authorizing them to accept the offer and inclosed deed to be delivered to W. Before communicating these facts to W., B. & W. received a better offer which they also submitted to S. and which he accepted. Sale was had and property transferred on second offer. Held that W. had no right of action, *ex contractu* or *ex delicto*.

2. No contract is formed where a principal merely communicates his acceptance to his agents, so long as neither principal nor agent dispatches such communication to the offeror.

3. An acceptor, principal, owes no duty to the third person to accept his offer, but is legally free to reject it and accept a subsequent offer,—to sell his property to the highest and best bidder.

4. The agent of such acceptor, principal, although instructed by him to communicate his acceptance to such third person, owes no duty to such third person to carry out such instructions, and is not liable to him for nonfeasance in that respect.

5. In such case, where neither the principal nor his agents owe any legal duty to the plaintiff, their willful refusal to close a contract with him and convey to him prop-

erty he offered to purchase is not an actionable tortious wrong.

6. On such a state of facts alleged by plaintiff and established by the evidence, the court should direct a verdict for defendants.

7. The constitutional guaranty of trial by jury can be invoked only by one who has a right of action at law.

Action by appellant, William Wilson, against the appellees, John Y. Sherman and the firm of Biddle & Wendt, for \$1700 damages alleged to have been sustained because of the wrongful and fraudulent transfer of certain real estate to another after the appellant's purchase of the same from appellees. From a judgment for defendants, plaintiff appeals. *Affirmed.*

Edwin W. Hunter and Harry P. Nester for Appellant.

Francis J. Clohessy and Joseph P. O'Hara for Appellees.

VURPILLAT, J. Marion Biddle and William G. Wendt, as partners in the firm of Biddle and Wendt, had been collecting rents for their co-defendant, Sherman, who owned the hotel property, cor. Michigan and Colfax Sts. South Bend. Plaintiff who resides in Elkhart, Indiana, wanted to buy the property. Biddle & Wendt wrote to plaintiff: "Sherman property selling at \$7,000 cash, or more than half cash, unless you want to wire us \$7100, at least \$3500 cash, balance one year, 6 per cent." Letter dated Sept. 2, 1919.

Next day, upon receipt of letter, plaintiff telegraphed: "Accept proposition, basis your letter. Am writing." Same day plaintiff wrote as follows: "I write to confirm my telegram of this day and to add that as soon as you get the papers and the abstract, I will pay you the \$3500 cash, and if you will make a fair discount on the balance will pay all cash."

Biddle & Wendt wrote in answer to this letter and telegram: "We have yours of the 3rd, and have no doubt the proposition will be accepted. Our letter was not intended as a proposition but we believe it will go through. The owner when here led us to believe he would take \$7,000 and we will urge its acceptance. We have written Mr. Sherman at his home in Chicago and enclosed deed for him to execute, conveying the property to you. We feel satisfied Mr. Sherman will accept and send the deed. We will advise you when we hear from him." On the same day Biddle & Wendt did send a letter to Sherman, advising acceptance and the return of deed of conveyance properly executed for plaintiff.

On September 9, Sherman replied to Biddle & Wendt's letter and enclosed the deed properly executed which would convey the property to plaintiff, with instructions to Biddle & Wendt to accept the offer and deliver the deed.

By the time this letter arrived with enclosure of deed, Biddle & Wendt received from another person an offer of \$7300 for the property and they immediately notified Sherman of this offer and enclosed new deed to be executed in blank for the insertion of the new purchaser's name should they succeed in closing deal with him, advised Sherman to execute it and suggested to him that they would keep plaintiff in ignorance of the new negotiations until it was seen that they could not be completed. Sherman sent the new deed and expressed the hope that the new deal might be closed. Biddle & Wendt closed the deal with the second purchaser and then notified

plaintiff that Sherman had refused to accept his proposition.

A complaint in three paragraphs went out of the record on demurrer and an amended complaint in one paragraph was filed. This alleges the facts to be substantially as above stated, and made parts of the amended complaint by copy and reference thereto the letters and telegram quoted, except the second letter of Biddle & Wendt explaining to plaintiff that their first letter to him was not intended as a proposition, but as a suggestion which, if adopted, would be forwarded to their co-defendant, Sherman, for acceptance upon their recommendation. It is further alleged that plaintiff's offer was accepted by Sherman, who instructed his co-defendants in writing to communicate such acceptance to plaintiff and deliver to him the deed, but that the defendants wrongfully and fraudulently refused to transfer the property so contracted for by him, but instead, sold and transferred the same to a third person for \$7300; that said property was purchased by plaintiff of defendants as a hotel site and that plaintiff could not procure another. That by reason of the wrong and fraud practised upon the plaintiff he was damaged in the sum of \$1700.

The defendants filed joint and separate demurrers to the amended complaint. To the overruling of these demurrers the defendants took proper exceptions. Separate answer in general denial was filed to the amended complaint, and the issues were submitted to the jury.

At the close of the plaintiff's case in chief the court overruled a motion of defendants to enter a nonsuit against the plaintiff. At the conclu-

sion of the defendants' case, the court, over appellant's objection, peremptorily instructed the jury to return a verdict for the defendants, which was accordingly done.

The appellant assigns as error for the reversal of the judgment the overruling of his motion for a new trial, the giving over his objection of the peremptory instruction, that the verdict is contrary to law and is not sustained by sufficient evidence.

The evidence in the record discloses no more facts than those alleged in the amended complaint. The amended complaint does not state facts sufficient to constitute a cause of action in behalf of the appellant, either upon the theory of breach of contract or upon the theory of tort by fraud. No facts are plead or proven that show a primary substantive law right in the plaintiff, or any legal duty owing to him from the defendants or any of them, and consequently no facts that constitute breach of duty and violation of right. In brief, none of the essential elements of a right of action is either plead or proven. For this reason the demurrer to the amended complaint should have been sustained. And for the same reason, any verdict that might have been returned for the appellant would have been contrary to law and not supported by sufficient facts, and the trial court would have been obliged to set aside such verdict and grant a new trial.

It is just such a situation that warrants the court, indeed, that makes it the court's duty, to direct the verdict by peremptory instruction. Speaking upon this point Justice Miller, in *Pleasants v Fant*, 22 Wallace 116-22 L. Ed. 780, says: "Must the court go through the idle ceremony in such a

case, of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside and a new trial had?"

This doctrine is approved and followed by the Federal courts. *Coughran v Bigelow* 164 U. S. 301-17 Sup. Ct. Rep. 117-41 L. Ed. 442; *Patten v Texas etc. Ry. Co.* 179 U. S. 658-21 Sup. Ct. Rep. 275-45 L. Ed. 361. See also *Felton v Spiro* 78 Fed. 576. But where, as contended by appellant's counsel, there is legal evidence tending to sustain the material allegations of the complaint, or where the finding of facts depends upon the credibility of the witnesses and upon inferences and deductions to be drawn from the established facts, it is an invasion of the province of the jury for the court to direct the verdict. *Adams v Kennedy* 90 Ind. 318; *Haughton v Aetna Life Ins. Co.* 165 Ind. 32-73 N. E. 592. But see the following Indiana cases which sustain directed verdicts on account of a failure of proof on the part of plaintiff. *Oleson v Lake Shore Ry. Co.* 143 Ind. 405-42 N. E. 736-32 L. R. A. 149; *Weis v City of Madison* 75 Ind. 241-39 Am. Rep. 135. Judge Elliott in his work on Evidence, Vol. I Sec. 31 states the rule thus: "It is settled that the question whether there is any evidence or not upon an issue or issues in a cause is a question for the court. At first blush it may seem that the doctrine that the court must determine whether there is any evidence trenches upon the fundamental principle that questions of fact are for the jury, but upon closer scrutiny it will be found that there is no invasion of that principle. If in

law there is no legal evidence, then there is nothing for the consideration of the jury and the whole question resolves itself into one of law. Verdicts must rest on legal evidence and by such evidence facts must be presented; if, therefore, there is no such evidence the functions of the jury are not called into exercise."

Appellant contends for the rule that if there is any evidence at all in support of his cause of action, the court erred in directing the verdict. In *Hathaway v East Tenn. Ry. Co.* 29 Fed. 4889, the court says: "Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit: that before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed." *Cudahy Packing Co. v Marcan* 106 Fed. 645; *Cowles v Chicago etc. Ry. Co. (Iowa)* 88 N. W. 1072; *Philadelphia etc. Ry. Co. v Fronk* 67 Md. 339-1 Am. St. Rep. 390; *Anders v Life Ins. Co.* 62 Neb 585-87 N. W. 331; *McNaul v Arnold* 177 Pa. St. 433-35 Atl. 672; *Offutt v Columbia Ex.* 175 Ill. 472-51 N. E. 651. Judge Elliott says: "The adjudged cases, and they are very numerous, warrant the conclusion that where there is nothing more than a scintilla of evidence it is the duty of the court to decide the case and not submit it to the jury." Elliott on Evidence Vol. I Sec. 32. Jones on Evidence (2nd Ed.) 292.

The verdict of the jury was properly directed by the court, not only on the ground of a failure of legal evidence upon which to base a verdict for appellant, but also on the ground of a fatal variance between the complaint and such proof as there was. The prevailing theory of appellant's complaint is fraud, while the evidence introduced tends only to establish a breach of contract. In *Pomeroy on Remedies*, page 554, it is said: "These causes of action differ in substance. One is upon a contract and the other in tort, and the law will not permit a recovery upon one by showing a right of recovery upon the other." Jones on Evidence 295; *Lowe v Turpie* 147 Ind. 652-44 N. E. 259-47 N. E. 150-37 L. R. A. 233; *Armco v Lindley* 116 Ind. 295-19 N. E. 138; *Henry County v Citizens Bank* 208 Mo. 209-106 S. W. 622-14 L. R. A. (NS) 1052. Note 46 to 50 L. R. A. (NS) 14.

Appellant's counsel quote as a point in their brief the provision of the Indiana Constitution that "in all civil cases, the right by jury shall remain inviolate." Art. I, Sec. 20. The constitutional right of trial by jury may be invoked only by those who have a right of action at law. *Lynch v The Railroad Co. (N. Y.)* 29 N. E. 315. Black on Constitutional Law, page 627, says: "Notwithstanding some difference of opinion, it is now generally agreed that the right of trial by jury does not include the right to have the jury render a verdict in case where the law is clearly against the plaintiff. The jury are to try and determine the facts, but it is the court which must declare the law applicable to the facts. Consequently when the judge, at the close of the plaintiff's evidence, orders a per-

emptory nonsuit, on the ground that, conceding all the facts which the jury could find from the evidence, those facts are not sufficient to establish a liability against the defendant, such action is no violation of the plaintiff's constitutional rights." The Indiana Supreme Court, speaking of this provision, in a case involving peremptory instruction, says:

"Courts have guarded this right, with scrupulous care, against any encroachment. In all cases triable by jury the jurors are the sole and exclusive judges of the facts proved, and, of necessity, therefore, of the witnesses, and of the weight to be given to their testimony. Where upon a material point there is a failure of proof in the evidence of the party having the burden of an issue, the court may, as a matter of law, instruct the jury in favor of the other party to such issue. Where the facts are admitted by the pleadings or otherwise, or where the evidence upon the controlling question is documentary, and its interpretation and construction a matter for the court and but one conclusion deducible therefrom, then in such cases, the court may, as a matter of law, direct a verdict in accordance with the evident facts, and in favor of the party having the affirmative of the issue." *Haughton v Aetna Life Ins. Co.* 165 Ind. 32-39-73 N. E. 592. Appellant's case is just such as is here described in the concluding language of the Supreme Court of Indiana: a case which involves the interpretation and construction of documentary evidence by the court to determine, as a matter of law, whether or not appellant acquired any contractual rights against the appellees or any of them, so that they can be said to have owed

the appellant some legal duty at the time and under the circumstances complained of, a breach of which would give to appellant a right of action against them. We do not think the pleading and the proof establish a right of action in the plaintiff, either *ex-contractu* or *ex delicto*. Any judgment rendered by the court must be in observance of the fundamental principle *secundum allegata et probata*. Phillips on Code Pleading, Sec. 79. *Neudecker v Kohlberg* 81 N. Y. 296.

The letter of Biddle & Wendt of Sept. 2, 1919, contained a definite offer to sell to appellant the Sherman property, and appellant's telegram and letter confirming it constitute an unconditional acceptance of the offer; so that, as between these parties themselves, a contract would result. Anson on Contracts 22. Biddle & Wendt, however, were not making an offer for themselves. They did not own the Sherman property. Sherman is made a party defendant as the owner of the property, and it is obvious, therefore, that no contract resulted, unless Biddle & Wendt had authority from Sherman at the time to make such offer. The second letter of Biddle & Wendt to appellant, properly admitted in evidence over the objection of appellant, and the subsequent transactions of the parties, establish the authority of Biddle & Wendt to procure and submit offers to Sherman for his property. Accordingly Biddle & Wendt forwarded appellant's offer to Sherman, who executed a deed which would convey the property to appellant and sent this deed to Biddle & Wendt, *his own agents*, with written instructions to them to close the deal and deliver the deed. These are all the opera-

tive facts in appellant's case, and they are not sufficient to transfer the property to appellant, or to form a contract with him.

The deed was never delivered to appellant, and delivery of a deed by a grantor to his own agent, with instructions to deliver to the grantee, is not a delivery to the grantee. *Madden v Cheshire Provident Institution* (Kan.) 94 Pac. 793. *Williams v Daubner* 103 Wis. 521-79 N. W. 748; *Osborn v Eslinger* 155 Ind. 355-58 N. E. 439; *Morris v Caudel* 178 Ill. 9-52 N. E. 1036-44 L. R. A. 489; *Mudd v Dillon* (Mo.) 65 S. W. 973; *Ball v Foreman* 37 Ohio St. 132.

Nor was the communication of Sherman's intention to accept appellant's offer ever made to appellant by Sherman himself or by his agents. Therefore no contract was formed. *Anson on Contracts*. 17. As said in *Madden v Cheshire Provident Institution*, *supra*, "Keeping in mind the fact that (Biddle & Wendt) were (Sherman's) agents and not (appellant's) and that what one does through and by an agent he does through and by himself, it cannot be said that the owner of the property accepted the offer of (appellant), so long as the acceptance was within his control. It was as much in his control while in the possession of his agents at (South Bend) as though the deed which had been executed and the letter of instructions to his agents had been left upon his desk in (Chicago). So long as they were in the hands of his agents they were in his own hands." Where a property owner instructed his agent to make immediate payment of the premium on a fire insurance policy which the insurance company had offered him, held, there was no acceptance of the

policy where payment of the premium was delayed by the agent till after the fire. *New v Germania Fire Ins. Co. et al.* 171 Ind. 33-85 N. E. 703. Having acquired no contract rights against Sherman, the principal, and, of course, none against his agents, the co-defendants, Biddle & Wendt, it follows that the defendants owed no duty to appellant; and since they owed him no duty, he can maintain no action against them.

The complaint alleges that the defendants "fraudulently refused to convey to the plaintiff the above described property, but have sold said property to another without the consent or knowledge of the plaintiff." These alleged facts are not fraudulent but are clearly within the legal rights of the defendants to do in discharging their duties and subserving their own interests. Biddle & Wendt owed loyalty and good faith to their principal, Sherman. To him alone are they answerable for any failure to carry out his instructions. They were under no obligation whatever to appellant. It is a general rule that agents are liable to third persons for misfeasance only, and not for non-feasance. Therefore an agent is not liable to third persons merely because of his failure to perform a duty which he owes to his principal. *Tiffany on Agency* 382; *Madden v Cheshire Provident Inst., supra*. "His liability . . . is solely to his principal, there being no privity between him and such third person." *Story on Agency*, Sec. 308; *Chapin on Torts* 171; *Henshaw v. Noble* 7 Ohio St. 226; *Labadie v. Hawley* 61 Tex. 177-48 Am. Rep. 278. As a matter of good faith, the agents, Biddle & Wendt, were bound to inform their principal, Sherman, of the highest and best bid

or offer they might receive for his property. *Hegenmyer v. Mark* 37 Minn. 6-32 N. W. 785-5 Am. St. Rep. 808. And the defendant, Sherman, was under no obligation whatever to accept appellant's offer for his property, but instead was legally free to sell to the highest and best bidder, either directly or through his agents, as he did in this case. The omission to act, however, willful, is not actionable unless there is a legal duty to act. *Ellis v. Birmingham Waterworks Co.* (Ala.) 65 So. 805.

Defendants could not be liable for depriving appellant of the benefits of his alleged contract, for there was no contract formed. Appellant acquired no right *in personam* against the defendants, and therefore there could exist no right of action *ex contractu*. Neither could defendants fraudulently deprive appellant of such contract benefits, for fraud is a tort founded upon the violation of some right *in rem* which everybody owes a duty to respect, and in ap-

pellant's case he had no such right with respect to the alleged contract and the defendants owed him no duty in the premises. It has been held that where a maker executes and delivers his promissory note to the payee for an illegal consideration known to both, and the payee negotiates the note to a bona fide purchaser who enforces collection thereof from the maker, the maker cannot recover from the payee on the alleged ground of wrongful and fraudulent transfer of the note by the payee; for the reason that such payee owes the maker no duty to retain such note in his possession. *Haynes v. Rudd* 102 N. Y. 372-7 N. E. 287-55 Am. Rep. 815; *Koepke et al. v. Peper* 155 Iowa 687-136 N. W. 902-45 L. R. A. (NS) 773). The Iowa Supreme Court, in the last case cited, in reversing a judgment for plaintiff, declared that "the verdict should have been directed for the defendant."

Finding no error in the record, the judgment is affirmed.

## BRIEF OF HARRY P. NESTER IN CASE OF WILSON v. BIDDLE et al.

In the Supreme Court of Notre Dame

James Wilson, Appellant,

vs.

Marion Biddle and Wm. G. Wendt,  
partners in the real estate business,  
and John Y. Sherman, Appellees.

Brief for Appellant.

By Harry P. Nester.

### 1. NATURE OF THE ACTION.

John Y. Sherman was the owner of certain real estate located in the city of South Bend, state of Indiana, and rented such property through the agency of Biddle and Went, his co-defendants, who also collected the rents for said property, and cared for it generally.

James Wilson, the appellant, desiring to purchase property suitable for a hotel site, entered into negotiations with Biddle and Wendt for the purchase of the Sherman property. These negotiations took the form of letters exchanged between the parties litigant, and were introduced as exhibits on the trial of the cause in the lower court, but since the determining of their force and effect is a vital issue in this case, they are set out below:

#### PLAINTIFF'S EXHIBIT NO 1.

South Bend, Indiana,  
Sept. 2nd, 1919.

Mr. Jaes Wilson,  
362 S. Hill St.  
Elkhart, Ind.

Dear Sir:—

Sherman property selling at \$7000. cash or more than half cash; unless

you want to wire us \$7100., \$3500. cash, balance one year at 6 per cent.  
Biddle and Went,  
per Biddle.

The foregoing was a letter received by James Wilson from Biddle and Wendt, immediately upon the receipt of which he telegraphed Biddle and Wendt as follows:

#### PLAINTIFF'S EXHIBIT NO. 2.

Western Union Telegram.

Biddle and Wendt,

501 M. S. Bldg.,

South Bend, Ind.

Accept proposition, basis your letter. Am writing.

James Wilson.

And on the same day, further communicated with Biddle and Wendt by the following letter:

#### PLAINTIFF'S EXHIBIT NO. 3.

Elkhart, Ind.

Sept. 3rd, 1919.

Biddle and Went,

South Bend, Ind.

Gentlemen:

I write to confirm my telegram of this day and to add that as soon as you get the papers and the abstract I will pay you the \$3500. cash, and if you will make a fair discount on the balance, will pay all cash.

Sincerely yours,

James Wilson.

Several days later the appellant received the following letter from Biddle and Wendt:

#### DEFENDANT'S EXHIBIT NO. 1.

South Bend, Ind.,  
Sept. 4th, 1919.

Mr. James Wilson,  
Elkhart, Ind.

Dear Sir:—

We have yours of the third and have no doubt the proposition will



be accepted. Our letter was not intended as a proposition, but we believe it will go through. The owner when here led us to believe he would take \$7000. and we will urge its acceptance.

We have written Mr. Sherman at his home in Chicago, and enclosed deed for him to execute, conveying the property to you. We feel satisfied Mr. Sherman will accept and send the deed. We will advise you when we hear from him.

Biddle and Wendt.  
per Biddle.

On the same day on which the foregoing letter was written, Biddle and Wendt did communicate with John Y. Sherman, which letter is as follows:

PLAINTIFF'S EXHIBIT NO. 4.  
South Bend, Ind.  
Sept. 4th, 1919.

Mr. John Y. Sherman,  
Chicago, Illinois.

Dear John:

I am sending you herewith a deed transferring your property at the corner of Colfax and Michigan streets in this city to a James Wilson of Elkhart, one of the few customers who have quickly responded to our proposal sent out on the 2nd instant. I believe he is sincere in his statements as to the payment of money which he sets forth in his letters sent herewith and which kindly return to us for filing in our records. Of course it is up to you to decide on any discount. We would encourage acceptance of this offer. In the meantime we will keep watch for any better offer. Should one come we will hold up this matter until we have communicated with you.

Sincerely yours,  
Marion Biddle.

In reply to the above letter John Y. Sherman wrote the following:

PLAINTIFF'S EXHIBIT NO. 5.  
Chicago, Illinois,  
Sept. 9th, 1919.

Mr. Marion Biddle,  
South Bend, Ind.

Dear Marion:

I am returning the deed for the transfer of my property at the corner of Colfax Avenue and Michigan Street to a man named Wilson.

Sincerely yours,  
John Y. Sherman.

The appellant, believing that a valid and binding contract had been entered into between himself and the co-defendants, tendered the purchase price provided for, but Biddle and Wendt refused to transfer and deliver the deed as ordered by Sherman, and subsequently sold the property to another person for \$7300. because of which the appellant was damaged to the extent of \$1500. which he seeks to recover in this action.

## 2. ISSUES PRESENTED.

A complaint in three paragraphs was filed, to which the defendants demurred. Demurrer sustained. Plaintiff then filed amended complaint in one paragraph, alleging the facts above set out, and asked for a verdict of \$1500. damages. Defendants demurred to amended complaint, and such demurrer being overruled filed answer in one paragraph in general denial. The cause being at issue, trial was had by jury. At the conclusion of the plaintiff's evidence, the defendant moved the court to dismiss the action because of insufficiency of evidence, which motion was denied. When the defendants had rested their case, the court gave the jury the peremptory instructions to return a verdict in favor of the de-

defendants, holding that the plaintiff's cause of action had sounded in tort, and since fraud had not been sufficiently shown, they were not entitled to recover on their complaint.

Verdict was accordingly returned in favor of the defendants.

### 3. ERRORS ASSIGNED AS CAUSE FOR REVERSAL.

The appellant assigns as errors for reversal of the judgment:

1. The verdict of the jury is not sustained by sufficient evidence.

2. The verdict of the jury is contrary to the law.

3. The court erred in giving to the jury over appellant's objection the peremptory instruction to return a verdict for defendants.

4. The court erred in overruling appellant's motion for new trial.

### 4. CONCISE STATEMENT OF THE EVIDENCE.

The witnesses introduced were so numerous, and the volume of testimony taken was so great, as to prohibit an exhaustive treatise in this work. A brief resume is all that is practical here. This we will endeavor to give.

James Wilson, the plaintiff, taking the stand in his own behalf, testified that he was a resident of Elkhart, Indiana, and being desirous of purchasing property for a hotel site, had conferred with Biddle and Wendt as to securing such a site. They informed him that he would be notified if they found suitable property. Later he (James Wilson) received a letter from Biddle and Wendt, (Introduced in evidence as Plaintiff's Exhibit No. 1) which contained an offer to sell him a certain property owned by John Y. Sherman of Chicago. He testified that he immediately wired Biddle and Wendt

an unconditional acceptance of said offer (Plaintiff's Exhibit No. 2) and followed this telegram by a letter, (Plaintiff's Exhibit No. 3) in which he further manifested his desire to buy the property offered at once. Wilson further testified that he has ever been ready and willing to keep the terms of the agreement, and on two separate occasions went to the offices of Biddle and Wendt to close the deal, but they were unwilling to do so, and put him off by stating first that they had not received the deed, and later, that it was improper in form and would have to be rectified before the deal could be closed. He testified that when he learned later that the property had been sold to another man, he made diligent search for property which would meet his requirements and could be obtained for the same price, but was unable to locate such property, to his damage.

Marion Biddle next testified that he was a member of the firm of Biddle and Wendt, and transacted most of the business for said firm. He said he had written James Wilson that the Serman property was for sale but denied that such letter was intended as an offer. He acknowledged the receipt of Wilson's letter and telegram, and stated that he had rewritten Wilson (Defendant's Exhibit No. 1), and that he had also written to John Y. Sherman in Chicago, (Plaintiffs Exhibit No. 4), informing him of the opportunity to sell his property to Wilson, and had enclosed a deed for Sherman to execute, conveying the property to Wilson. Biddle further testified that he later received a reply from Sherman (Plaintiffs Exhibit No. 5) ordering him to close the deal with Wilson. He admitted that a properly executed

deed conveying title to James Wilson was enclosed with this letter from Sherman. He said that Wilson had subsequently called at his office concerning the property, but he (Biddle), when questioned, could give no satisfactory reason for his refusal to deliver the deed to Wilson. Biddle further testified that while the deed was in his possession, he had held himself open for other offers to buy the property in controversy, and finally secured a purchaser who bought the property for \$7300.

John Y. Sherman was next called, and testified that he was a resident of Chicago, and owned the property at the corner of Colfax Avenue and Michigan Street in South Bend, Indiana. He said that Biddle and Wendt were his duly appointed agents, with the power to dispose of said property. He said that upon the receipt of Marion Biddle's letter concerning the sale of his property to James Wilson, he had immediately executed a deed conveying the property to Wilson, and returned said deed to Biddle with the instructions to close the deal. He testified that later he had received a letter from Biddle requesting him to execute another deed, conveying the property to one Drexel, which he had accordingly done, and forwarded the deed to Biddle.

William G. Wendt was next called to give testimony. He said that he was a member of the firm of Biddle and Wendt, but gave little attention to the firm's business matters, being out of the city most of the time. He appeared to know nothing of the facts and circumstances which led to this case, and was excused. The plaintiff introduced Edward M. Doran and Leo J. Hastings, who testified

that they were real estate men of South Bend, Indiana. They both testified that the present market value of the property in controversy was approximately \$8500.00 and testified as to the scarcity of property in any location which would serve the plaintiffs purposes.

This is the substance of the evidence introduced. Other minor witnesses were introduced, but as their testimony neither added to nor detracted from the merits of the case, we may safely disregard them.

#### 5. POINTS AND AUTHORITIES.

In a consideration of this case, there are three outstanding questions to be dealt with. They may be briefly stated as follows:

1. The appellant and the appellees entered into a good and binding contract for the sale of the Sherman property.

Anson on Contracts 57.

2. The trial court error in giving the peremptory instruction. 6 Encyc. of Ev. 50; *The City of New Albany v. Ray* 3 Ind. App. 321; *Adams v. Kennedy* 90 Ind. 318; *Haughton v. Aetna Life Ins. Co.* 165 Ind. 32.

3. The plaintiff proved sufficient fraud to entitle him to a verdict. *Shaeffer v. Sleade et al.* 7 Blackf. 178; *Peter v. Wright et al.* 6 Ind. 183; *Pritchett v. Ahrens et al.* 26 Ind. App. 56; *Friedmann et al. v. Campfield (Mich.)* 52 N. W. 630; *Williams et al. v. Harris, Sheriff (S. Dak.)* 54 N. W. 926.

#### 6. ARGUMENT.

Proceeding in logical order, we come first to the negotiations and agreement entered into between the appellant and Marion Biddle, which forms the foundation of this action. The lower court due to its peremptory disposition of this cause, did not

pass upon this issue, hence we dwell upon it briefly. The contention of the appellant that plaintiff's exhibits 1 and 2 form the basis of a good and binding contract was disputed by the appellees, who introduced Defendant's Exhibit 1 to prove a revocation of any offer which may have been received by the appellant. In admitting said Exhibit over the objection of the appellant, the lower court committed its first error, for the subsequent execution of the deed proved the existing contract, and estopped the appellees from denying its force and effect.—(Anson on Contracts page 57, Chap. 2 Sect. 2) It is a principle of law too fundamental to admit of cavil that an offer cannot be revoked by the offeror after its unconditional acceptance by another person. The subsequent assertion of Biddle, that his letter to the appellant was not intended as an offer, bears little weight. This is a question for the court to decide, and not one to be disposed of lightly by a contracting party, as best suits his interests. If a person were permitted to dispose of his contractual liabilities by a simple denial, then every commercial usage would be undermined, and unscrupulous persons be held guilty of no greater offense than bad faith.

As to the alleged failure of the appellant to prove sufficient fraud in the court below, and as to the peremptory instructions given by the court, we may treat these two topics as one, for a decision reached upon either, automatically decides the other. The question which now confronts us, therefore, is, what is fraud, and what degree of fraud must be proved to entitle the plaintiff to a verdict of the jury upon the facts of the case?

As early as 7 Blackford, 178, we find the Supreme Court of this state declaring that, "An action may be maintained at law for false representations, made by a vendor to a purchaser, of matters within the particular knowledge of the vendor, whereby the purchaser is injured." How could the acts of the appelle Biddle be characterized, if not fraudulent, where he, having a perfectly executed deed in his possession, first denies that he has the same, and then later says that it is imperfectly executed, and tells the appellant that he must wait until such defect is remedied? And during this time, while Biddle had the appellant cleverly deceived, the former was perpetrating a double wrong, for not only was he depriving the appellant of obtaining possession of the land he had contracted to buy and which Biddle had been ordered to sell, but he was also preventing the appellant from looking elsewhere for a suitable location, for the latter had implicit faith in his contract, and took no measures to protect himself against the former's fraudulent designs. Which facts make the decision of the court in 6 Ind. 183. particularly applicable to the case at bar; the court said, "Where a party designedly produces a false impression, in order to mislead, entray, or obtain undue advantage over another—in every such case there is a fraud, an evil act and an evil intent,—Fraud may be deducted not only from deceptive or false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive in the given case of a fraudulent design." 26 Ind. App. 56. "The denial of that which has been previously affirmed constitutes fraud, where an-

other who was induced to act by the first statement, is thereby injured." 6 Encyc. of Evidence 50. If the facts and circumstances in evidence are such as to lead a reasonable man to believe that fraud exists, that is all that is required by the law.—54 N. W. 926.

The act of the lower court in giving the jury the peremptory instruction to return a verdict for the defendant, because of the failure to return a verdict for the defendant, because of the failure of the plaintiff to prove fraud, was clearly done under a misconception. The appellant realizes that in many jurisdictions, the rule laid down by the court would apply, but an exhaustive research of Indiana decisions will reveal the fact that the local law differs from the general rule. The "Scintilla of Evidence Rule" as advanced by the appellant, ignored by the court, and scoffed at by the attorneys for the defense is nevertheless the law applied in Indiana—The appellee in contesting the appellants motion for a new trial, cited several federal court cases which held this rule to be no longer in effect. Perhaps that is true of federal courts, and may even hold good in some state courts. but as our own Supreme Court has said in 165 Ind. 32, after applying the "Scintilla Doctrine," "The rule as to directing verdicts is different in the federal courts from that of the Indiana Courts. When the judgment of the judge upon the sufficiency of the evidence to sustain the verdict is innoked by a motion for a new trial then it becomes his duty under the law to weigh the evidence for himself, and either to conform or over-

throw the conclusions of the jury, as in his opinion the preponderance of evidence may require. But until such time as the matter may be thus brought before him, the duty of weighing the evidence must be left to the jury where the law has placed it.

That this rule has long been in force is evident from the fact that in an early case in 3 Ind. App. 321, we find the court declaring that "It is within the power of the trial court to control the verdict by instructions only when there is a total absence of evidence upon some essential issue, or where there is no conflict, and the evidence is susceptible of but one inference."

In 90 Ind. 318, the court said, "Where, on the trial of a civil action the plaintiff introduces evidence tending to sustain the material allegations of his complaint, it is error for the court to invade the province of the jury, and instruct them to return a verdict for the defendant."

6 Encyc. of Evid. 50.—Actual fraud is a question of fact to be determined by the jury from a consideration of all the evidence before them, and where the evidence, upon the whole, to a reasonable degree of certainty, tends to sustain the charge of fraud, and should be submitted to the jury.

In conclusion the appellant merely wishes to point out to the court the undisputable correctness of the cases cited, and feels confident that a review of these cases will convince the learned Supreme Court that the lower court erred in its decision, which should accordingly be reversed.

Respectfully submitted.

## BRIEF OF FRANCIS J. CLOHESSY IN CASE OF WILSON v. BIDDLE et al.

In the Supreme Court of Notre Dame

James Wilson, Appellant.

vs.

Marion Biddle and William G. Wendt  
partners in the real estate business;  
doing business under the firm name  
of Biddle and Wendt; and John Y.  
Sherman, Appellees.

Brief for Appellees.

By Francis J. Clohessy.

The statement of the record as contained in appellant's brief is correct and requires no comment or amendment from appellees.

We proceed at once to a statement of the points and authorities relied upon by appellees to sustain the judgment and decision of the court:

### POINTS AND AUTHORITIES.

#### I.

Fraud is a tort.

Shirk vs. Mitchell, 137 Indiana 185.

#### II.

Breach of contract is not a tort.

Shirk vs. Mitchell, 137 Indiana 185;

Rose vs. Hurley, 39 Indiana 77;

Denning vs. State (cal.), 55 Pac. 1000;

Carpenter Paper Case (Neb.), 87 N. W. 1050;

Barkley vs. Williams, 64 N. Y. Sup. 318;

Bouvier's Dictionary, Page 1215;  
Words and Phrases, Page 7008.

#### III.

In order that plaintiff may recover judgment on his cause of action there must be no variance and failure of proof between the pleadings and the evidence.

Bremmerman vs. Jennings, 101 Indiana 253;

Armacost vs. Lindley, 116 Indiana 295;

Snaders vs. Hartge, 17 Ind. App. 243;

Lowe vs. Turpie, 147 Indiana 652;

Schilling Case, 57 Ind. 9pp. 131;

Pierce vs. Carey, 37 Wisconsin 232;

Henote vs. Bergman, 44 Florida 589;

Minneapolis Harvester Works Case, 30 Minn. 399;

Degraw vs. Elmora, 50 N. Y. 1;

Note, 50 L. R. A. (N. S.) 14.

#### IV.

When a variance and failure of proof exists between the pleadings as set forth in plaintiff's complaint and the evidence, the court has the power and right, in fact is duty bound to direct a verdict for the defendant.

Cincinnati Railway Case, 61 Indiana 183;

Dodge vs. Gaylord, 53 Indiana 377;

Hynds vs. Hays, 25 Indiana 31;

Griggs vs. Houston, 104 U. S. 553;

Anthony vs. Wheeler, 130 Ill. 128;

Corning vs. Troy Factory, 44 N. Y. 577;

Carpenter vs. Huffsteller, 87 N. C. 273;

Johnson vs. Moss, 45 Cal. 515;

Volkening vs. DeGraf, 81 N. Y. 268;

Pendleton vs. Dalton, 96 N. C. 507;

Faulkner vs. Faulkner, 73 Missouri 327;

Hackett vs. Bank, 57 Cal. 335;

Rothe vs. Rothe, 31 Wis. 570;

Bank vs. Schultz, 2 Ohio 471;

Goodlett vs. Louisville et al., 122 U. S. 391;

Grand Trunk R. R. Co. Case 18 Mich. 170;

Order of Chosen Friends Case, 64 Mich. 671;

Deyo vs. N. Y. C. R. R. Co., 33 N. Y. 9;

Metropolitan R. R. Co., Case, 121 U. S. 558;

Note in 2 L. R. A. 340;  
 Note in 85 American Decisions  
 706;  
 Note in 4 L. R. A. 778.

#### V.

There is always a preliminary question for the judge whether there is evidence upon which the jury may properly proceed to find a verdict.

Metropolitan R. R. Co. Case 121 U. S. 558;

Hunt vs. Chosen Friends, 64 Mich. 671;

Beard vs. Railway Co., 79 Iowa 518;

Anthony vs. Wheeler, 130 Illinois 128;

Deyo vs. Railway Co., 34 N. Y. 9;  
 Achtenhagen vs. Watertown, 18

Wis. 331;

Ellis vs. Ohio Life Insurance Co., 4 Ohio 628;

Jones on Evidence, Page

Thompson on Pleadings, Section

#### ARGUMENT.

Counsel for the Appellant have presented such a full and able discussion of the issues had and evidence offered at the trial of this case that we are left nothing to add upon these and content ourselves with offering authorities to support the questions of law as decided by the trial judge and now involved upon this appeal. These questions are set forth in this brief under numerals I, II, III, VI, and V.

Fraud, according to the authorities is a tort. It is a civil wrong; an injury inflicted otherwise than by a mere breach of contract. A case not precisely in point but in which this rule was cited is that of Shirk vs. Mitchell, 137 Indiana 185. The learned judge in his decision said:

"The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests on contract while fraud or

fraudulent representations have no element of contract in them but are essentially a tort."

It is said in Denning against State, 55 Pacific 1000, a California case:

"A tort is any wrong not consisting in mere breach of contract for which the law undertakes to give to the injured party some appropriate remedy against the wrong-doer."

Words and Phrases at page 7008 defines a tort as an injury inflicted otherwise than by a mere breach of contract.

Bouvier defines a tort in its legal sense as a wrong independent of contract.

It thus clearly appears that mere breach of contract is not fraud. In other words a breach of contract is not a tort, fraud being a tort: The appellant therefore failed in his proof when he alleged fraud in his complaint and offered evidence at the trial which tended only to prove mere breach of contract. The question now arises as to whether or not this variance between the pleading and proof is such a failure of proof as will permit the court to direct a verdict.

An established rule of pleading is that a complaint must proceed upon some definite theory or on that theory which the plaintiff must succeed or not succeed at all. Appellant's complaint proceeds upon a definite theory, that of fraud. His proof, however, only showed mere breach of contract. This variance, according to the highest court in this state and leading decisions from other states, is material and a failure of proof sufficient to permit the dismissal of the action.

Three Indiana decisions are in point on this question. In Brem-

merman vs. Jennings, 101 Indiana, the Supreme Court held:

"That a plaintiff can succeed upon the case made by his complaint and not upon a different one; his evidence must prove the substance of the issue tendered by his pleading or he will fail no matter what else he may prove."

The court in *Armacost vs. Lindley*, 116 Indiana 295, said:

"A party must stand or fall upon the theory of his case as he presents it in his pleadings. Recovery will be upheld only when the evidence and the facts found support the case made by his complaint."

In *Sanders vs. Hartge*, 17 Indiana Appellate 243, the Supreme Court in discussing the same rule of law said:

"It is of the highest importance to the administration of the law that courts should adhere most tenaciously and strictly to the rule of pleading which requires the pleader to be bound by his cause of action as stated by him, as otherwise his adversary could have no assurance of the facts he would have to controvert to meet his attacks and would be taken in- aware in the forensic encounter at the bar."

A New York case, *Ross vs. Mather*, 51 N. Y. 108, is directly in point. There the complaint alleges that the defendant on selling to the plaintiff a horse which was lame, warranted and falsely and fraudulently represented that the lameness was in his foot and nowhere else, and would soon be well; that the plaintiff relying upon such warranty and representations and believing them to be true purchased the horse; that the horse was not lame in his foot but in his grambrel joint and was of little value which the defendant well

knew. The plaintiff proved the warranty and breach thereof but gave no evidence tending to prove fraud or any intention to deceive. The court held that the basis of the action was fraud, not a breach of warranty and that the plaintiff could not recover upon proof of the latter only. In rendering this decision the court said:

"Where the complaint is for fraud the general rule is that the plaintiff cannot recover for a breach of contract. The law never intended that a party who has failed in the performance of a contract merely should be sued for a fraud or that a party who had committed a fraud should be sued for a breach of contract unless the fraud was intended to be waived. The two causes of action are entirely distinct and there can be no recovery as for a breach of contract where a fraud is the basis of the complaint."

*Jones on Evidence* at page 295 says:

"Where the proof fails to support the allegations not in some particulars only but in their entire scope and meaning, and if the divergence extends to such an important fact or group of facts that the cause of action or defence as proved would be another than that set up in the pleadings it is not a variance but a failure of proof which cannot be cured by amendment and the action must be dismissed."

Since the authorities are unanimous in supporting the rule that the variance between a complaint sounding in tort and proof showing only a mere breach of contract is material and a sufficient failure of proof to warrant a direction of verdict, the question now arises as to the power.



authority and duty of the court to direct such verdict.

The power and authority of the court to direct a verdict upon failure of proof, that is, when the evidence is deemed insufficient, is practically absolute. Although such authority is impliedly given by the very fact that the existence of a material variance and failure in proof is sufficient to dismiss the action on trial, there are many authorities expressly holding that the court is vested with this authority and power.

Perhaps the foremost case on this question is that of *Griggs vs. Houston* decided by the United States Supreme Court and reported in 104 U. S. 552. This case is one in which the plaintiff sued a contractor. The court dismissed the case on the ground that the statutes in relation to railroads did not apply to a contractor engaged in building a road. Upon appeal the Supreme Court held that it was right and within the power of a court to direct a verdict for the defendants where the evidence was insufficient to sustain plaintiff's cause of action.

The court in *Anthony vs. Wheeler*, 130 Illinois 128, said:

"The jury may be instructed to find for defendant when plaintiff has failed to prove some material point in his case."

In *Corning vs. Troy Factory*, 44 New York 577, the court said:

"If the facts proved clearly fail either to establish a cause of action or a defence as a matter of law, the court may direct a verdict."

Pomeroy on Remedies at page 554 writing on cause of action based on contract and tort says:

"These causes of action differ in substance. One is upon contract and

the other in tort and the law will not permit a recovery upon one by showing a right of recovery upon the other."

According to some authorities not alone is it the power and right of the court to direct a verdict upon failure of proof but it is the duty of the court to so direct the jury.

In the leading case on this point, that of the *Metropolitan Railroad Company vs. Moore* decided by the United States Supreme Court and reported in 121 U. S. 558, the court said:

"If no evidence is offered or if it is not such as one in reason and fairness could find from it the fact sought to be established the court ought not to submit the findings of such fact to the jury."

A New York case, *Deyo* against New York Central Railroad Company, 33 N. Y. 9, likewise is in point. There the court laid down the doctrine to be that if the evidence is not sufficient to warrant a verdict or if the court would set aside a verdict if found, it is the duty of the court to nonsuit a plaintiff.

Appellant in his argument on appeal lays much stress upon the scintilla of evidence rule. The rule as set forth in his brief has no bearing upon this case in that it is an expression of the old doctrine now obsolete.

Jones on Evidence at page — says regarding the present day attitude of courts toward the scintilla of evidence rule:

"The recent decisions have completely exploded the old doctrine by which a judge was compelled to submit the case to the jury if there was a scintilla of evidence to support the claim of the plaintiff. In place of

this old rule has come the more reasonable one, that in every case there is a preliminary question for the judge whether there is evidence upon which the jury may properly proceed to find a verdict. When the evidence with all the inferences that the jury can justifiably draw from it is insufficient to support a verdict for the plaintiff it is the duty of the court to take the case from the jury and to direct a verdict or grant a nonsuit as the facts of the case may warrant.

We might summarize the issues in this appeal as they appear to the appellees as follows:

1. That fraud is a tort.
2. That breach of contract is not a tort.

3. That plaintiff, now appellant, failed in his proof when he alleged fraud in his complaint and offered evidence at the trial tending to prove mere breach of contract.

4. That when such failure of proof exists the court has the right and power, in fact is duty bound, to direct the verdict dismissing the action.

5. That the scintilla of evidence rule has been replaced by the more reasonable rule that in every case there is a preliminary question for the judge whether there is evidence upon which the jury may properly proceed to find a verdict.

There is no error in the record.

Respectfully submitted,

# NOTRE DAME CIRCUIT COURT

## Record of Cases.

(Leo J. Ward)

### CAUSE NO. 8.

Charles E. Duff, doing business as  
The Pioneer Stock Powder Co.

vs.

Samuel Koontz.

Leo J. Hassenhauer,  
Francis Walsh,  
Attorneys for the Plaintiff.

Clifford O'Sullivan,  
William J. McGrath,  
Attorneys for the Defendant.

This is an action on a negotiable instrument given by the defendant to the plaintiff, which note is due and unpaid. Demand \$250.00.

The plaintiff files declaration in two paragraphs.

Defendant files general demurrer to plaintiff's declaration. Demurrer sustained and plaintiff takes leave to file amended declaration.

Plaintiff files amended declaration in two paragraphs: (1) on the note and (2) on the contract.

Defendant files plea in five paragraphs: (1) *non est factum*; (2) breach of contract; (3) payment; (4) failure of consideration; (5) partial failure and payment.

Plaintiff now files replication in three paragraphs: (1) similiter to defendants first paragraph of plea; (2) confession and avoidance; (3) general traverse.

Defendant now files traverse to the second and similiter to the third paragraphs of plaintiff's replication.

The cause being at issue the jury

is impanelled and the cause is submitted and the trial had.

The defendant tenders three instructions in writing which are refused. The defendant excepts to the court's ruling in refusing to give the said instructions.

The defendant submits interrogatories numbered one to seven inclusive, which interrogatories are given as submitted.

Francis Walsh opens the argument for the plaintiff, followed by Clifford O'Sullivan for the defense. William J. McGrath closed the defendant's argument and the plaintiff's case was concluded by Leo J. Hassenhauer.

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

The jury retires and returns into open court their general verdict in favor of the defendant and against the plaintiff.

The jury also returns the interrogatories and the answers thereto.

The plaintiff files motion for a new trial which motion the court overrules, to which ruling the plaintiff takes exception.

Judgment is rendered in favor of the defendant and against the plaintiff.

The plaintiff prays an appeal to the Supreme Court of Notre Dame, which is granted and five days are given in which to file a general bill of exceptions. Ten days are given to the said plaintiff in which to file an appeal bond in the sum of \$250.00 which bond and sureties thereon are hereby approved.

## CAUSE NO. 9.

James Wilson

vs.

Marion Biddle et al.

Harry P. Nester,  
Edwin Hunter,  
Attorneys for the Plaintiff.

Joseph Patrick O'Hara,  
Francis Clohessey,  
Attorneys for the Defendants.

This is an action for damages for alleged fraudulent conduct in failing to convey land to the plaintiffs by the defendants under an agreement. Demand \$1500.00.

The plaintiff files complaint presumably in three paragraphs: (1) fraudulent transfer; (2) breach of contract; (3) defrauding of benefits of contract.

Defendants file motion to separate paragraphs of complaint. Motion sustained and complaint is separated into three paragraphs and numbered.

Defendants file separate and several motion to strike out parts of the plaintiff's complaint as surplusage. Motion sustained and matter stricken out.

Defendants file separate and several general demurrer to the complaint. Demurrer sustained. Defendant takes leave to file an amended complaint.

Plaintiff files amended complaint in one paragraph for fraud in depriving him of benefits of alleged contract.

Defendants file separate and several demurrer alleging, (1) misjoinder

and (2) insufficiency. Demurrer overruled.

Defendants file answer in general denial.

Plaintiff files motion to strike out part of defendants answer. Motion sustained and defendants separately except.

The cause being at issue the jury is impanelled and the cause is submitted to the jury for trial, and the trial is had.

The plaintiff tenders five instructions in writing which are refused. The plaintiff excepts to the ruling of the court in refusing to give his instructions. Defendants tender peremptory instruction.

Harry P. Nester opens argument for the plaintiffs followed by Joseph Patrick O'Hara for the defense. Francis J. Clohessey closed the argument for the defense and the case for the plaintiff was concluded by Edwin W. Hunter.

Court instructs the jury peremptorily to return a verdict for the defendants.

The jury returns into open court their general verdict in favor of the defendants and against the plaintiff.

The plaintiff files motion for new trial which the court overrules, to which ruling the plaintiff excepts.

Judgment is rendered in favor of the defendants and against the plaintiff.

The defendant prays an appeal to the Supreme Court of Notre Dame, which is granted and ten days are given in which to file a general bill of exceptions. Five days are given in which to file an appeal bond in the sum of \$200.00 which bond and sureties thereon are hereby approved.

## CAUSE NO. 10.

William Hill

vs.

John Green et al.

Ralph Bergman,

Emmett Rohyans,

Attorneys for the Plaintiff.

Maurice F. Smith,

Leo B. Ward,

Attorneys for the Defendants.

This is an action on a promissory note given by the defendants and negotiated to the plaintiff, which note is due and unpaid; demand \$210.66.

The plaintiff files complaint in one paragraph on the note.

Defendants file separate and several answer in four paragraphs: (1) general denial; (2) Breach of warranty; (3) fraudulent negotiation to avoid defenses; (4) separate defense of no consideration for suretyship of Daniel Walker.

The plaintiff files a general and several demurrer to each of the second, third and fourth paragraphs of answer. Demurrer overruled as to the second and third paragraphs of answer. Demurrer sustained as to the fourth paragraph of answer.

The defendant, Daniel Walker, files cross-complaint in one paragraph against William Hill and John Green to be adjudged a surety on the note.

The plaintiff William Hill and the defendant John Green file general denials to the cross-complaint.

The case being at issue the jury is impanelled and the cause submitted and the trial had.

The plaintiff tenders four instructions in writing which instructions are refused.

The plaintiff takes exception to the ruling of the court in refusing the instructions. The defendant tenders 15 instructions all of which are refused except numbers two, three and six. The defendant takes exception to the court's ruling in refusing to give each and all of his instructions.

The plaintiff submits interrogatories numbered from one to five inclusive, all of which are submitted by the court.

The defendants submit interrogatories numbered from one to nine inclusive, all of which are submitted by the court except number two.

Ralph Bergman opens the argument for the plaintiff and is followed by Maurice Smith for the defendants. The defendants' argument is closed by Leo B. Ward and Emmett Rohyans concludes the argument for the plaintiff.

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

The jury retires and returns into open court their general verdict in favor of the plaintiff for \$212.00 against John Green as principal and Daniel Walker as surety.

The jury also returns the interrogatories and answers thereto.

The defendants file motion for new trial which motion is overruled by the court, to which ruling the defendants separately take exception.

Judgment is rendered in favor of the plaintiff and against John Green, principal, and Daniel Walker, surety, in the sum of \$212.00.

The defendant prays an appeal to the Supreme Court of Notre Dame, which appeal is granted and ten days are given in which to file a general

bill of exceptions. Five days are given to the said defendant in which to file an appeal bond in the sum of \$200.00, which bond and the sureties thereon are hereby approved.

### CAUSE NO. 11.

The First National Bank of Chicago  
vs.  
The St. Joseph Loan and Trust Co.

Edward P. Madigan and  
Delbert D. Smith,  
Attorneys for Plaintiff.  
Francis J. Murphy and  
Walter R. Miller,  
Attorneys for Defendant.

This is an action on two checks each for \$500.00, drawn on the Mishawaka National Bank and transferred to the defendant bank for collection, demand \$1000.00.

Complaint in one paragraph for money had and received on checks.

Defendant files answer in two paragraphs: (1) general denial; (2) confession and avoidance.

Plaintiff files motion to strike out defendant's second paragraph of answer. Motion sustained and defendant excepts.

The cause being at issue, the jury is impanelled, the cause submitted and the trial had.

The plaintiff tenders two instructions in writing which are refused. Defendant tenders four instructions in writing which are refused. Plaintiff excepts to courts ruling in refusing to give his instructions tendered. Defendant excepts to courts ruling in refusing to give his instructions tendered.

The defendant submits interrogatories numbered 1 to 5. The court

refuses all but numbers one and two.

Delbert D. Smith opens the argument for the plaintiff, followed by Francis Murphy for the defendant. Walter Miller closed the argument for the defense and Edward P. Madigan concluded the case for the plaintiff.

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

The jury retires and returns into open court the general verdict in favor of the plaintiff fixing damages in the sum of \$1000.00.

The jury also return the interrogatories and the answers thereto.

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

Judgment is rendered in favor of the plaintiff in the sum of \$1000.00

The defendant prays an appeal to the Supreme Court of Notre Dame which is granted and ten days are given in which to file general bill of exceptions. Five days are given to said defendant in which to file an appeal bond in the sum of \$1000.00, which bond and sureties thereon are hereby approved.

### CAUSE NO. 12.

(Junior Division)

George D. O'Brien and Clyde Walsh,  
partners as O'Brien & Walsh  
vs.

Charles M. Dunn

Alden J. Cusick and  
Joseph H. Flick,  
Attorneys for Plaintiff.

James L. O'Toole and  
Frank Francescovich,  
Attorneys for Defendant.

Action on account for legal services rendered, demand \$100.00.

Plaintiff files complaint on account, with bill of particulars attached.

Defendant files demurrer to complaint for want of facts. Court overrules demurrer to which ruling defendant excepts.

Defendant files answer in three paragraphs: (1) general denial; (2) Payment; (3) Accord and satisfaction.

Plaintiff files motion to require defendant to elect between alleged inconsistent defences. Motion overruled to which ruling plaintiff excepts.

Plaintiff files reply to the 2nd and 3rd paragraphs of answer.

Defendant filed demurrer to the reply which the court overrules, the defendant excepting.

Jury is waived and the cause is submitted to the court for trial and the trial concluded.

Joseph H. Flick opens the argument for plaintiff, followed by Frank Francesovich for the defendant. James L. O'Toole concludes the argument for defendant and Alden J. Cusick closes for plaintiff.

Court finds for the defendant upon the 3rd paragraph of answer, accord and satisfaction, and against the plaintiff, that plaintiff take nothing by his action and that defendant recover his costs.

## JUNIOR MOOT COURT

Cases Reported.  
(Chas. J. Mooney)

## CAUSE NO. 5

Andrew White and Samuel Small,  
Partners as White & Small  
vs.  
Andrew Johnson

Andrew Johnson, the defendant, in writing authorized the real estate firm of White & Small, plaintiffs, to sell a certain tract of real estate for him at a stated price and on certain terms also stated. The plaintiffs, pursuant to such written authority, entered into a written contract with Whitcomb & Kellar for the sale of defendant's said real estate. Plaintiff executed said contract of sale as agents for the defendant, referring to themselves as agents in the body of the contract and signing themselves as agents.

The sale thus contracted for, however, was so different in character of price and terms and conditions from the sale the defendant had authorized plaintiffs to make, that he refused to close the deal as thus made and refused longer to recognize the plaintiffs as agents and in fact discharged them by letter expressly revoking the agency. Later the defendant and Whitcomb & Keller got together and closed the deal and carried out the contract on the terms and conditions as stated therein.

Plaintiff demanded a commission from defendant which was refused on the ground that plaintiffs acted wholly outside their authority in entering into such a contract of sale, that he, defendant, had refused to recognize their action in making such a contract, had in fact discharged them,

and was not liable to the plaintiff for anything he did subsequently, being free to contract and transact for himself in the sale of his land.

Should plaintiffs recover or not and why?

Archibald Duncan and  
Lewis L. Van Dyke

Attorneys for Plaintiffs.

Charles M. Dunn and  
Edward J. Meagher,

Attorneys for Defendant.

PLAINTIFFS' POINTS AND  
AUTHORITIES

The plaintiff contends in this case that he was the procuring cause of the sale and therefore entitled to compensation for his services from defendant.

The general rule is that a broker has performed his contract and is entitled to his compensation when he is the procuring cause of the sale affected with the purchaser, and the rule is the same even though the sale is affected by the owner himself.

In the case of *Hoadley v. Savings Bank of Danbury*, 44 L. R. A. 321, the broker merely called a person's attention to a certain piece of property, and gave him information as to how to obtain admission thereto. Later the owner, without the broker's knowledge, took up the negotiation and completed the sale. Here the Conn. court held the broker the procuring cause, and was entitled to compensation.

Also in the case of *Platt v. John*, 9 Ind. App. 58, the same proposition was applied. In this case the broker secured a prospective buyer and introduced him to his employer, which



resulted in a sale between them. Here the Indiana Supreme Court said he was the "procuring cause" and entitled to compensation.

The following citations support this general proposition 62 Mich. 543. 93 Am. Dec. 718. 22 Am. Dec. 441.

"Mechan" on this proposition says: "If an agent has done all that he undertook to do, he is entitled to compensation, even though the principal received no benefits, or failed or refused to avail himself of the advantages secured. Thus a broker employed to effect a sale of property is entitled to compensation when he has found a purchaser ready, willing and able to buy on the proposed terms, even though the principal does not, or cannot through defective title or otherwise complete the sale."

#### DEFENDANT'S POINTS AND AUTHORITIES

1. An agency not coupled with an interest may be revoked at any time. John Alexander et al vs. Sherwood Co. 77 S. E. 1027. This principle shows that the defendant may discharge the broker at anytime since the broker is not coupled with an interest.

2. If the broker attempts unsuccessfully to effect a sale and his proposed purchaser abandons the idea of buying but is afterwards induced to do so by the principal or by another person without being in any way induced by the broker, the latter is not entitled to his commission. So where the broker has had a reasonable time in which to affect a sale and does not do so the principal may complete the sale and the fact that the sale is made to the same customer

does not entitle the broker to his commission. Vol. 4 Amer. & English Law 2d. Ed. 978. Then in Crook et al. vs. Forest, Ala. 1897 22 So. 540 It was held in the opinion that a land owner by employing a broker does not bar his right to sell the land if he does it in a fair and honest way and if he notifies his agent before the sale is completed, further an agent cannot recover for a commission if he does not procure a party ready, willing and able to buy on the terms and price made by the principal. These two authorities show that the defendant in our case was entitled to revoke the agency which he did with a letter and sell the land to the customer if does so with no intention of defrauding the agent and there is no such fraud alleged in the case before the court. To support this contention further Mecham on Agency says pp. 964-9666: "The broker must show before he can recover commission, that he has completed his undertaking according to its terms, or that its completion was prevented without his fault by the principal. What constitutes a completion, however, is a question of no little difficulty in many cases, depending as it does upon vague and indefinite agreements between the parties. The duty of the broker is performed when he has procured a purchaser ready, willing and able to purchase upon the terms specified or if no particular terms are agreed upon, when he procures a purchaser to whom the principal sells." As may be seen in our case the terms were specified and the agent was unable to procure a purchaser who was able to purchase at the price agreed upon and therefor was discharged by a letter giving him actual notice of his dismissal.

## CAUSE NO. 6

Mary Hardesty

vs.

Anna Jamison

Action for Damages for Alleged  
Assault and Battery.

Demand \$500.

Mrs. Anna Jamison, the defendant, was the owner of a number of tenement flats which she rented, located in the City of South Bend. For more than a year her husband collected the rents and accounted to her for them, and during this year the plaintiff had been a tenant of Mrs. Jamison and had paid the rent to Mr. Jamison.

On August 15, 1919, Mrs. Jamison took from her husband the authority to collect these rents, intending to appoint a firm of real estate agents to collect her rents thereafter. On September 1st, following, Mr. Jamison, notwithstanding the revocation of his authority to do so, called as usual to collect the rent from Mrs. Hardesty. Mrs. Hardesty represented at the time that she was unable to pay the rent; because of her refusal or inability to pay Mr. Jamison became quarrelsome and in fact struck Mrs. Hardesty several times in the face.

For this assault and battery Mrs. Hardesty brings action against Mrs. Jamison. Mrs. Jamison knew nothing about her husband's attempt to collect the rent on this occasion and, after learning of it, immediately communicated to Mrs. Hardesty the fact that she had prior to the difficulty with her husband taken from him all authority to collect the rents, by expressly forbidding him to collect the rents September and thereafter.

Who should recover?

Clyde A. Walsh and  
Henry W. Fritz,  
Attorneys for Plaintiff.

James K. O'Toole and  
Francis Franciscovich,  
Attorneys for Defendants.

PLAINTIFF'S POINTS AND  
AUTHORITIES

A married woman may appoint an Agent and her husband may be so appointed: Section 48 Mechem on Agency "Where a married woman is competent to act by Agent her husband may be appointed as the Agent." Case of *Shane v Lyons* (1898) 172 Mass. 199-51 N. E. 976, 70 Am. St. Rep. 261.

Court said in this case: "We see no reason for regarding her as incapable of authorizing any act to be done by him in her name, and her behalf, or for shielding her from responsibility."

Married woman as principal—it is now a settled principal of law that a married woman may be a principal and appoint her agent. Mechem on Agency Section 42. Statutes in most states have removed the common law disability for married women and she is clothed with the power to manage to her own affairs, and certainly the power to appoint an agent or attorney to do that which she is capable of doing in person.

Notice of Revocation—upon revoking the authority of a general agent, the principal must give notice of revocation to persons who have had previous dealings with the agent as such, or he will continue to be bound by agent's acts.

The notice must be actual—and must be extended to those who have extended credit in reliance upon the authority and general public notice

to others. *Mechem on Agency*. Section 117.

Court in *Diversity v Kellog* 114 Ill. Reports says: "Where a party is shown to have been the agent of another in a particular business or continues to so act within the scope of his former authority it will be presumed that his authority still continues, and will bind his principal unless the persons with whom he acts have been notified that his agency has ceased.

*Burns Revised Statutes*. Section 5120 (1882) Removes the common law disability of married woman in this state and allows a married woman to contract, appoint an agent.

Principals liability for Tort of Agent—*Mechem on Agency* Sec. 98—Both principal and agent are liable for tort committed in scope of his authority.

In the case of *Bergman v Hendrickson* 81 N. W. 304 The court said that if the assault was committed for the purpose of compelling payment the servant was acting within the scope of his employment and the master was liable for plaintiff's injuries, though he may never have authorized such method of collection and may have expressly prohibited it.

*Mechem on Agency* page 135 Sec. 253 says: "The older cases hold the principal not liable to third persons for the agent's wilful and malicious acts, but the modern rule is that he is liable for these also if the agent committed them while he was acting in the execution of his agency and within the scope of his authority.

Cases supporting this: *Singer Mfg. Co. v Rahn* 132 U. S. 518. *Southern Express Co. v Brown* Am. St. Rep. 306 (67 Miss. 260).

In 90 N. Y. 77 Judge Earle says:

"It matters not that he exceeded the powers conferred on him by his principal and that he did an act which the principal was not authorized to do so long as he acted in scope of authority and line of duty, or being engaged in the service of the defendant, attempted to perform a duty pertaining which he believed to that service.

In 116 Ill. App. 80 the Court held that principal was liable for assault of agent in attempting to collect an installment due on furniture sold by the principal to the complainant.

Supporting this *C. B. & Q. R. R. v Bryan* 90 Ill. 126.

Vol. 21 R. C. L. page 846—A duty rests upon every man in the management of his own affairs whether by himself or by his agents or servants so to conduct them as not to injure another, and that if he does not do so, and another is thereby injured, he shall answer for the damage. 1 Atl. 709-91 Am. Dec. 425.

Page 94 Cyc. of Law Vol. 5. It is sufficient to make the master liable if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, even if he departed from the instruction of the master.

It is an old rule of law that "where one of two innocent persons must suffer for acts of another, the person who caused or set in motion the agency will be held liable.

Case of 109 Fed. 369-45 N. Y. 549-71 N. W. 427-44 Iowa 318-7 N. W. 368.

#### DEFENDANT'S POINTS AND AUTHORITIES

The doctrine that in order that the principal not be bound by the acts of an agent whose authority has been revoked, notice must be given to

third parties, has no application in this case.

20 N. W. 476 . . . . "The doctrine that a discharged agent can bind his principal to the extent of the authority with which he was apparently clothed has no application beyond the claims of the agent."

Even if the authority of the agent had not been revoked, this principal would not be liable for the assault. There is a clear-cut distinction between torts of the agent which are merely negligent and unskillful and those which are in themselves malicious, intentional and unlawful.

McManus vs. Cricket (1 East 160) . . . . "When a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests, he is no longer acting in the pursuance of the authority given him and his master is not liable for such act."

It is clearly beyond the authority of an agent who has the mere authority to collect rents, to assault and batter a tenant.

82 S. W. 552 . . . . "The defendant is not liable for the assault of his collecting agent upon the plaintiff, the agent in so doing not being about his master's business and not acting within any authority delegated to him by the master. To assault and beat a creditor is not a recognized or usual means resorted to for the collection of a debt nor is it one calculated to bring about a settlement."

137 Pac. 428 . . . . "A merchant is not liable for the act of his general manager authorized to collect for goods sold and to recover goods wrongfully taken, in assaulting a customer to whom he has gone to collect

for goods which he claims were taken by the customer."

56 Hun. 506 . . . . "A drayman sent by the purchaser to get some goods from the warehouse of the defendant objected to receiving certain damaged packages and was assaulted by the employe of the defendant who was sent by the defendant to superintend the loading of the goods. It was held that the defendant was not liable for the assault as the employe was acting outside the scope of his authority.

#### CAUSE NO. 7

Pittsburg, Cincinnati, Chicago &  
St. Louis Railroad Company

vs

John Hamilton

Action for Collection of Stock  
Subscription.

#### FACTS

Defendant signed and delivered to the plaintiff's agent, the following written instrument:

"We, the undersigned, agreed to pay fifty dollars (\$50) for each share of stock stated and annexed to our names, to be paid in installments of 5 per cent levied every sixty days by the Board of Directors of the Company. No assessment is to be made till the subscriptions amount to the sum of \$600,000. The railroad is to be constructed within a mile of the subscriber's place."

Defendant signed and opposite his name set "50 shares."

The \$600,000 was later fully subscribed and the Board of Directors levied the assessments upon the subscribers to be paid every sixty days. The defendant refused to pay his subscriptions, because, as the facts are, John Doe, the company's agent who

solicited the subscription and to whom the paper was delivered, before and at the time of the signing of the subscription, stated to defendant that defendant would not be required to pay any money on his subscription till the railroad was built—till the road was constructed and worked in that county; that the road had not been constructed in that county; that he, the defendant, relied upon the statements of the company's agent thus made and signed and delivered the instrument in action on the belief that no money would have to be paid thereon till the road was constructed; that he, defendant, was induced by such statement to make the subscription and that, but for such representation of the company's agent, he would not have signed the instrument; that this fraud of the agent procured the subscription, and that, therefore, plaintiff should not recover on the subscription in action.

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

Alden J. Cusick and  
Joseph H. Flick,  
Attorneys for Defendant.

#### PLAINTIFF'S POINTS AND AUTHORITY

(Indiana Rule). It is a general rule that extrinsic or parole evidence is not admissible to contradict, vary, add to, subtract from, or otherwise modify the terms of a written instrument. 17 L. R. A. 273; 6 L. R. A. 33; 6 Ind. 656.

Quotation from Wigmore, Vol. 4. Par. 2439: "It may be added that the term 'fraud' must here be understood in its legitimate, narrow sense, i. e., a misrepresentation of a past or

present fact; for, although a much looser significance has been occasionally intimated, yet it is obvious that an intent not to perform a promise (i. e., a misrepresentation as to a future fact), or a subsequent failure knowingly to perform an extrinsic agreement not embodied in the writing, cannot be included in the term 'fraud.' It seems to be a disregard for this distinction that is in part responsible for the anomalous attitude of the Pennsylvania court towards the general rule."

Referring to the foregoing quotation 18 L. R. A. (N. S.) 434, says: "The only cases which have been disclosed holding that fraud of this kind is sufficient to warrant the allowance of parole evidence are those of Pennsylvania."

Where a man, who can without difficulty read, executes a paper without reading it, trusting to the party to whom it is executed for a statement of its contents, or trusting to the reading of it by the latter, there being no substantial reason shown for not reading it himself, he will be guilty of negligence. (37 L. R. A.) 64 Ind. 120; 73 Ind. 198; 106 Ind. 406.

Thornburgh vs. Newcastle & Danville R. R. Co. (14 Ind. 6) "Reliance cannot be placed upon the statements of a soliciting agent for stock of a railroad company, that the terms of the subscription, that the subscriber is asked to sign, provided for payment in money or supplies."

The foregoing citation presents the attitude taken by the courts of this state, as regards the contracts made by the soliciting agent of a railroad. It presents the court's attitude as to contemporaneous oral agreements and the rule in this state, as to the

introduction of such agreements is clearly stated in 121 Ind. 6. "Evidence of prior or contemporaneous agreement is not admissible to contradict, or vary the terms of a written instrument or contract."

According to Hughes on Evidence, Page 238, it is conclusively presumed that all extrinsic or parole agreements have been merged into the one written contract of the parties. Since this is a conclusive presumption, parole may not be introduced to in any way change the written contract.

#### DEFENDANT'S POINTS AND AUTHORITIES

1. Fraud is a false representation of fact, made with a knowledge that it is false, or in reckless disregard as to whether it is true or false, made with an intention that it should be acted upon, and actually inducing one to act thereon to his damage. Anson on Contracts 199.

(a) Corporation liable for representations of its agent selling stock Fifth Ave. Bank v Ferry Co. 19 L. R. A. 331; Jewett v Valley R. Co. 34 Ohio 601.

(b) If corporation seeks to enforce subscription obtained by promoter, it will be bound by fraudulent representations made by the promoter to induce the subscription. McDermott v Harrison 30 N. Y. 324.

2. Nothing indefinite or suspicious about agent's statement and defendant was not bound to investigate.

(a) Parole evidence is admissible to prove fraud induced the giving of the subscription. Haynes v Moore 17 L. R. A. 272; 6 L. R. A. 45.

(b) The mere fact that the contract is reduced to writing will not prevent its being set aside for fraud in procuring it. Boyce v Grundy 28 U. S. (Pet.) 120

(c) Whether the representation is of opinion or of fact is a question to be decided by the jury and not by the court. Banta v Savage 12 Nev. 151.

3. Opinion cannot be relied upon unless so made as to intentionally deceive by putting the person off his guard and inducing him to act on it. Jackson C Collins 30 Mich. 557.

(b) If the false statements are of matters peculiarly within the knowledge of the person making them and are affirmations of fact, the other party has a right to rely on them. Rouer v Truant 83 Va. 397-54 Am. Rep. 60.

(c) Case in point. Statements made concerning the happening of a future event cannot be relied on to avoid a subscription obtained by an agent, unless they are made fraudulently, with an intention to deceive. Jefferson v Hewitt 95 Cal. 535; Armstrong v Karshner 47 Ohio 276.

#### CAUSE NO. 8.

Alfred Whitaker  
vs

George Swanson

Action for Damages, \$1000, for injuries due to Defendant's alleged negligent driving of his automobile into plaintiff.

Plaintiff, while crossing the street in South Bend, was struck by the automobile of defendant driven at the time by the defendant himself. Defendant crossed the street without obtaining the traffic policeman's signal or leave to cross, and while thus crossing and without warning, ran into plaintiff, causing injuries which occasioned doctor and hospital bills, loss of time from work, to the extent of \$200.

After the injury the plaintiff met and settled their case in this manner:

defendant agreed to give to plaintiff his certain described horse and buggy which plaintiff then and there agreed to accept in full settlement and compromise of the plaintiff's right of action against defendant.

Despite the fact of this agreement in settlement, plaintiff brings this action and defendant seeks to bar the action by pleading the agreement in settlement set out.

Gerald Craugh and  
William S. Allen,

Attorneys for Plaintiff.

Joseph Sanford and  
Frank Coughlin,

Attorneys for Defendant.

#### PLAINTIFF'S POINTS AND AUTHORITIES.

The right of plaintiff to recover damages for injury.

24 L. R. A. (N. S.) 557, Kentucky.

50 So. 449, Louisiana.

188 S. W. 638, Kentucky.

The facts show accord without satisfaction which cannot constitute settlement.

Buchart v. Barger, 114 Ind. 553—  
17 N. E. 125.

McKeon v. Reed—12 Am. Dec. 319  
—Kentucky.

Young v. Jones—18 Am. Rep. 279  
—Maine.

Russell v. Lytle—22 Am. Dec. 537  
—New York.

Brooklyn Bank. DeGrauw et al.  
35 Am. Dec. 569 New York.

Hoxie v. Empire Lumber Co.—41  
Minn. 548.

Also the following decisions sustaining the above proposition.

97 S. E. 90.

45 L. R. A. (N. S.) 1062.

77 Atl. 874.

159 N. W. 717.

171 S. W. 939.

155 Pac. 246.

114 Pac. 1106.

Accord and Satisfaction defined as an *executed* agreement.

Bully. Bull —43 Conn. 455.

Continental Gin Co. et al. v. Arnold, 153 Pac. 160—Okla.

Must put in statu quo, then can recover—

5 R. C. L. 899.

Swan v. Gt. Northern Ry. Co.—168  
N. W. 659. North Dakota.

Accord without satisfaction only a bar where so stipulated.

Binder v. Altman, 210 Ill. App. 237.

#### DEFENDANT'S POINTS AND AUTHORITIES.

The rule that a promise to do another thing is not a satisfaction is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty and the new agreement is based upon a good consideration and is accepted in satisfaction—then it operates as such and bars the action.

Goodrich vs. Stanley—24 Conn. 613 holds that an acceptance of a new and valid promise which can be enforced in substitution of an existing claim may be as effectual a satisfaction and extinguishment of such claim as the acceptance of any other thing. Cases.

Smith vs. Elrod 24 So. 994.

Allison vs. Abendroth 15 N. E. 606.

Nassay vs. Tomilson 42 N. E. 715.

Langhead vs. Frich Coke Co. 58

A new promise is evident in this Atl. 685.

case. Whitaker agreed to the promise made by Swanson (my client) whereby he would give up his right of action to sue for damages upon the new agreement to accept a horse and buggy in compromise.

Other cases.

Munley vs. Vermont Mut. Ins. Co. 62 Atl. 1020.

Palmer vs. Yager, 20 Wis. 91.

## CRIMINAL PRACTICE COURT (Harry E. Denny)

Be It Remembered, That at the February Term, 1920, of the Criminal Practice Court of Notre Dame, the sophomore lawyers of the College of Law practising therein, the following record was made:

Court convened pursuant to law with the regular judge and officers in attendance, namely: Judge, Francis J. Vurpillat; Clerk, Arthur C. Keeney; Sheriff, Frank M. Hughes. The following proceedings were had and orders made, to-wit:

*In re Jury Commissioners:* The court appointed as Jury Commissioners for the year 1920 E. M. Kennedy, J. F. Heffernan, two resident householders of Notre Dame, Indiana, and legal voters therein, good and lawful men, known to be of opposite political party affiliations. Come now the said appointees and qualify as such jury commissioners by taking and subscribing the oath as such.

*In re Grand Jury:* The Jury Commissioners, including the Clerk of the court, *ex-officio*, having met pursuant to law in the discharge of their duties, come now into court and report their action, to-wit: the selection in manner and form as prescribed by law of the following named persons as Grand Jurors, for the February Term, 1920, of this court:

Clyde Walsh,  
Charles B. Foley,  
Joseph Farley,  
Fred B. Dressel,  
Clarence B. Smith,  
Kenneth F. Nyhan,

good and lawful men, householders and legal voters of Notre Dame Indiana.

Proceedings of the Grand Jury:

Joseph Doran and  
Harry E. Denny and  
Mark Storen,  
Prosecuting Attorneys.  
  
Bernard V. Pater and  
Aaron H. Huguenard,  
Attorneys for Defendants.

Upon the issuing and service of a grand jury subpoena the following witnesses were examined before the grand jury, to-wit: Edwin J. McCarthy, Charles E. Butterworth, William A. Miner, Paul V. Paden, Eugene M. Kennedy, Alfonso A. Scott, Charles M. Dunn.

The following is the state of facts evidenced by the testimony introduced before the grand jury: Jack Johnson and John Smith planned to break into the house of Ben Franklin for what they might find. On the evening of June 1, 1919, they went to the home of Ben Franklin. Johnson stood outside on guard while Smith went to the house and tried the door. Just as Smith was about to insert a skeleton key in the door lock, Mrs. Franklin opened the door, shrieked with fright and fled through the house and out at the back door.

Smith immediately entered the house and took a watch and chain from the table. At that moment Johnson gave a warning from outside and Smith ran from the house, taking with him the watch and chain and he and Johnson ran down the street together.

The next evening they went to the house of John Brown, telling him how they got the watch and chain and asked him to assist them in dis-



posing of them. Brown took the watch and chain and two days later the three men went to the pawn shop of Ike O'Brien in Misawaka and there pawned the watch and chain. The watch was a Boss filled gold case with an H. H. Taylor movement inside and a gold chain attached. worth twenty-six dollars and belonged to Mr. Ben Franklin.

The grand jury returned into open court their indictment based on this state of facts, charging John Smith with larceny in the first count, Jack Johnson with larceny in the second count and John Brown with receiving stolen goods in the third count. The court, on motion of the prosecuting attorneys, ordered the clerk to issue bench warrant for the immediate arrest of the defendants. Comes the Sheriff into open court with the three defendants named under arrest and makes return of his warrant.

The three defendants by their attorneys above named moved separately and severally to quash each count of the indictment on the following grounds stated: 1st, for misjoinder of count three against John Brown for receiving stolen goods with counts one and two against Smith and Johnson for larceny; 2nd, for

insufficient facts alleged to constitute a crime against the defendants or any of them.

After argument upon the motion to quash, the court sustained the motion and the indictment was quashed. The defendants, however, were not discharged, but the grand jury was recalled and the cases again submitted to them, and after deliberation, the grand jury returned into open court their second indictments in the cases, to-wit: one indictment in one count against John Smith and Jack Johnson charging them jointly with the crime of larceny; and the second indictment in one count charging John Brown with the crime of receiving stolen goods. A motion to quash was made in behalf of defendants John Smith and Jack Johnson which was overruled, and to which ruling the defendants separately excepted.

The case was submitted to the jury (class) for trial upon the above facts assumed as proven. The arguments were made, by the attorneys above named and the jury retired to deliberate upon the case and arrive at their verdict.

The case against defendant John Brown for receiving stolen goods was continued.

ONLY OUR OWN OPINION  
CONSTITUTIONAL LAW-WAR POWERS OF CONGRESS.  
(Validity of Conscription Act)\*

by

Francis J. Vurpillat.

\*NOTE: This paper was read before The Round Table of South Bend, Indiana, and before the classes in constitutional law prior to the rendition of the decision by the United States Supreme Court, sustaining the Conscription Act. The paper is here presented in its original form, by request, on account of its controversial character and legal-brief style, the subject-matter of constitutional law and war powers being ever new to students of the law.

The subject, the validity of the Conscription Act, necessarily presents a legal question. But it is at once a question intensely interesting to the layman as well as to the lawyer, because of its vital importance to the nation in this world-war crisis, to the General Government in its powers to cope with an unscrupulous and dangerous enemy, to all the citizens in their rights and conditions affected, and especially to the millions of young Americans who must answer their country's call to serve as soldiers and, if need be, die in this unprecedented war on foreign battlefields.

That we may clearly understand the points for and against the Conscription Act we must keep in mind the peculiar nature of our government, national and state, and its constitutional history. Under the Articles of Confederation, before the adoption of the Constitution, the states were sovereign, completely independent and bound together only by a league. But as stated by Chief Justice Marshall, in *McCulloch vs. Maryland*, 4 Wheat. 316-4 L. Ed. 579, "in order to form a more perfect union, it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers." By the adoption of the Constitution national sovereignty passed from the States to the United States. nation and government. It is said by

the Supreme Court of the United States that "The only Government of this country which other nations recognize or treat with is the Government of the Union, and the only American Flag known throughout the world is the Flag of the United States." *Fong Yue Ting vs. U. S.* 13 Sup. Ct. Rep. 1016-37 L. Ed. 905. The United States, therefore, possesses the character of a sovereign nation. The Constitution confides to the General Government plenary control over all foreign relations. A large measure of the internal sovereignty or local government is left to the states, subject, however, to the express provision in the Constitution itself that this Constitution and the laws and treaties made pursuant thereto "shall be the supreme law of the land."

We come now to consider whether the United States as a sovereign nation, under the Constitution, has the power to enact the Conscription Act, which shall operate as the supreme law of the land, binding upon all the citizens of the country even those who are for the time serving as members of the State militia. True it is that the Federal Government has only such powers as are expressly or by necessary implication granted to it by the Constitution, and that all powers not so granted to the General Government are reserved to the States and the people. But what is

the rule of constitutional construction that must be applied in determining the powers of the United States?

In construing the commerce clause of the Constitution in the case of *Gibbons vs. Ogden*, 9 Wheat. 1-6 L. Ed. 23, Chief Justice Marshall laid down the rule of construction which has ever since been adhered to. The Chief Justice said: "This instrument contains an enumeration of powers granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? . . . What do the gentlemen mean by a strict construction? . . . If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

This opinion of Chief Justice Marshall and the rule of construction here stated, we would respectfully

urge upon the consideration of the gentlemen who would cripple the national government in the defeat of the Conscription Act by means of that strict and narrow construction of the Constitution which is here so vigorously condemned.

In the absence of any express grant of power to Congress to declare war and to raise and maintain armies by any means it may deem necessary and proper, we submit that such power exists as a necessary attribute to sovereignty, and must be construed to have been conferred by the very act of the creation of the United States Government in the adoption of the Constitution. Self preservation is not only the first law of nature, but of nations as well. To make war and peace with other nations is universally recognized as a legitimate exercise of external sovereignty; and this power necessarily implies the power to raise and maintain armies and navies to that end by any means that the sovereign power may adopt. Speaking of the Louisiana purchase and the acquisition of Florida and Alaska, Black, in his work on Constitutional Law, says: "The power cannot be derived from any narrow or technical interpretation of the Constitution. But it is necessary to recognize that there is in this country a national sovereignty. That being conceded, it easily follows that the right to acquire territory is incidental to this sovereignty. It is in effect a resulting power, growing necessarily out of the aggregate of powers delegated to the national government by the Constitution."

If sovereignty in itself be not sufficient to sustain the Conscription Act as a war measure of the United States, it must, however, exert a

strong influence in the construction to be put upon the enumerated war powers granted to Congress by Section 8 of Article I of the Constitution, which are as follows:

To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;

To raise and support armies; (appropriations therefor to be made for two years at a time);

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States.

These powers are expressly granted, are absolute and without any limitation or restriction whatever as to the means by which they may be exercised. And to these powers must be added the provision that "the President shall be the commander in chief of the army and navy of the United States and the militia of the several states when called into the actual service of the United States," a provision which VonHolst's Constitutional Law declares, invests the president, as such commander, with all the power which the King of England enjoyed as the commander of the land and naval forces of the United Kingdom.

Concerning these war powers it is said in Black's Constitutional Law that "the power to declare war necessarily includes the authority to prose-

cute the war, and make it effective, by all and any means, and in every manner, known to and exercised by any independent nation under the rules and laws of war as the same are ascertained by the principles of international law. Justice Field, in the case of *Miller vs. United States* II Wall. 268-20 L. Ed. 135 says: "It is evident that legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those applicable to legislation founded upon the municipal power of the government. . . . Legislation (founded on the war powers) is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. The war powers of the government have no express limitations in the constitution, and the only limitation to which their exercise is subject is the law of nations." In *Stewart vs. Kahn* (II Wall, 493-20 L. Ed. 17) the Supreme Court says: "The measures to be taken in carrying on war and to suppress insurrections are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the constitution." In construing the enumerated power granted to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," Chief Justice Marshall said:

"We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high

duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In the light of the principles and rules enunciated, and with the guidance afforded us by the eminent authorities cited, let us proceed to a construction of the constitution necessary to sustain the validity of the Conscription Act.

In addition to the unrestricted powers granted to Congress to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, for the purpose of waging any war it may declare, Congress also is given the power "to provide for calling forth the militia to execute the laws of the Union, to suppress insurrections and repel invasions" and "to provide for organizing, arming and disciplining the militia. . . ." It is the attempt to construe this added power over the state militia for domestic purposes, into a limitation upon the absolute and unrestricted powers of Congress over all its citizens for war purposes, that furnishes the only apparent objection to the Conscription Act. We say apparent objection advisedly, for it is not a real objection.

True it is that, when Congress calls forth the militia for the purely domestic purposes enumerated in the constitution such militia cannot be made to serve beyond the territorial limits of the United States. The Supreme Court has so held. But these decisions must be considered as hold-

ing simply this, and nothing more. They can have no application to the Conscription Act, because that act is not founded upon the militia clause of the Constitution at all. The Conscription Act is a legitimate exercise of national sovereignty, and is founded upon the war powers expressly granted in the Constitution, and calls forth all the citizens of the country, without discrimination for the purpose of raising and maintaining an army to wage a foreign war already upon us. Mr. George W. Wickersham, as Attorney General of the United States, speaking of an Act of Congress, of date March 27, 1908, founded upon the militia power, which attempted to authorize the President to call the militia for use, and when so called, to serve either within or without the territory of the United States," said: "If this provision were to be construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional." This opinion is said to militate against the Conscription Act. But note the language of this eminent lawyer: "*If this provision is to be construed to authorize Congress to use the Organized Militia.*" Organized Militia being capitalized, clearly having reference, therefore, to the Organized Militia as such. The Conscription Act does nothing of the kind and bears no similarity to the act construed by Mr. Wickersham. Furthermore, we are informed that the one-time Attorney General, at the recent meeting of the American Bar Association stated that his official opinion applied to an act founded on the militia power of Congress, and could have no application to the Conscription Act which is based solely

upon the other war powers of Congress. Thus, all this argument and citation of authority brought to the attack of the Conscription Act, must fall before the irrefutable logic of the country justice of the peace, that "they have no bearing on the case."

In the case of *Burroughs vs. Peyton*, 16 Gratton 475 the militia is defined as "a body of men composed of citizens occupied temporarily in the pursuit of civil life, while an army is said to be a body of men whose business is war." Why should the militia of the state be recognized as having any greater right than other citizens of the United States? Why should they be exempted from the call of their country in time of national peril and disaster? Are they any less citizens of the United States because they are militia? What divine right of the State or what inalienable character of its militia, exempts such citizens from their country's call to arms that every other citizen in the land must answer? To so construe the powers of congress as to give absolute exemption to the state militia, is to put it into the power of the state to thwart the powers of Congress altogether; for, if a state may make militia of some of its citizens it may make militia of all. Thus would all the war powers of congress be made nugatory, except, indeed, the so-called power to raise a volunteer army, and this exception, we submit, is a rank contradiction in terms—power to raise a volunteer. To raise this absurd contention to the dignity of a constitutional construction would be to transform the already vanishing war power of Congress to a mere glimmering hope that some patriots might volunteer to come to the rescue of their helpless country. The state

has no such power, and the citizen, merely because he happens to be a member of the state militia, has no such exemption. The Constitution of the United States and the Conscription Law enacted pursuant thereto, are the supreme law of the land, "any thing in the constitutions or laws of any state to the contrary notwithstanding," as so prescribed in this very language of the Constitution itself.

The Constitution makes no provision whatever for a national militia. There is no such thing; and whoever uses that phrase commits error. In lieu of such national militia, Congress is empowered to call the state militia to serve the same purposes in the nation that they are organized to serve in their respective states. The militia is a peace organization for domestic purposes only. The Constitution does make provision for a National Army. Congress is empowered to call all the citizens of the United States to serve the same purposes as any army in the world may be made to serve its nation. The National Army is a war organization for the purpose of waging war. There are two express powers affecting the militia, as such, for the domestic purposes enumerated. There are four other express powers affecting the citizens, as such, and these are for purposes of war. No necessary relation exists between these militia powers on the one hand and the four war powers on the other hand. No conflict need be invited in the process of their construction. Indeed such conflict can be and should be avoided. In the absence of the two provisions relating to the militia, no difficulty would arise in the construction of the four war powers first enumerated in

the constitution which establish the power of Congress to raise an army by calling all its citizens. Why, then, should the two provisions that follow, granting added power to Congress over an entirely distinct subject matter, be construed as a subtraction from or a limitation upon the war powers already enumerated and granted without an "if".

In no important case has the discretionary power of Congress over the means to be employed in the execution of any of its enumerated powers been denied by the Supreme Court of the United States and a fixed and arbitrary rule of construction applied instead. Nor will such a rule of construction be adopted in this case to deny the sound discretion exercised by Congress in the enactment of the Conscription Act. "It would have been an unwise attempt," says Chief Justice Marshall (*McCulloch vs. Maryland*) "to provide by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." Justice Strong, in the second *Legal Tender* Decision, says: "It was at such a time and in such an emergency (*Civil War*) that the *Legal Tender Acts* were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the *Legal Tender Acts* would, could any one be bold enough to assert that Congress transgressed its powers." Anent the war powers of Congress the United States Supreme Court already has given ex-

pression to a strong opinion in the *Tarbel's Case* 13 Wall. 408-20 L. Ed. 601. In this case the court said: "Among the powers assigned to the government is the power to raise and support armies. . . . Its control over the subject is plenary and exclusive. It can determine without question from any state authority how the army shall be raised, whether by voluntary enlistments or forced draft the age at which the soldier shall be received and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned."

But what of the contentions against the validity of the Conscription Act? The cardinal rule to be observed in the interpretation of the constitution is that effect must be given to the intention of the people who adopted it. And this intention must be ascertained from the instrument itself, from the very language used to express that intention. If this language does not plainly import the intention, if indeed, it be ambiguous, then resort may be had to the expressed purposes for which the instrument was adopted and the government was established. If ambiguity still remains, then, and not until then, have we a right to consider matters extraneous of the constitution itself in aid of its interpretation.

We strenuously deny that any ambiguity exists as to the nature or extent of the war powers granted to Congress in the Constitution. The language used in the grant of these powers is so plain and unequivocal that "he that runs may read." These powers appear in four enumerations of Sec. 8, Article I. *ante*, each without a word, phrase, clause or sentence, qualifying or restricting the

power, as for instance, the power "to declare war" and "to raise and support armies."

The only contention against the Conscription Act which is based upon any construction of the language of the Constitution at all, is the persistent fallacy of construing the Act as an exercise of power over the state militia in virtue of the separately enumerated grant of such power, instead of construing it, as Congress expressly declares it to be and as it clearly is, an exercise of the war powers in virtue of the four enumerated grants of power for such purpose. We have already adverted to this. The enumerated powers of Congress over the state militia also need no aid in their construction. Their language too is plain and unequivocal. In the absence of any declaration of war by Congress and the enactment by it of a law such as the Conscription Act for raising a national army, neither Congress nor the President can call and use the state militia, as such, for purposes other than those enumerated in the Constitution, namely: "to execute the laws of the Union, to suppress insurrection and repel invasions." That the militia, who are mere peace officers, have always been recognized as having immunity from service "outside the realm" is admitted, and that "such immunity was a thousand years old" in Great Britain before the adoption of our Constitution. But that any citizen of any civilized country under the sun since the dawn of time ever held immunity from his country's call to war, we emphatically deny. Even England, as is well known, has used her citizens as soldiers for the prosecution of wars, both offensive and defensive, everywhere throughout her whole history, despite the much

vaunted immunity of the militia. And the acts of Parliament declaring such wars and raising armies to wage them did not constitute any amendments to the so-called British Constitution, but were the legitimate and frequent exercise of the sovereign power inherent in every organized government, whether autocratic or democratic.

The debates in the Constitutional Convention of 1787 are palpably perverted and misapplied in argument against the Conscription Act. That convention was created by Congress to amend the Articles of Confederation, but it found that instrument so defective as not to admit of correction. The convention, therefore, abandoned altogether the purpose for which it was called, and instead, adopted the Constitution which it reported to Congress with the recommendation that it be referred to the States, to be by them in turn submitted to the people for adoption. In this manner was the United States Government established. So inherently defective were the Articles of Confederation that they were thus rejected as an entirety. And the one defect that stood out more prominently than all the others, was the utter inadequacy of power in the United States Government to wage war and to raise and support armies; the utter inefficiency of the state militia as a war organization upon which the General Government was made to depend. To obviate for all time this defect, which almost proved fatal to the success of the revolution and to our independence, and to make of the United States under the Constitution a powerful nation, equal in sovereignty to every other state in the international world, there were adopted by that Constitutional Con-



vention the four unrestricted powers, namely: to declare war, to raise and support armies, to provide and maintain a navy, and to govern the land and naval forces. The intention of the patriots who framed the Constitution and the people who adopted it is to be derived from the plain language used by them to express that intention and to create the power granted, and not by resort to any individual construction put upon the conflicting statements made in convention debate. And yet, there are a few men insisting in this manner upon such a construction of the Constitution as will make the United States of today still dependent upon the state militia and, in fact, more impotent and inefficient than it was under the Articles of Confederation, —a contention so palpably absurd as to provoke derision and contempt. The real solution of the militia and war power controversy in the Constitutional Convention is this: No national militia was created at all, but instead the states were permitted to retain their respective militia and the General Government empowered to call and use these militia for the enumerated national peace purposes of executing the laws of the Union, to suppress insurrection and repel invasions. And to obviate the grave defect and impotency in the National Government of having to depend upon the state militia in time of war, the four enumerated war powers were conferred without any limitation whatever as to the extent of those powers or the means by which they were to be exercised.

Except for the purposes of the Civil War, when President Lincoln and the Congress did not hesitate to adopt the conscription and enforced draft, it has always been the policy

of the government to depend upon the state militia for domestic purposes and upon the volunteer system for general war purposes. This policy of the Government has been uniformly criticised and condemned by military men and writers on the military unpreparedness of the United States. And President Wilson in his public speeches plainly pointed out the inadequacy of this policy in the present world-war crisis, as a reason why the Congress should enact the Conscription Law. And yet, strange as it may seem, these criticisms of the government for adhering to such a *policy* are cited as establishing the *principle* that the Government is powerless to raise an army by any other than the militia and volunteer systems. This furnishes the perfect example of the boomerang in argument. Instead of establishing the invalidity of the Conscription Act, these criticisms have at last influenced Congress to exercise its discretionary power of raising a national army by the more adequate means of Conscription and these military men and writers now are approving the congressional action.

We have no patience with the contention for a construction of the constitution that would make the United States more impotent and inefficient than it was under the Articles of Confederation, and that would leave it a pitiable and humiliating spectacle in the gaze of the international world —a sovereign nation shorn of its inherent power to wage war and raise and support armies; to resist wanton assaults upon its sovereign rights, and threatened destruction of its institutions; unable to defend its citizens or to prevent the substitution of an autocracy for the present glorious freedom of its people. And yet we see

this very contention emblazoned, by a few, in speech and petition, with all the fallacy, sophistry and vociferousness of the demagogue. No wonder the great Lincoln was stirred to real eloquence and just wrath by the same ill-timed and illogical contention against the conscription act of the Civil War that is urged against the present act, to give expression to the following opinion in support of the power of Congress validly to enact such a law. President Lincoln said:

"In this case, those who desire the rebellion to succeed, and others who seek reward in a different way, are very active in accommodating us with this class of arguments. They tell us the law is unconstitutional. It is the first instance, I believe, in which the power of Congress to do a thing has ever been questioned in a case when the power is given by the Constitution in express terms. Whether a power can be implied when it is not expressed has often been the subject of controversy; but this is the first case in which the degree of effrontery has been ventured upon by denying a power which is plainly and distinctly written down in the Constitution. The Constitution declares that 'the Congress shall have power . . . to raise and support armies; but no appropriation of money to that use shall be for a longer time than two years.' The whole scope of the conscription act is 'to raise and support armies.' There is nothing else in it. . . . Do you admit that the power is given to raise and support armies, and yet insist that by this act Congress has not exercised the power in a constitutional mode, has not done the thing in the right way? Who is to judge that? The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall

prescribe it. In such case Congress must prescribe the mode or relinquish the power. There is no alternative. . . . The power is given fully, completely, unconditionally. It is not a power to raise armies if state authorities consent; nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if.' . . . The principle of the draft, which simply is involuntary or enforced service, is not new. It has been practiced in all ages of the world. It was well known to the framers of our Constitution as one of the modes of raising armies, at the time they placed in that instrument the provision that 'the Congress shall have power to raise and support armies' . . . Wherein is the peculiar hardship now?"

The foregoing opinion was quoted by Honorable Charles E. Hughes, late Justice of the United States Supreme Court, in his recent address before the American Bar Association. Mr. Hughes commented on this opinion as follows: "These are the words of Lincoln, penned in the midst of the Civil War, in which conscription was enforced, and his reasoning is conclusive. And while the question was not presented to the United States Supreme Court, the power of Congress was explicitly recognized in *Tarbel's case*. 13 Wall. 407, 20 L. Ed. 600, and in later opinions."

"To provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity" and "to make the (United States and the) world safe for democracy," the Congress has recognized a state of war existing against us and has enacted the Conscription Law as the neces-

sary means for raising and maintaining an army to wage this war. If it be said that these means resorted to by Congress in the enforced draft, and by the President as Commander in Chief of the army in using our forces to fight a foreign foe on foreign fields, are extraordinary means, it must immediately be replied that the conditions confronting us too are extraordinary and cannot be met by any other means. A war-mad military autocracy, which can be compared only to the very "Gates of Hell" described by the Scriptures, is trying to prevail against Christianity, civilization and international law, to impose upon us and the world their military domination and to destroy the constitutional democracy which now is our glorious heritage.

We firmly believe that the sound discretion exercised by Congress in the adoption of the Conscription Act as the means of raising an army for use in the present world-war crisis will be sustained by the United States Supreme Court, just as such discretionary right of Congress as to the means to be used has always been recognized in every important exercise of its power under the Constitution. Witness the decisions sustaining the National Bank Act, the Confiscation Acts of the Civil War, the Legal Tender Act, the Sherman Anti-Trust Law and the Adamson Eight-hour Law.

Would it not be a violation of the fundamental principle of our institutions, that one of the separate departments of the government shall not usurp power committed by the Constitution to another department, for the Judiciary in this case to deny to the Legislative Branch the war powers and the discretionary means of exercising them when they are expressly conferred upon The Congress by the Constitution?

Are not these war powers and their exercise by Congress, and the power of the Executive, as Commander in Chief of the Army, to fight on foreign fields, political powers for which The Congress and the President, respectively, are answerable only to the people,—political powers over which the Judiciary can assume no jurisdiction whatever?

We believe that the Judiciary will be in unison with the Legislative and Executive branches of the Government in respect of these powers and the means of their exercise; and that, as a result, our country will emerge from this national crisis and world-war triumphant and victorious, with the sun of American Democracy shining throughout the world more brilliantly than ever before, and with the Flag of the United States floating higher in the heavens, inspiring renewed love and patriotism in the people at home and a lasting gratitude and respect in the peoples abroad.

## CASE AND COMMENT

1. In *Sprey vs. Kiser*, 102 S. E. 708, the North Carolina court held a druggist civilly responsible for the death of a baby resulting from the sale of a dangerous drug. The court further held on the facts, that the action was properly brought in contract or tort. Generally speaking, a druggist is liable for injuries to, or death of a person, resulting from the sale of dangerous drugs, but the liability rests upon the principle of negligence. The druggist owes his customers the legal obligation of ordinary care in the sale of his products; but ordinary care is a relative term. It means the highest degree of care and caution consistent with the conduct of the business. The decision in this case places druggists in the legal category of public servants, such as innkeepers and carriers, and reflects a progressive tendency to extend the liability of all persons who render service in any form to the public, for all injuries resulting from their negligent acts.

2. The Court of Appeals of Georgia renders an interesting decision in the case of *Metropolitan Life Ins. Co. vs. Hand*, 102 S. E. 647, wherein it is held that in an action on an insurance policy the conviction of insured for manslaughter did not render inadmissible his evidence that the death of the insured was accidental. The court does not discuss the principle at length nor cite any authority in support of it. The question involved here is disputed, however, by a few courts, but the decision in the case is clearly sound. A judgment of conviction in a criminal action is inadmissible to establish the facts upon which it is based in a civil action. It does not vary the rule of

law in this case that judgment was sought to be contraverted as to those facts. The proceedings are entirely different and no rule of *res adjudicata* sanctions the reciprocal admissibility of civil and criminal judgments for the reason that their purposes differ, the procedure differs, the rules of evidence differ and the proceedings do not affect the identical parties. Those cases admitting a criminal judgment as evidence in a civil action are exceptional, as where the civil action is based directly on the judgment. The case is therefore properly decided.

3. In *Ellington vs. Rides*, 102 S. E. 510, the North Carolina Court held that a person who installs a machine on the premises of another is an invitee and can hold the owner liable for defective condition thereof even though the injury results while the plaintiff is doing an act not strictly within the terms of the invitation. The court said: "A slight departure in the ordinary aberrations or casualties of travel do not change the rule of liability and hence the protection of the law is extended to him while lawfully on that portion of the premises reasonably embraced within the object of his visit." This decision is questionable. An owner of premises is liable for negligent condition thereof only as long as the invitee exercises the invitation strictly in accordance with its terms. This the plaintiff failed to do in going to another part of the property as the case showed merely for curiosity and not for a reason connected with the object of his invitation. The instant, therefore, he exceeded the terms of his invitation the relation between the parties was suspended, he be-

came a mere trespasser and should bear the risks resulting from his own misconduct.

4. *Cobble vs. Royal*, 219 S. W. 118, a Missouri case, was an action to recover on a mutual benefit insurance certificate. In denying a recovery the court held that a by-law, providing that proof of death can not be based on the legal presumption of death arising from seven years' absence and substituting a like rule based on expectancy of life of insured, was valid. The court gave as its reason the fact that the seven years' absence presumption is a mere rule of evidence and can be abrogated by contract. The case is intensely instructive and contains a valuable dissenting opinion. The decision, limiting it to the facts, is sustainable. A member of a society is conclusively bound by all its by-laws provided they are legal and reasonable. There was no contention in the case that it was void because unreasonable, the only argument being that it was illegal. Now, a by-law is illegal if it violates some principle of public policy whether it be manifested by a statute or by a common law rule. The seven years' absence presumption is, as the court stated, a mere rule of evidence which can be abrogated by contract and is not a rule of public policy like a clause making decision of the society conclusive. The distinction established in the case is therefore valid and is applied generally throughout the law of contract. Rules of evidence can be abrogated by contract, but principles of public policy are beyond the power of abrogation by the parties.

5. *Hurlbut vs. Bradley*, 109 Atl. 171, a Connecticut case, holds that an indorser of a note discharged by

failure of holder to give him notice of dishonor, removes his liability by a promise to pay the note. This is the rule of the Law Merchant and under the Uniform Negotiable Instruments Law. The decision is absolutely sound. When an indorser is discharged by failure to receive notice of dishonor, the debt itself is not discharged, but only the indorser is personally relieved from the obligation to pay the note. When he promises to pay it therefore he waives the defense that he would otherwise possess, revives the original obligation and is liable as though notice of dishonor had been regularly given.

6. The recent Illinois case of *Ford vs. Greenwalt* establishes an important precedent. The Supreme Court held that where a will shows by its terms that it was not intended to be revoked by marriage of the testator, the intention is controlling and the statutes does not revoke the will. In other words the decision substantially holds the statute is not an arbitrary rule of law, but is a mere rule of evidence, the operation of which can be avoided by appropriate testamentary expression. The opinion of the court, while not entirely logical, is interesting, and no doubt properly and reasonably construes the statute. The statute as above stated provides that if a single man makes a will his subsequent marriage revokes it. The policy of the statute is to induce him by revoking his original will to make a second will, thereby reconsidering the provisions of the original instrument, in view of the altered conditions in person and property resulting from the marriage. But *cessante ratione, cessat lex*: where the reason for a law ceases to apply, the law itself no longer exists. Hence in this

case since, when he made his will he contemplated marriage, he considered the changes it would create and naturally it can be inferred that he moulded the will to meet such post-marital conditions. There was, therefore, no reason for holding the statute applicable and court effectuating the clearly defined intention of the testator, probated it as his last will.

There are several miscellaneous recent decisions on varied subjects in the law. For instance, in *Gibbs vs. Almstone*, 176 N. W. 173, the Minnesota court held that under rule of

avoidable consequences, a person who has sustained injury is not legally required to submit to an operation.

Again, in *O'Connor vs. McCabe*, 176 N. W. 43, the South Dakota court held that equity will reform a voluntary conveyance of realty in an action between grantee and heirs at law of grantor.

Lastly, in *Elms vs. Flick*, 126 N. E. 66, the Ohio court held, a father who had provided an automobile for the general use of the family, was not liable for negligence of his son who at time of injury was driving several of his friends on a pleasure trip.

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## PROSPECTUS AND ANNOUNCEMENT OF THE COLLEGE OF LAW FOR 1920-1921.

With the year 1919-1920, the College of Law of the University of Notre Dame began a new era. This year, for the first time in the history of the old school, the law men are afforded a distinctive law building all their own, and a law atmosphere separate and apart from the other schools and colleges. These features, together with the splendid new and modern equipment and facilities for conducting the law course, lend dignity to the School, offer singular advantages to the law students and stimulate in them a zest for studying, understanding and learning the law. Nowhere in the country are these conditions better.

The pictorial review of the school, which appears in this issue of the Reporter, presents an external view of the Hoynes College of Law, named in honor of William Hoynes, Dean-Emeritus, whose lifelong labors laid the splendid foundation for the present School of Law. A glimpse is also given of each of the four large rooms of the building, the library, court room and class rooms.

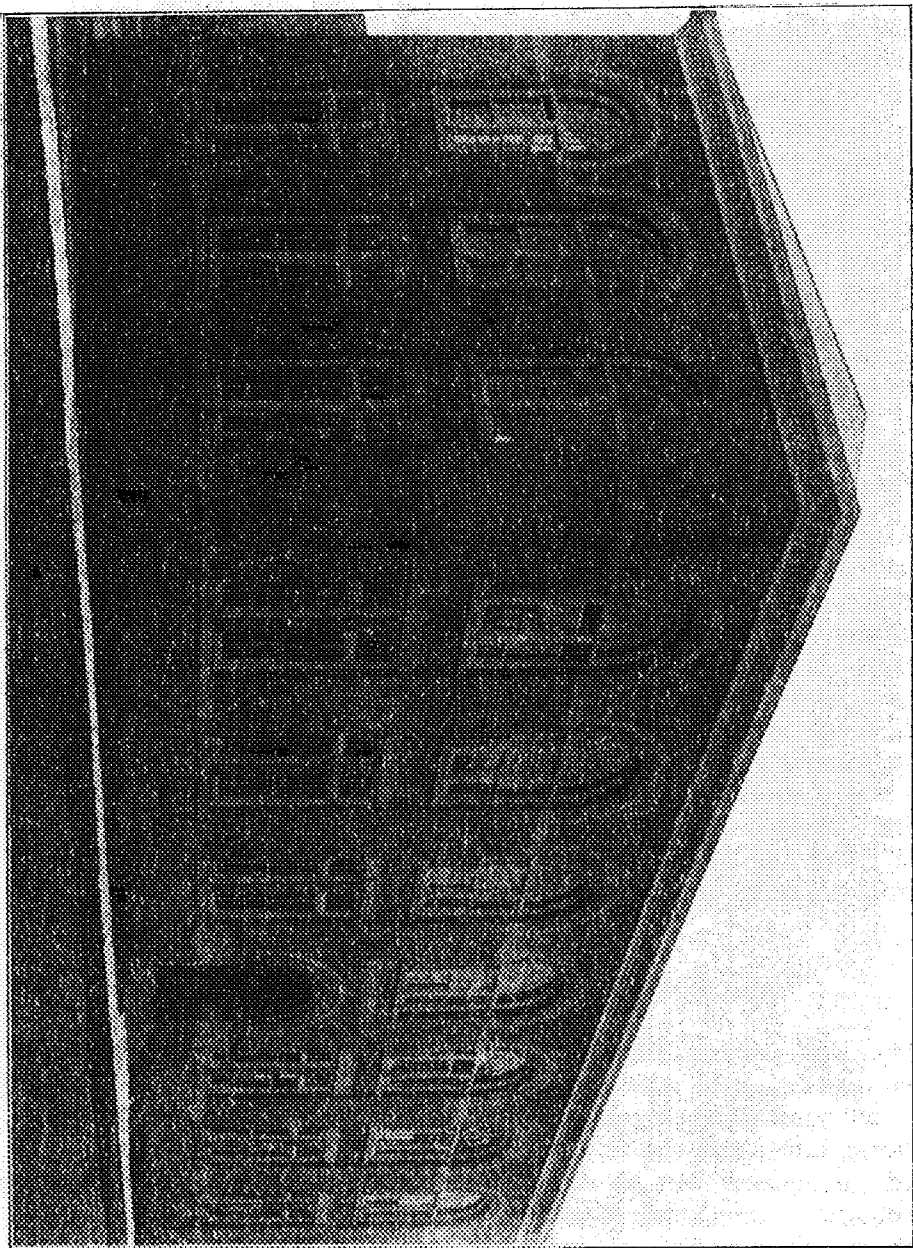
### LAW LIBRARY.

The law library, quite extensive and adequate for the needs of our large and growing law school, is continually augmented by the arrival of new books. There are the U. S. Supreme Court Reports, complete; Federal Cases; Federal Reporter; United States Statutes and Digests; Meyers' Federal Decisions; The National Reporter System, complete with Digests; Lawyers' Reports Annotated, both old and new series;

American Reporter system, American Decisions, American Reports, American State Reports; English Ruling Cases; British Ruling Cases; American and English Annotated Cases; American Annotated Cases; Moak's English Reports; Petersdorf's Abridgment; American & English Corporation Cases; Moore's International Law Digest; American & English Encyc. of Law; Cyc., Ruling Case Law, Words & Phrases; Encyc. of Pleading & Practise; Encyc. of Evidence; Standard Encyc. of Pleading & Practise; hundreds of text books, of the old and modern writers. There are the Indiana Supreme and Appellate Court Reports, complete; New York Common-law Reports; New York Court of Appeals Reports, Vermont Reports.

There are now coming the state reports of the individual states of Ohio, Illinois, Iowa, Michigan, Wisconsin, Minnesota, Pennsylvania, Massachusetts, Missouri, California and Connecticut. Arrangements have been made for acquiring the state reports of all the states to the point where the Reporter System begins to publish them, and the Codes and Statutes have also been applied for, so that the law of every state will be made available to every law student.

The library has a capacity of twenty thousand volumes, is admirably equipped with stacks, tables and chairs, has high ceiling, is perfectly lighted, day and night, and like the court room and class rooms, is so arranged and cared for as to afford the most commodious, convenient and cheerful accommodations for efficient use.



THE LAW BUILDING, KNOWN AS THE HOYNES COLLEGE OF LAW.



## COURT ROOM.

The court room, which is a marvel of beauty and perfection, is conveniently located on the ground floor, opposite the law library. The court room, in its equipment, arrangement and faithful compliance with the requisites of the actual court, is in fact superior to many real court chambers. Here are held the various sessions of the University courts in the strictest observance of the procedural law,—pleading, practise and evidence,—trial and appellate. We have only to refer to the present issue of the Notre Dame Law Reporter, which, as an exhibit, speaks for itself, to confirm our statements.

A glimpse of the Notre Dame Circuit Court in session may be seen in the accompanying pictorial review. A pretentious bench for the judge, perfect accommodations for the jury, ample room at the bar for litigants and their attorneys, witness box, stenographer's table, and offices for the clerk, sheriff and bailiff of the court. The bar is raised and separated from the lobby, which has a seating capacity of one hundred.

## CLASS ROOMS.

The class rooms, like the court room, are equipped with the beautiful and substantial American, steel pedestal, tablet arm chairs, the latest word in modern lecture room accommodation. One hundred and fifty of these mahogany finished chairs are arranged in semi-circular form in front of the instructor's rostrum, constituting such an efficient and attractive spectacle as almost to speak law for themselves. There are two

such large rooms which together with the court room, afford ample accommodation for the large student body and the entire faculty of the School of Law.

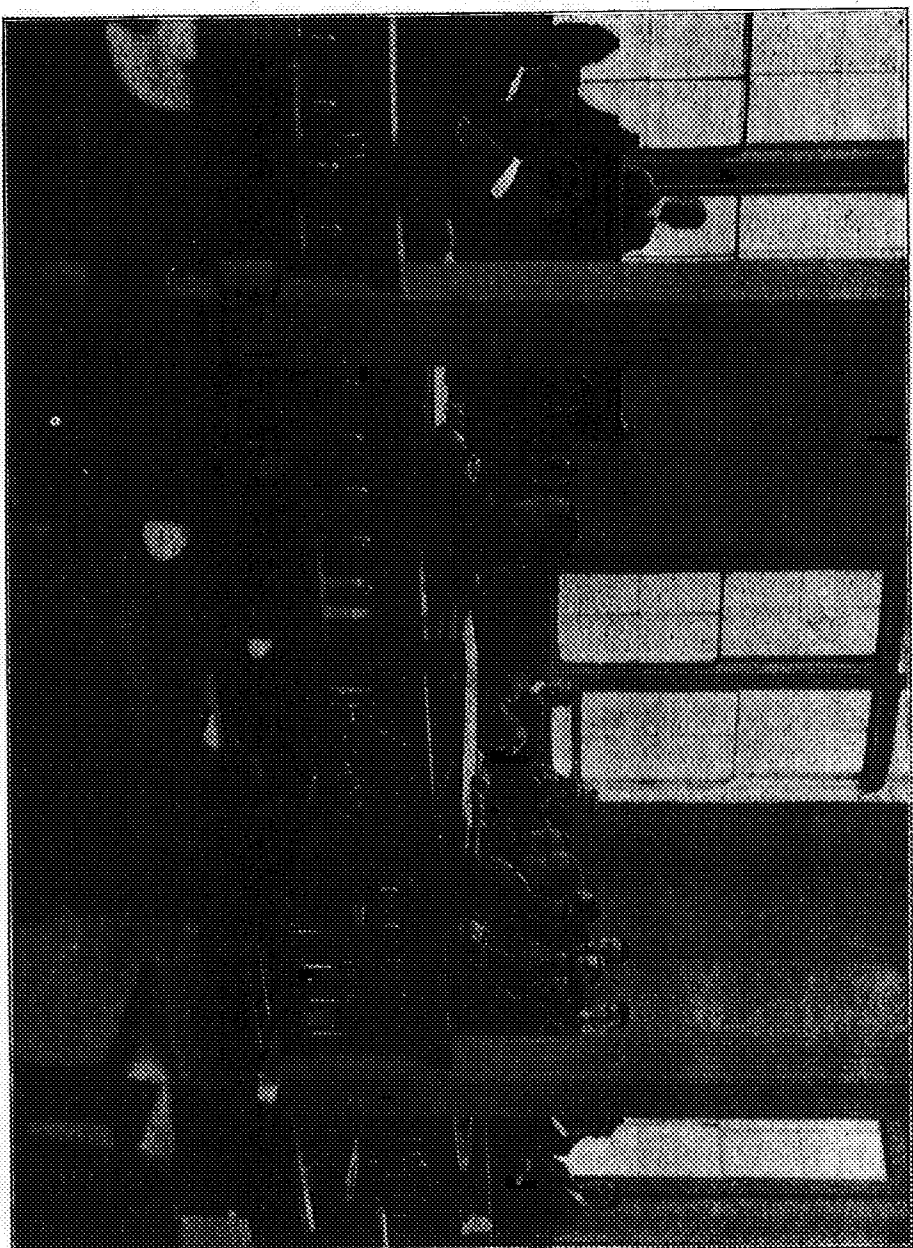
## ORGANIZATION AND SYSTEM.

The law faculty comprises six resident instructors, all of whom are graduates of the leading law schools of the country, most of them experienced in the practice of law, and three of whom have been regular judges of city, and circuit courts. Four of the faculty devote their entire time and service to the School of Law while the other members of the faculty also engage in the law practice.

The classes of the course are arranged in groups according to their relationship and the logical order of their study and with due regard to the time to be devoted to each class subject. These classes are assigned to the various instructors with a view to the instructor's special qualification and experience to teach them. The course is conducted under the careful supervision of the dean of the department to the end that the best methods may be applied and the highest degree of efficiency attained in the teaching department, thereby assuring the students the greatest possible measure of success in the course.

A special advantage to the law student at Notre Dame is his daily association with the instructors and the personal assistance rendered him and the special interest taken in him by the law faculty as well as by the administrative officers of the University.

A PARTIAL VIEW OF THE COURT ROOM, WITH THE NOTRE DAME CIRCUIT COURT IN SESSION.



## METHODS OF INSTRUCTION.

Experience at Notre Dame has confirmed the opinions of eminent law teachers that the case method alone is not adequate to teach a thorough and comprehensive knowledge of the law. Excellent as the case method is for imparting a knowledge of the particular principles of the law applicable in the cases analyzed, a general idea of the law as a whole, its main features and its universal concepts can not be learned without the aid of the text-book. Therefore the law is taught here by text-book assignments as well as cases, both explained and illustrated by the class-room talks of the instructors. In addition to these daily assignments, frequent written tests and the quarterly examinations are given, and class records are kept of the students' work.

## INTRODUCTION TO THE STUDY OF LAW.

As an introduction to the study of law the students are given a course of preliminary lectures to acquaint them in a general way with the system of law as a whole, its various classifications and those concepts and principles underlying the whole law so necessary to an intelligent and successful study of the various branches of the law prescribed in the course for study. These lectures may be briefly outlined as follows: the nature of law; law as it effects the individual, organized society and nations; the system of American jurisprudence; the common-law and equity systems, their origin, development and relation; our constitutional and statutory law systems and their relation to the common law; the

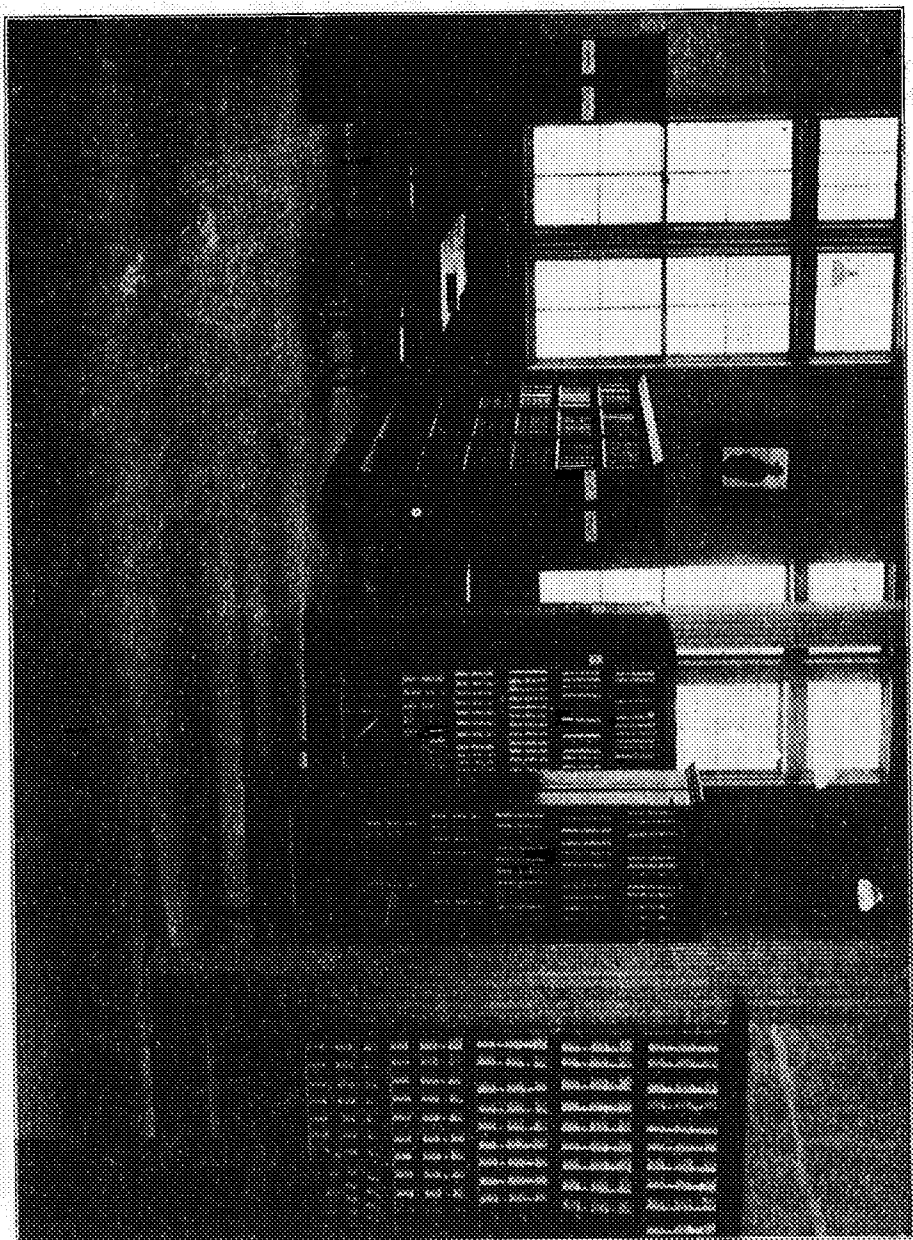
sources of the law, custom, judicial decisions and legislation; judicial systems and the processes of the courts; higher court decisions as precedents and the reporter system; the law divided into two great branches, the substantive law and the law of procedure—rights and remedies—and these branches again divided respectively into the law of contracts, wrongs and property and practice, pleading and evidence, these in turn divided into the special branches of the prescribed course; where to find the law; how to study the law.

## THE LAW AND HOW TO PRACTICE IT.

The lawyer's profession is a practical one and most law students intend to practice the law. It is frequently said of the law schools of the country that their courses are not practical, that they teach the substantive law to the exclusion of the more practical branch of the law, the law of procedure.

The substantive law operates *proprio vigore* to establish the rights and obligations of parties. When such right is violated the substantive law creates a secondary right which is denominated a right of action. Then it is that the law of procedure applies, and it is the knowledge of this law that enables the practitioner to invoke the jurisdiction of the courts and the strong arm of the state to secure his client's rights and redress his wrongs. A law course, therefore, to be practical should teach not only the substantive law but also the law of procedure.

To meet this condition the law course as now prescribed at Notre



A GLIMPSE OF ONE CORNER OF THE LAW LIBRARY.

Dame is intended not only to teach the law but how to practice it as well. Provision has been made for a systematic course in civil procedure and a thorough and practical court system to operate throughout the entire three years of study.

### COURSE OF PROCEDURE.

In addition to criminal procedure which is taught in the first year there is also a preliminary course in civil procedure consisting of the study of common-law and equity courts, the original writs and processes, the common-law forms of action and remedies and relief in equity. Not only does this serve as a beginning of the course in practical procedure but it enables the law student from the outset to better understand the substantive law taught through the application of the common-law actions and remedies. This course is followed in the second year by a complete course of pleadings and practice at common-law, the making of issues in the various common-law actions, equity pleading in general and as applied in the federal courts, and pleading and practice under the code. The third year is devoted to the making of issues in the principal civil actions under the code, trial practice and appellate procedure. The course in federal procedure is also given in this year.

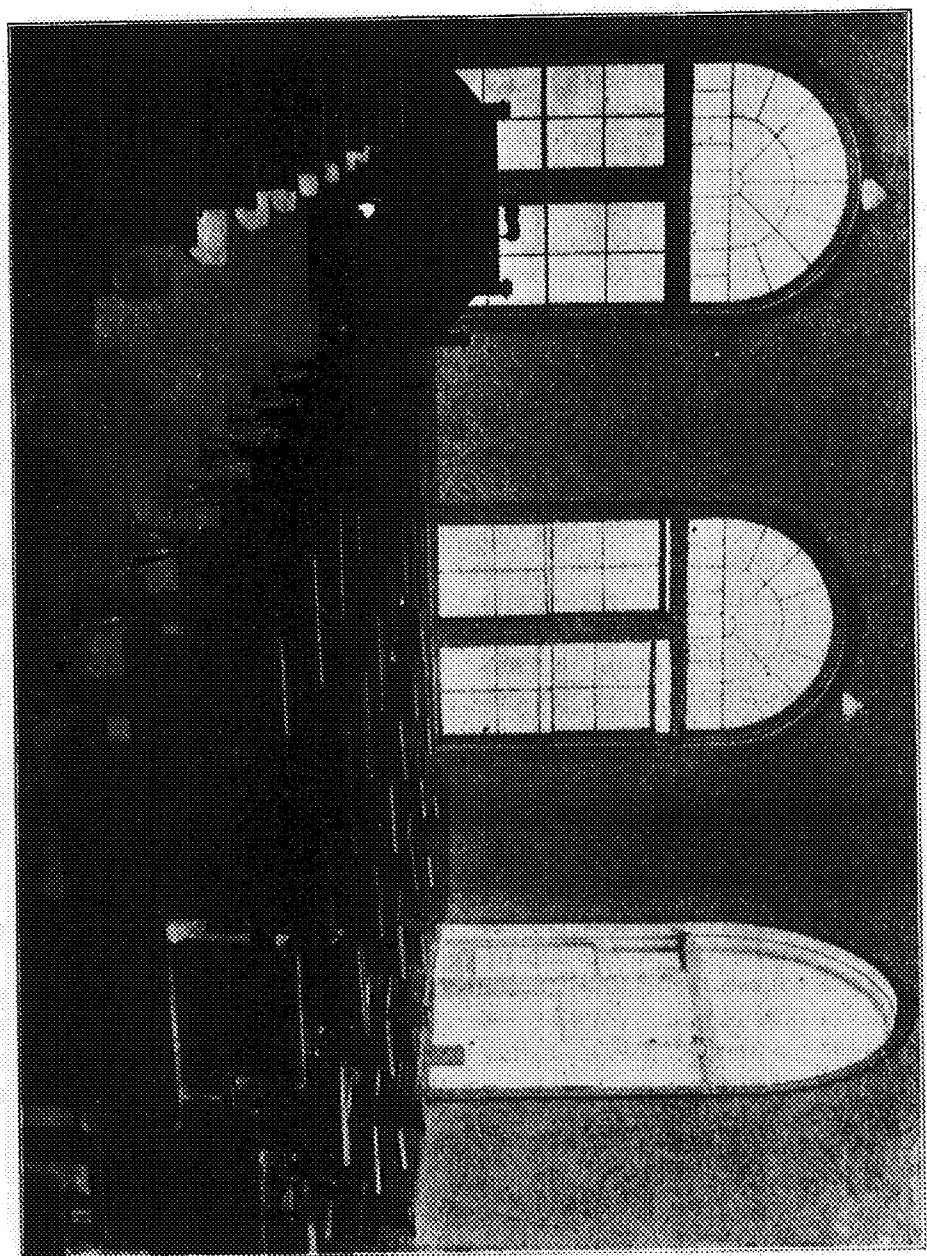
### THE UNIVERSITY COURTS.

These consist of the Criminal Practise Court, the University Moot Court, the Notre Dame Circuit Court and the Supreme Court of Notre Dame. These courts constitute a thorough and practical system and

are kept in operation throughout the three years of the law course. The Criminal Practise Court is open to the first year law students for criminal pleading and practice immediately after the course in criminal law and procedure. Hypothetical cases are submitted to regularly chosen grand juries and prosecuting attorneys and indictments are voted and returned. Warrants are issued, arrests made and attorneys appointed for the defendants. Motions to quash are argued, pleas entered and arguments made before the court and jury on the question of conviction or acquittal. Many hypothetical cases are submitted to the students for the preparation of affidavits and indictments thereon and for argument in the court. Thus all the students are given a start in court practice in their first year. The University Moot Court is kept busy throughout the junior year in the preparation and argument of cases on the law applicable to hypothetical statements of fact, principally in civil cases. When the law of evidence is taught in course of the second year the Notre Dame Circuit Court opens, and here the students apply all the law procedure, pleading, practice and evidence. Throughout the senior year practice is had with a view of teaching the students how to make trial records, save exceptions and avail themselves of alleged error on appeal to the Supreme Court. Each candidate for a degree is required to prepare at least one record and transcript together with an assignment of error and brief thereon in the Supreme Court of Notre Dame.

These courts are all fully organized, have their regular officers and official records. Four students are

A SECTIONAL VIEW OF THE CLASS ROOM.



assigned to each case and all are thus made to engage in the active practice. It is thought that this system of procedure and practice will so qualify the graduate that he may with confidence in himself begin the active practice of his profession.

#### COURSES OF STUDY.

The prescribed course of study in the Law School itself covers a period of three years and leads to the Degree of Bachelor of Laws. An additional year of resident, graduate work in the school merits the Degree of Master of Laws. The requirements for the Degree of Doctor of Laws or Doctor of Civil Laws are prescribed by the University and the College of Law upon proper application therefor.

A six-year course has also been arranged by which two degrees may be acquired,—the degree from the College of Arts or Science or Commerce and the degree from the College of Law.

#### REQUIREMENTS FOR ADMISSION.

Students who have a bachelor's degree or who have completed at least one year of college work, the equivalent of the courses prescribed in the University, are eligible to enter the three year course of law as candidates for the degrees.

Graduates of a four year high school or preparatory school of recognized standing, evidenced by diploma or certificate from such school, will be admitted to the four-year course, the first year of which consists of certain college subjects, some prescribed and some elective and including the elements of law.

Those who have not high school graduation or certified credits equal to those required for entrance into the other colleges of the University, may obtain such credits by examination in the subjects required, and may acquire additional credits by taking the courses outlined for the regular school year and the summer school of the University.

A few men of advanced age and practical business or office experience, who are otherwise specially qualified for the study of the law, may apply to the University for admission as special students.

Students of other law schools will be given such advanced rating in the School of Law as warranted by the character of the school from which they come and the certificate of credits attained there. Only schools of known repute and standing as compare favorably with the College of Law of the University of Notre Dame will be recognized, whether they be in or out of any association.

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## SCHEDULE OF CLASSES.

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### FIRST YEAR

First Semester.			Second Semester		
	Weeks	Periods		Weeks	Periods
Introductory Lectures and Study of Cases	18	1	Persons and Domestic Relations	18	2
Principles of Liability and Damages	18	2	Common-law Pleading Forms	18	2
Common-law Actions	18	2	Torts	18	5
Contracts	18	5	Sales (8) Bailments (5)	13	5
Criminal Law & Procedure	18	2	Personal Property	5	5
Selected Reading	18	1	Criminal Practice Court	18	1
Public Speaking	18	1	Public Speaking	18	1

### JUNIOR YEAR.

Agency	8	5	Equity and Trusts	18	5
Partnership	10	5	Real Property, Mortgages, Liens, Conveyancing	18	5
Real Property	18	5	Bills & Notes	12	5
Finding & Briefing Law	2	5	Insurance	6	5
Wills & Decedents Estates	16	5	Evidence	18	3
Evidence	18	3	Code, Equity Pleading	18	2
Civil Pleading	18	2	Notre Dame Circuit Court		
Junior Moot Court			Public Speaking	18	1
Public Speaking	18	1			

### SENIOR YEAR.

Quasi Contracts	4	5	Public Utilities	4	5
Private Corporations	14	5	Municipal Corporations	9	5
Suretyship	10	5	Conflict of Laws	5	5
Bankruptcy	8	5	Federal Procedure	12	5
Constitutional Law	18	3	Legal Ethics	6	5
General Practical Plead.	18	2	Constitutional Law	18	3
Notre Dame Circuit Court			Trial and Appellate Pract.	18	2
Supreme Court of N. D.			Notre Dame Circuit Court		
			Supreme Court of N. D.		

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