

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 or 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 war-rants 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,