

11-1920

Notre Dame Law Reporter Vol. 2 Issue 1

Notre Dame Law Reporter Association

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Recommended Citation

Notre Dame Law Reporter Association, "Notre Dame Law Reporter Vol. 2 Issue 1" (1920). *Notre Dame Law Reporter*. Book 6.
http://scholarship.law.nd.edu/ndlaw_reporter/6

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NOTRE DAME LAW REPORTER

NOVEMBER, 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

DUFF, AS PIONEER STOCK
POWDER CO. vs. KOONTZ.

No. 5.

Agency — Disputed Authority — Blank Forms—Written Addition by Agent—Ratification in Part—Action by Principal—Failure of Consideration—Evidence—Alleged Unauthorized Part of Contract Admitted—Letter of Third Person to Principal Admitted.

1. Where an agent, using the form blanks provided by the principal, takes the third person's written order for goods and his promissory note in payment therefor, and as part of the same transaction agrees to map out territory for the sale of such goods and signs and delivers a written agreement "to come and ride, advertise for and with (said third person) to help sell and make him safe in (said) bill of goods," the principal cannot ratify the written order and note alone and recover thereon; he must ratify the entire contract or not at all. To repudiate part constitutes failure of consideration for which the third person may rescind the contract, return the goods and bar the principal's recovery on the note and order.

2. A note as follows: "No contract or agreement other than what appears on the face of this order shall bind the Pioneer Stock Powder Co.," printed on the order blank below the line for the purchaser's signature, does not constitute notice as a matter of law, but is merely relevant evidence tending to establish actual notice to the purchaser of the limitation of the agent's authority.

3. If the agency or the scope of authority is in dispute, it is not error to admit evidence of the alleged agent's acts under instruction of the court that the principal is not bound by such acts unless the jury find that agency exists or that the acts were authorized by the principal, as he case may be.

4. Where payment and failure of consideration are plead it is not error to admit in evidence a letter of the third person to the principal which refers to the enclosures of check in payment of part of the goods received and bill of lading for the return shipment of the balance of such goods and which also states as reason for so doing the admitted facts that the principal did not map out territory and send agent to work therein as agreed.

5. The function of appellate courts is to determine errors of law occurring on the trial and not to consider anew the issues of fact. Verdicts will not be disturbed on the mere weight or conflict of the evidence. Only where there is a total lack of evidence to support some material element in the case will a new trial be granted on appeal.

Action in assumpsit by Chas. E. Duff, doing business in the name and

style of the Pioneer Stock Powder Company, against Samuel Koontz. From a judgment for the defendant plaintiff appeals. *Affirmed.*

Leo J. Hassenauer and Francis J. Walsh for appellant.

Clifford O'Sullivan and William J. McGrath for appellee.

VURPULLAT, J. This action was begun by the filing of a praecipe in the Notre Dame Circuit Court declaring in the action of special assumpsit. After declaration and affidavit of merit were filed the plaintiff filed amended declaration in two counts. The facts plead and proven by way of inducement disclose that Charles E. Duff, by purchase, assignment and delivery, became the sole owner of all the notes, contracts, claims, stock and business of The Pioneer Stock Powder Company of Bloomington, Illinois; that he continued to conduct the business in the name and style of said company; and that in that capacity he brought this action.

The first count of amended declaration is founded on the following promissory note, to-wit:
\$165.00

Walkerton, State of Indiana.

May 10, 1918.

On the 2nd day of September, 1918, we, or either of us, promise to pay to the order of the Pioneer Stock Powder Company, One Hundred and Sixty-five Dollars, value received, without discount, waiving all our right to all exemptions allowed us by law, with interest at 7 per cent. from maturity if not paid when due or when presented.

(Signed) Samuel Koontz.

County of St. Joseph.

Witness, F. E. Rohrer.

The second count is founded on the following written contract:

Walkerton, Indiana, May 10, 1918.
Pioneer Stock Powder Company,
Bloomington, Illinois.

Pleas to ship to Samuel Koontz, 2,000 pounds of Pioneer Stock powders at six cents per pound. Amount \$120.00. Fifty gallons Pioneer Dip at \$.90 per gallon. Amount \$45.00.

On the second day of September after date, for value received, I agree to pay One Hundred and Sixty-five dollars to the order of the Pioneer Stock Co., at Bloomington, Purchaser.

Illinois.

(Signed) Samuel Koontz,
F. E. Rohrer, Salesman.

The note and contract declared on support but one and the same demand, the note having been given pursuant to the contract. To this amended declaration the defendant filed plea in five counts supported by affidavit of merit. The first count is the general issue, the second and fourth counts plead failure of consideration, the third count payment and the fifth count part payment, and failure of consideration as to the remainder. The second count of plea is upon the theory of failure of consideration upon facts specially plead. We believe that the facts and issues of the case can be best presented by setting out in full this count which is as follows:

"And for this second count of plea to the first and second counts of declaration and to each separately and severally, the defendant says that on the 10th day of May, 1918, one, Forrest E. Rohrer, was acting as a traveling agent for the Pioneer Stock Powder Company and on said day had full authority from said company to execute contracts for and in behalf

of said company, and said Rohrer did act in behalf and for and as agent of said company at all of the times and in all things hereinafter complained of; and on said day sold to the defendant one ton of stock food and ten jacket cans of fluid, the same being a food product manufactured and kept for sale by said company at Bloomington, Illinois, to be shipped to said defendant billed to Walkerton, Indiana.

"That at the time of said sale, the said Pioneer Stock Powder Company, by its said agent, Rohrer, and the defendant, Koontz, entered into the following written contract, to-wit:

"Walkerton, May 10th. By this I certify and agreed to come and ride, advertise for, and with Mr. Samuel Koontz to help sell and make him safe in the Pioneer bill of Goods. Forrest E. Rohrer.

\$165.00. Walkerton, State of Indiana, May 10th, 1918. On the second day of September after date, we or either of us, promise to pay to the order of Pioneer Stock Powder Company, One Hundred and Sixty-five Dollars. Value received, with discount or set off, waiving our rights to all exemptions allowed us by law, with interest at 7 per cent from maturity, if not paid when due or when presented. Co. of Starke.

Witness, F. E. Rohrer.

Samuel Koontz."

"And at the time of the negotiations and at the time said sale was made, said agent stated to this defendant that the latter was purchasing the right and would be allowed to sell the stock food, both barrel and can product in such territory as the company would map out for said defendant which said agent stated would be about up to Stilwell. And after the execution of said written

contract, said agent said to this defendant in substance do not sell in any territory until the company maps it out for you and I will let you know when I come to advertise and help you sell. And said defendant alleges that after being signed, such part of the contract by said Rohrer signed was delivered to this defendant, and such part of the contract signed by Koontz was delivered to said Rohrer as agent for said company.

And defendant further says that within two weeks after the agreement was made the ton of stock food was shipped to said Koontz and within a further ten days thereafter the fluid product was also shipped to him and all reached him in less than a month after the sale; and defendant says that he at once cared for and housed said products and notified such Pioneer Stock Powder Company to come on and outline and lay out this defendant's territory and ride and advertise and help sell the product, but that said company neglected and refused to allot defendant any territory and neglected to aid him in advertising such product, and never did allot to defendant and territory or help in any manner to advertise, sell or make defendant safe in the Pioneer bill of goods.

That defendant, soon after the receipt of such product, used one barrel, about 165 lbs., of the stock food for his own animals as part of the advertising agreed upon; but he said that at the time he so used the same he believed that the said company would come on and allot him territory and would aid him according to the contract. And the defendant further says that he has paid the said company the full value of the stock food so used. And the defendant further alleges that he kept such

shipment other than said barrel for which he fully paid, from the time of its receipt by him, safely housed and stored until the 17th day of July, 1918, when he reshipped said product billed to the said Pioneer Stock Powder Company at Bloomington, Illinois. And defendant says that he has kept and performed all the conditions of such contract so far as he was permitted to do under the terms thereof, and was prevented from complying further by reason of the acts of the plaintiff, Pioneer Stock Powder Company; but he says that said Pioneer Stock Powder Co. has wholly failed and refused to keep and perform the conditions imposed upon it by said agreement.

And this the said defendant is ready to verify.

Plaintiff's replication was a similitude to the first count and a tender of the general issue to the other counts of plea which was accepted by defendant. A jury returned a general verdict for the defendant together with answers to interrogatories. The court overruled the motion for a new trial and rendered judgment on the verdict from which plaintiff prosecutes this appeal.

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

One of the causes in support of the motion for a new trial is the alleged error in admitting in evidence over appellant's objection the following writing, being defendant's Exhibit No. 4, to-wit:

"Walkerton, May 10th. By this I certify and agree to come and ride, advertise for, and with Samuel Koontz to help sell and make him

safe in the Pioneer Bill of Goods. Forrest E. Rohrer."

This offered evidence is part of the contract set out in the second count of the plea which appellee alleges is the contract entered into between himself and the appellant through the negotiations of appellant's agent, Forrest E. Rohrer. Appellant contends that his agent had no authority to enter into such a contract and that it was therefore error to permit the introduction of this evidence to establish such contract.

Whether appellant's agent had or had not this authority was one of the important issues to be determined on the trial; and in this case the issue was one of fact for the jury and not one of law for the court. Where the appointment and authority of an agent are in writing, or the facts relating thereto are undisputed, it is a question of law for the court alone to decide whether agency exists and, if so, the nature and scope thereof. But where the authority is not in writing and the facts are in dispute, as in this case, it is for the jury to determine, under proper instructions of the court, both the existence of the agency and the character and extent of the agent's authority. *Loudon Savings Fund Society vs. Hagerstown Savings Bank*, 36 Pa. St. 496-78 Am. Dec. 390-Mecham's Cases on Agency 371; *Rees vs. Medlock* 27 Tex. 120-84 Am. Dec. 611; *Gulick vs. Grover* 33 N. J. L. 463- 97 Am. Dec. 728; *Seehorn vs. Hall* 130 Mo. 257-32 S. W. 643- 51 Am. St. Rep. 562; *I Am. & Eng. Enc. of Law* (2nd Ed.) 967; *Mecham on Agency* Sec. 104. Where the agency is in dispute, it is not error to admit in evidence statements of the alleged agent under an instruction of the court that, unless the jury find the facts necessary to

establish the agency, the principal will not be bound by such statements. *Wilcox vs. Hines*, 100 Tenn. 524-45 S. W. 781-66 Am. St. Rep. 761.

Even if appellant's contention be conceded that his agent did not have authority to enter into the contract in question, or that he exceeded his authority, yet the contract was properly admitted in evidence; for the appellant is bound by such contract if he ratified what his agent did in his behalf without authority. *Elliott on Evidence* Vol 3, Sec. 1639. The familiar maxim of agency applies "*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*" Such adoptive authority," says Woodward, J., in *Loudon Savings Fund Bank vs. Hagerstown Savings Bank*, *supra*, "relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before." Whether the appellant did or did not ratify such contract is also an issue which, under the disputed facts, must be determined by the jury under the proper instructions of the court. *Mecham on Agency*, Sec. 137; *Taylor vs. Conner*, 41 Miss. 722-97 Am. Dec. 419; *Paul vs. Berry* 78 Ill. 157.

If the jury had found that appellant's agent had authority to negotiate the contract in question, or that such contract entered into without such authority, was ratified by appellant, then it would have been reversible error for the trial court to have rejected the admitted evidence tending to establish part of that contract. *Stagg vs. Compton* 81 Ind. 171; *Stone vs. Sanborne* 104 Mass. 201-6 Am. Rep. 238. There was no error in admitting Defendant's Exhibit No. 4.

Nor was there error in the admission over appellant's object of de-

defendant's Exhibit No. 5, which is also complained of as ground for new trial. This was a letter of defendant, properly enclosed in a sealed, stamped and addressed envelope and sent by mail to appellant, calling attention to the enclosure therewith of defendant's check in payment of part of the goods shipped to defendant under the contract, and also to a bill of lading for the return shipment of the balance of such goods, and stating as reasons for so doing that appellant had failed to map out territory and send its agent to work with defendant, facts which appellant admitted on the trial. This letter, together with the enclosed check and bill of lading which were also admitted in evidence, constituted direct, legal, relevant evidence in support of defendant's plea of payment and failure of consideration, and, as such, was clearly admissible in evidence. *Elliott on Evidence* Vol. 1, Sec. 144; *Hughes on Evidence* 35.

Is the verdict contrary to the evidence? It is a general rule of appellate procedure that the verdict of the jury or finding of the trial court will not be disturbed merely on the weight and conflict of the evidence. Every presumption is indulged in support of the verdict and the trial court's rulings. The theory is that the trial court that heard the testimony of the witnesses and considered their credibility is more competent to determine the sufficiency of the evidence to support the verdict when passing on the motion for a new trial, than is the court of appellate jurisdiction which has only the transcript of the record of the trial as a basis for its decision. Moreover, the function of the appellate court is not to decide issues of fact, but to determine alleged errors of law occur-

ring on the trial. With respect to the evidence, the appellate court decides merely whether there is any evidence in the record to sustain the operative facts on which the verdict must rest. See Article, *New Trial*, Vol. 14, Pg. 768 *Enc. of Pldg. & Pr.* Also Article on *Appeals*, Vol. 2, Pgs. 390-391 *Id.*, with citation of cases from all jurisdictions. *Railroad Co. vs. Wyman* 134 Ind. 681-33 N. E. 367.

However, since agency is so much a question of law or a mixed question of law and fact, we shall consider the evidence in the light of the law and determine whether there is any evidence to support the verdict.

It is elementary in the law of agency that an agent can bind his principal only to the extent of the authority actually conferred on him by the principal; and that the agent, in the exercise of his authority, may use only such means as are necessary, proper and usual in accomplishing the purpose for which the agency was created. 2 *Kent's Com.* 620-621; 1 *Parsons on Contracts* 44-45; *Bickford vs. Menier*, 107 N. Y. 490-14 N. E. 438; *American Sales Book Co. vs. Whitaker*, 100 Ark. 360-140 S. W. 132-37 L.R.A. (NS) 91; *Dispatch Printing Co. vs. National Bank of Commerce* 109 Minn. 440-124 N. W. 236-50 L. R. A. (NS) 74; *Upton vs. Suffolk County Mills* 11 Cush. (Mass.) 586-59 Am. Dec. 163; *Waupaca Elec. Co. vs. Milwaukee Elec. Ry. Co.* 112 Wis. 469-88 N. W. 308; *Troy Grocery Co. vs. Potter* 139 Ala. 359-36 S. W. 12; *Lindow vs. Cohn* (Cal.) 90 Pac. 485; *Peterson vs. Wood Mach. Co.* 97 Iowa 148-66 N. W. 96-59 Am. St. Rep. 399.

Whether the agent's authority be express or implied, general or special, the party dealing with the agent

is bound to take notice of the nature and extent of such authority and should make inquiry to ascertain the same. Mechem on Agency, Section 273; Story on Agency, Sec. 125 *et seq.* This is true of the commercial traveler's authority, which as a general rule extends only to soliciting orders for goods. 6 Am. & Eng. Enc. of Law 224.

What are the facts as disclosed by the record? That Forest E. Rohrer was the agent of the appellant is admitted; and that he had authority to obtain from appellee, Samuel Koontz, the note and contract declared on in this action is, of course, necessarily admitted. It is also admitted that said Rohrer had authority to sell to Koontz the stock powders and dips of the appellant as consideration for the note and contract set out in the amended declaration. But appellant denies that his said agent had any authority, express or implied, to effect such sale to the appellee upon the further consideration and conditions of agreement alleged in the second count of plea.

What authority did appellant's agent have in the transaction with appellee, and what notice of such authority or limitation thereof was brought to the appellee? The blank form of contract supplied by the appellant and used by the agent, Rohrer, contained on its face, printed at the bottom thereof and below the purchaser's signature, the following note: "No contract or agreement other than what appears on the face of this order shall bind the Pioneer Stock Powder Company." Is appellee chargeable with notice on account of this note? If the appellee had actual notice of the limitation of authority, by having read the note, or having the same read to him or call-

ed to his attention, he would be bound by such limitation. Does this note, as a matter of law, constitute constructive notice, binding upon the appellee in the absence of actual notice? To this point a Wisconsin judge writes this opinion: "On the face of the bill sent to the defendant, and directly under his address, there appears in large, legible print in red ink, as if stamped upon it, the words 'Agents not authorized to collect' * * * If these words so legible and prominent on the face of the bill, would not be notice, it would seem to be impossible to give a purchaser such a notice. By all authorities he must be presumed to have observed these words, and to have had such notice, where they were so prominent on the face of the bill of goods in his possession, and in which he alone was interested as purchaser." Orton, J. in *McKinley vs. Dunham* 55 Wis. 515-42 Am. Rep. 740. Most of the decided cases on this point, however, do not go to the extent of holding such writing to be sufficient in itself as constructive notice to bind the purchaser, but hold that it is a question of fact whether or not actual notice was thereby given the purchaser. *Putnam vs. French* 53 Vt. 402-38 Am. Rep. 682; *Trainor vs. Morrison* 78 Me. 160-57 Am. Rep. 790; *Wass vs. M. M. Ins. Co.* 61 Me. 537; *Kensmann vs. Kershaw* 119 Mass. 140; *Law vs. Stokes* 32 N. J. L. 249-90 Am. Dec. 655.

We are not disposed to follow the Wisconsin case doctrine of constructive notice, but prefer to adopt the holding of the other courts. The law of constructive notice does not, as a general rule, apply to such transactions, but leaves the party having the burden of proving notice in any case for any purpose, to establish it

by proof of actual notice; such attempts as this to give written notice having probative force in evidence, according to the nature and circumstances of the particular case. In the present case there appears no evidence whatever tending to establish actual notice of the provision printed on the face of the contract form limiting the authority of appellant's agent to the procurement of the execution of such printed form contract. Certain it is that the provision in question does not constitute any part of the contract itself; nor does it prevent the execution of a valid contract in any other form within the scope of the agent's authority. This is clearly decided by the case of *Somers vs. Hibbard*, *Spencer, Bartlett Co.* 153 Ill. 102-38 N. E. 899, where the Supreme Court says: "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words: 'All sales subject to strike and accidents,' no more make these words part of the contract than they made the words there printed, 'Sommers Bros. & Co., Manufacturers of Box-Annealed Common and Refined Sheet Iron,' a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter heads would not have the effect of preventing appellants from entering into an unconditional contract of sale." The case of *Johns vs. Jaycox* 67 Wash. 403-121 Pac. 854-1913d Am. Ann. Cas. 471, cited by appellant, states that the agent's authority can hardly be limited by the forms of contract he carries, but that

such circumstance and the nature of the business should put a purchaser on inquiry.

As part of the contract entered into with appellee the appellant, by its agent, agreed "to come and ride, advertise for and with Samuel Koontz to help sell and make him safe in the Pioneer bill of goods." Appellant, assuming this to be a contract for advertising his principal's business, presents the following point and authority in his brief: "A traveling salesman's implied authority does not include authority to contract for advertising his employer's business." *United States Bedding Co. vs. V. J. Andre* (Ark.) 150 S. W. 413-41 L. R. A. (NS) 1019. This was a case wherein Andre, a bill poster of Osceola, brought action to recover forty-four dollars from the United States Bedding Co., a mercantile corporation of Memphis, Tenn., which had in its employ a traveling salesman who was authorized to solicit orders for and make sales of goods. This company had a customer in Osceola to whom it sent large printed advertisements. It is alleged that this agent contracted with this bill poster for posting these bills for the company. This was the simple contract; nothing else involved. Comment by comparison or contrast is hardly required to show that there is no analogy in point of fact or principle between the two cases. Of course, the agent of a mercantile company who is authorized to solicit orders for and sell goods to merchants, has no authority, express or implied, to contract with a bill poster to post bills. Had this agent contracted with the merchant to pay for posting these bills as part of the consideration for the purchase and sale of his principal's goods, and

such principal, while refusing to recognize that part of the contract to pay for the bill posting, had brought action to recover for the price of the goods, then we would have a case similar to appellant's. As it is the case cited gives no support to appellant's appeal.

Appellant also relies on the case of *Johns vs. Jaycox et al, supra*. This case is analogous in the facts of its *original* transaction involved. A selling agent, using a printed form of contract for the sale of 200 talking machines, in order to effect a sale, added to such form of contract in writing a guaranty that "purchaser would sell 25 records on average to each machine given away four months from date customer has received machine." The court held that this added provision to the contract of sale was so extraordinary in character, so foreign to the powers and purposes of the agency, as not to bind the principal, and held, in the purchaser's action against the principal on the counterclaim, that the purchaser could not recover on the guaranty. But in the plaintiff's branch of the case, which is decidedly against appellant's position and right of recovery in this case, it was also held that the principal could not have recovered upon the contract so executed by its agent, if the purchaser had not subsequently in express terms agreed to waive the unauthorized guaranty and accept the terms of the original contract as approved by the principal. It was therefore solely by reason of the principal's subsequent express repudiation of its agent's guaranty to the purchaser, and the purchaser's consequent agreement to accept the talking machines under the contract without such guaranty, that the principal

was held entitled to recover. The case as a precedent therefore is against appellant. For the same reason that the principal could not recover on the contract as executed by the agent in the case cited, the appellant cannot recover in this case.

There is nothing extraordinary or unusual in the authority exercised by appellant's agent, nor in the nature of the contract entered into with appellee. It is not an uncommon thing for a company, in consideration for the purchase of a large bill of its goods, to contract to make the purchaser the exclusive sales agent in a certain territory, to define such territory, and also to agree to ride and help advertise such goods for the purpose of introducing them in such territory. Furthermore there is no evidence of any express grant of authority which restricted appellant's agent to negotiating unconditional sales. As already seen the form blanks used were not sufficient to do so. There is ample evidence to sustain the verdict upon the theory that appellant's agent had such authority as general agent to make sales as would authorize the contract entered into with appellee.

There is also evidence in the record to sustain the verdict upon the theory of ratification. Such ratification may be either express or implied. If the principal on being informed of the acts of his agent fails for an unreasonable length of time to repudiate the unauthorized acts, ratification will be presumed as matter of law 21 R. C. L. 930. Sec. 99; *Union Gold Mining Co. vs. Rocky Mountain Nat. Bank* 96 U. S. 640-24 L. Ed. 648; *Brook & Co. vs. Cunningham Bros.* (Ga.) 90 S. E. 1037; *Reese vs. Medlock* 27 Tex. 120-84 Am. Dec. 611.

If the jury found that the alleged agency existed either by appointment or ratification, then appellant is barred from recovering in this case, because he does not even pretend to have furnished the consideration contracted for under his agent's contract. But there is another proposition of law that absolutely precludes appellant's recovery in this case and sustains the verdict of the jury. Mechem on Agency 89, Sec. 130, says: "It is a fundamental rule that if the principal elects to ratify any part of the unauthorized act he must ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him and repudiate its obligations; and the rule applies when his ratification is express and also when it is implied." 2 Corpus Juris 483 and cases cited; 21 R. C. L. 932, Sec. 111. In the case of Jones vs. Jaycox, *supra*, cited by appellant, involving the extraordinary and unauthorized warranty added to the printed forms of contract supplied the agent, the court said: "There is no question that, if the principal elect to ratify a contract which the agent was not authorized to make, he must ratify the whole of it. If he ratifies the contract, *he ratifies the warranty*." In appellant's case, therefore, if he ratifies the contract of sale, he also ratifies the agreement that he "come and ride and advertise for and with Samue lKoontz, to help sell and make him safe in the Pioneer bill of goods." There is no other contract to which the appellee gave his assent and to which under the law of contract he is bound. A case on this point, one in every particular analogous to appellant's case is Eberts vs. Selover 44 Mich. 519-38 Am. Rep. 278.

Since the contract which the agent

of appellant entered into with appellee is the only contract that can be enforced in this case, and since failure of consideration for such contract is admitted on appellant's part, and since rescission thereof has been made by appellee by payment for and return shipment of the goods received, appellant's right of action is barred. The verdict of the jury is not, therefore, contrary to law.

Finding no error in the record the judgment of the trial court is in all things affirmed.

ST JOSEPH LOAN & TRUST COMPANY vs. FIRST NATIONAL BANK

No. 6.

Negotiable Instruments—Restrictive Indorsement—Notice to Purchasers—Province of Court and Jury—Instructions—Interrogatories.

1. An indorsement as follows: "For collection, pay to the order of Frank D. Jones, Cashier" (for the Elkhart National Bank), is a restrictive or qualified indorsement which not only limits the negotiability of the check to purposes of collection merely, while it retains title thereto in the indorser, but such indorsement constitutes in itself notice to all subsequent indorseees and purchasers for value that the party making the indorsement is the owner of such check and entitled to the proceeds of its collection.

2. A bank which collects such check, after receiving it in due course from the bank to which it was first sent for collection, cannot apply the proceeds of collection to the liquidation of a balance due from that bank, by virtue of their existing agreement and practice to collect and credit to their respective accounts commercial paper sent to one another instead of remitting such proceeds to the sending bank, for the sending bank having no title to such check or proceeds, the collecting bank can acquire none.

3. The bank which collects a check so indorsed is liable to the bank which so indorsed it, in the action of indebitatus assumpsit for money had and received, and it is no defense to such action that there is no actual privity of contract or legal relation between such banks.

4. A tendered instruction which correctly states the law of a case where the check negotiated for collection has upon it an unqualified indorsement, is properly refused in a case where the indorsement is a restrictive one "for collection"; for in the lat-

ter case the facts that such check was transferred for collection only and that the collecting bank had notice thereof, are determined by the court's construction of the indorsement as a matter of law, and are therefore not facts for the jury to determine as in the other case.

5. Interrogatories which elicit facts that are immaterial or tend only to contradict the court's construction of a written indorsement are properly refused.

Action for money had and received, brought by the First National Bank of Chicago, against the St. Joseph Loan & Trust Co., of South Bend, Indiana. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Francis J. Murphy and Walter R. Miller for Appellant.

Delbert D. Smith and Edward Madigan for Appellee.

VURPILLAT, J. The appellee, plaintiff, First National Bank of Chicago, being the owner of two certain checks for \$500 each, indorsed them as follows: "For collection, pay to the order of Frank D. Jones, Cashier," said Jones being the cashier of the Elkhart National Bank to which appellee sent the checks for collection. The Elkhart National Bank indorsed the checks by general indorsement, making them payable to the appellant, the St. Joseph Loan & Trust Company. There existed at that time and for a long time prior thereto an agreement and practice between the Elkhart National Bank and the St. Joseph Loan & Trust Company by which they mutually collected all the commercial paper forwarded to one another, and instead of remitting the proceeds of such collection, credited and charged the same to their respective accounts. The appellee collected the checks in question and, pursuant to said agreement, credited the proceeds thereof to the Elkhart National Bank, which was at that time, and ever since has

been, heavily indebted to the St. Joseph Loan & Trust Company in a large balance on their said account, to wit: \$3,000. The Elkhart National Bank became insolvent and has not paid to the appellee the one thousand dollars on the checks thus collected.

The appellee thereupon instituted this action against the appellant for money had and received on the two checks which it had forwarded to the Elkhart National Bank, having first made demand upon appellant, St. Joseph Loan & Trust Company, for such money which was refused. To the complaint appellant filed answer in two paragraphs, general denial and confession and avoidance. The second paragraph of answer was stricken out. The cause was submitted to a jury which returned a general verdict together with answers to interrogatories. Judgment was rendered on the verdict in favor of the plaintiff from which defendant appeals.

The errors assigned are the overruling of the demurrer to the complaint, the striking out of the second paragraph of answer, overruling the motion for a new trial and that the verdict is contrary to law. The first two of the alleged errors are not discussed by appellant's counsel in their briefs and are therefore waived according to the rules of the appellate courts. However, the complaint for money had and received is in the common form prescribed and sufficiently alleges all operative facts, including demand and refusal, to constitute a cause of action. 14 Enc. of Pleading & Practice 53, and cases there cited. And the second paragraph of appellee's answer was properly stricken out as a sham pleading. 20 Enc. of Pldg. & Pr. 1;

Brown County Bank vs. Lewis 18 Wend. (N. Y.) 566; Beeson vs McConnaha 12 Ind. 440.

The verdict of the jury is not contrary to law. The law of negotiable paper is the law of this case. The checks in question are negotiable instruments, and the construction which the court, as a matter of law, must give to the indorsement placed on the checks by the appellee, is decisive of the rights of the parties and of the issues in this case. The indorsement, "For collection, pay to the order of Frank D. Jones, Cashier" (of the Elkhart National Bank), is a restrictive or qualified indorsement which not only operates to limit the negotiability of the checks to purposes of collection merely, while it retains title thereto in the indorser, but such indorsement constitutes of itself notice to all subsequent indorseees and purchasers for value, that the party making such indorsement is the owner of such checks and entitled to the proceeds of their collection. 1 Daniel on Negotiable Instruments, Sec. 698; Edwards on Bills & Notes, Sec. 277; Bank of the Metropolis vs. First National Bank of Jersey City 19 Fed. 301; First National Bank of Chicago vs. Reno County bank 3 Fed. 257; White vs. National Bank 102 U. S. 658; Claflin vs. Wilson 51 Iowa 15.

In the case of Bank of Metropolis vs. First National Bank, *supra*, the indorsement was, "For collection, pay to the order of O. L. Baldwin, cashier," which in every detail is like the indorsement here. In First National Bank vs. Reno County Bank, *supra*, the indorsement was, "Pay to the order of Hetherngton & Co., on account of the First National Bank, Chicago." Concerning these two indorsements, the Federal

court in the latter case says: "Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper would seem to be that the owner has authorized the endorsee to collect it for the owner, and conferred upon him a qualified title for this purpose and for no other."

Appellant contends that it became the owner of the checks in due course and for value; that by virtue of the Elkhart National Bank's general indorsement, it became *prima facie* the owner of the checks, and that, by reason of its agreement and practice with said bank, in applying the proceeds of the collection of the checks to the existing debt of said bank, it was a purchaser for value and entitled to a lien on such proceeds no matter who was the owner of the checks. The case of the Bank of the Metropolis vs. New England Bank, 1 Howard 234-11 L. Ed. 234 is cited in support of the contention. The facts of the two cases are analogous with the material exception that in the case cited the New England Bank, in sending its check to the Commonwealth Bank for collection, did so by a general indorsement which, in legal effect, transfers an unqualified and perfect title; while in appellant's case, the appellee, the First National Bank, in sending the checks in question to the Elkhart National Bank for collection, did so by a restrictive indorsement, which, in legal effect, transfers only a qualified title "for collection." In the case cited the Bank of the Metropolis could become an innocent purchaser for value without notice of the New England Bank's claim, and could therefore apply them to the account of the Commonwealth Bank under their agreement; but appellant,

St. Joseph Loan & Trust Co., could not become a purchaser without notice of appellee's claim, because the restrictive indorsement itself was notice to appellant that appellee had retained its title to the checks and the proceeds of their collection, and that appellee could acquire no better title than had been transferred to the Elkhart National Bank, to-wit: Title "for collection" only.

In the case of the First National Bank vs. Reno County Bank, *supra*, which involves the restrictive indorsement and is in all respects analogous to appellant's case, and in which the same contention was made and the same case cited in support thereof, the U. S. Circuit Court makes this distinction: "It will be seen that the case (Bank of Metropolis vs. New England Bank) was decided upon the ground that the paper was indorsed so as to show, *prima facie*, a perfect title in the indorsee, thus enabling the latter to use it as its own, and to get credit on the faith of absolute ownership. It is clear that had the indorsement been restricted in its character, so as to show the continued ownership of the New England Bank, the result would have been different." And in another part of the opinion the same court says: "The defendant's (Appellee's) claim, that it had a right to apply the proceeds of the checks collected by it to the liquidation of the claim against the Mastin (Elkhart National) Bank, is entirely without merit. There is not a shadow of ground for holding that the defendant believed the paper belonged to the Mastin (Elkhart) Bank. The indorsement of that bank declares in plain words "for collection," so that the defendant (appellee) was definitely informed that the Mastin

(Elkhart) Bank did not own the check."

To sustain appellant's contention the court would be compelled to expressly overrule the decision of the United States Circuit Court for the Southern District of New York in the case of Bank of Metropolis vs. First National Bank of Jersey City, *supra*. After stating the facts of that case, which are in perfect analogy to the facts of this case, that court says: "Upon these facts it is clear that the relations between the defendant and the Newark Bank in respect to paper received by the former from the latter for collection were those of debtor and creditor, and not merely of agent and principal, (Morse, Banks, 52) and the defendant, having received the paper with the right to appropriate its proceeds upon general account as a credit to offset or apply to any indebtedness existing or to accrue from the Newark Bank growing out of the transactions between the two banks, was a holder for value. Since the decision in Swift vs Tyson, 16 Pet. 1, it has been the recognized doctrine of the federal courts that one who acquires negotiable paper in payment or as security for a pre-existing indebtedness is a holder for value, (Nat. Bank of the Republic vs. Brooklyn city, etc., R. Co. 14 Blatchf. 242, affirmed, 102 U. S. 14), and if the defendant had been justified in assuming that such paper was the property of the Newark Bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper. Bank of Metropolis vs. New England Bank, 1 Howard 234. But the checks bore the indorsement of the plaintiff in a restricted form, signifying that the plaintiff had nev-

er parted with his title to them. In the terse statement of Gibson, C. J., 'a negotiable bill or note is a courier without luggage; a memorandum to control it, though indorsed upon it would be incorporated with it and destroy it' Overton vs. Tyler, 3 Pa. St. 348. The indorsement by plaintiff 'for collection' was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds, to another. As was held in Cecil Bank vs. Bank of Maryland, 22 Md. 148, the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark Bank was merely its agent for collection."

Nor can appellant's contention prevail that there is no privity of contract or other legal relation between appellant and appellee in this case, for, as stated by the court in the case of the Metropolis vs. First National Bank, *supra*, "It has long been settled that want of privity is no objection to the action of *indebitatus assumpsit* for money had and received. See note A, appendix, 1 Cranch 367 (2 L. Ed. 139), where the authorities are collated." The doctrine applicable to the action for money had and received is announced by the Supreme Court of Massachusetts in Hall vs. Marston, 17 Mass. 574-579 as follows: "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action (assumpsit) although he has never seen nor heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law

creates the privity and the promise." This doctrine as here stated is expressly approved in First National Bank of Chicago vs. Reno County Bank, *supra*.

Appellant alleges as cause for new trial the refusal to give the following instruction properly tendered, to-wit: If you find from the evidence that the Elkhart National Bank did for a period of years transact business with the defendants, the St. Joseph Loan & Trust Company of South Bend, Indiana; and did from time to time transmit notes and other commercial paper to the said defendants for collection, which were treated by both parties as the property of the other, unless an indorsement on such paper was of such a nature as to convey notice as to the outstanding equity in such negotiable paper by a third person; and if you find that the checks in this case were transmitted in the ordinary course of business between the two banks aforesaid and were held by the defendant, and while thus held, the said Elkhart National Bank became insolvent, and that there was at that time a large balance on general account due said defendants, the St. Joseph Loan & Trust Company, from said Elkhart National Bank; and that in the collection of such negotiable paper from one another the said banks would not remit the proceeds to the transmitting bank in each particular instance, but instead would debit and credit each other, as the case might be, in a book called a collection register; and that at the time of the insolvency of the said Elkhart National Bank, the balance due defendants from said Elkhart National Bank by reason of such collections, was an amount in excess of the amount of the checks collected, to-wit: \$3,000; therefore

you must find for the defendant and against the plaintiff, since said defendant is entitled to the proceeds of such collection until such balance is paid."

The appellant again relies on the case of the Bank of Metropolis vs. New England Bank, *supra*, in which the refusal of the trial court to give a similar instruction was held to constitute reversible error. In both cases the plaintiff banks had the burden of proving that the checks had been transferred by them for the purpose of collection only, and that the collecting banks received the checks with notice of that fact. In the case cited it was the province of the jury to determine these facts under proper instructions of the court, because the indorsement on the check, being general, passed perfect title to the check and conveyed no notice whatever of the indorsing bank's claim. It was therefore error to refuse the instruction which properly stated the law applicable to the facts of that case. In appellant's case,

however, the facts that appellee negotiated its checks "for collection" only, and that appellant had notice thereof, were established by the restricted indorsement itself which it was the duty of the court alone to construe as a matter of law, and such facts thus established could not be submitted to the jury for finding. The instruction, therefore, had no application to this case and was properly refused. Indeed, had the judgment been for appellant, it would have constituted reversible error to have given it.

Appellant also complains of the trial court's refusal to submit to the jury two certain interrogatories. Neither of these had material application to the issues, and both tended to contradict the legal effect of the limited indorsement, and were therefore properly refused.

There is no error in the trial court's record and the judgment of the Notre Dame Circuit Court is therefore affirmed.

BRIEF OF LEO J. HASSENAUER in CASE OF DUFF AS PIONEER STOCK POWDER CO. vs. KOONTZ.

In the Notre Dame Supreme Court.
Chas. E. Duff, doing business under
the name and style of The Pioneer
Stock Powder Company, Appel-
lant,

vs.

Samuel Koontz, Appellee.

Brief for Appellant.

NATURE OF THE ACTION

This is an action in special assump-
sit, by which the plaintiff seeks
judgment against the defendant for
damages alleged to have been sus-
tained by him on account of a breach
of contract, the non-payment of a
note given for the purchase of stock
powders and dips, and assigned to
plaintiff, upon becoming the sole
owner of The Pioneer Stock Powder
Company.

WHAT THE ISSUES WERE

The issues as formed consisted of
the declaration in two counts; the
first count alleging that the plaintiff
became sole owner of the Pioneer
Stock Powder Company, and all ac-
counts and notes due the said com-
pany, by an assignment without re-
course from the former owner. That
he is the sole owner of a promissory
note, set out in the declaration, exe-
cuted to the company and signed by
the defendant, Samuel Koontz. That
said note is due and unpaid. And for
his second count, plaintiff alleges that
the defendant, and plaintiff by his
agent entered into a certain agree-
ment in which defendant agreed to
buy and pay for a certain amount of
powders and dips, products of The
Pioneer Stock Powder Co., and plain-
tiff agreed to sell and ship the same.

That plaintiff has wholly performed
his part of the agreement. That up-
on demand defendant failed to pay
as per the signed agreement.

The defendant filed a general de-
murrer which was overruled; defen-
dant then filed a plea in five counts
to which the plaintiff files a similiter
and replication to the 2nd, 3rd, and
fourth counts of plea. The jury
brought in a verdict for defendant.
Plaintiff then filed a motion for new
trial in four paragraphs which was
denied by the court. Whereupon the
plaintiff doth appeal to the court of
last resort.

ASSIGNMENT OF ERRORS

1. That the verdict is contrary to
the evidence;
2. That the verdict is contrary to
the law and evidence;
3. The court erred in overruling
plaintiff's motion for new trial.

Condensed statement of the evi-
dence. (Omitted from publication.)

POINTS AND AUTHORITIES

1. "A party dealing with the
agent must ascertain the scope and
reach of the power delegated to such
agent, and must abide by the conse-
quences if he transcends them."

Farmers' & Mechanics' Bank vs
Butchers & Drovers' Bank, 16 N. Y.
125 69 Am. Dec. 678; Monson et al.
vs Kill, 33 N. E. 43 (Ill.) 242 Ill. 434-
90 N. E. 298; Hartensbower et al. vs.
Uden et al. 28 L. S. A. NS. 738.

2. "A traveling salesman's im-
plied authority does not include au-
thority to contract for advertising
his employer's business." (Ark.)
150 S. W. 413; United States Bed-

ding Company, vs. V. J. Andre, 41 L. R. A. NS. 1019.

3. The law in relation to the agent's authority is thus stated in 6 Am. and Eng. Enc. of Law, page 224:

Sec. 1. "The scope of a commercial traveler's authority is well defined, and as a general rule, extends only to the soliciting of orders for goods."

Sec. 2. "Third parties dealing with him are bound, at their peril to ascertain his real powers; and the mere statement of the salesman that he is authorized to do any unusual act will not be sufficient to bind the principal."

4. "While a selling agent's authority cannot be limited by the form of blank contracts he carries, such contracts and the nature of the business may be sufficient to put the purchaser on inquiry." *John vs. Jaycox*, 67 Wash. 403-121 Pac. 854-Anno. Cases.

5. Judge Story, Commentaries on the law of Agency, Sec. 126, Sec. 133.

"Where the agency is not held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business it must from necessity be construed according to its real nature and extent; and the purchaser must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent, beyond what he has apparently authorized; because he has not misled the confidence of the other party, who has dealt with the agent.

"The duty of inquiring, then, is incumbent on such party, since the principal has never held the agent out as having any general authority whatsoever in the premises; and, if he trusts without inquiry, he trusts to the good faith of the agent, and not to that of the principal."

ARGUMENT

The appellant's 1st, 3rd, and 5th paragraphs of Points and Authorities are considered together in his argument.

The evidence discloses these parties had no usual course of dealing between themselves. It is clear under the facts in this record that instead of anything appearing to cause the defendant to believe the contract was one within the agent's apparent authority, as being usual and ordinary in the course of such business, the case of an extraordinary and unusual proposition is presented, so unreasonable and so entirely repugnant to the usual course of conduct pursued by business concerns that this defendant being governed by the standard of an ordinarily prudent business man must have known, and, in fact, every reasonable inference from the proof shows that he might have known the authority of the salesman to that extent was improbable. He should therefore be precluded from asserting the apparent authority of the agent to make the contract, which, if made, and was binding in every case, would probably result in entailing bankruptcy upon the most stable manufacturers and wholesalers who attempted to sustain their credit by abiding such conditions.

Now, it is certain a salesman having no express authority to enter into such a contract, his principal can only become obligated by the act of the agent in that behalf upon one of two theories. First, the principal would be bound on the doctrine of ratification; or, secondly, the principal would, of course, be bound by the act of the agent if the contract made by him was within the apparent

scope of the agent's authority. This responsibility of the principal for the acts his agent, not expressly authorized, is limited however, to such acts as are within the apparent scope of the authority conferred; that is to say, it is implied, of course, that an agent on the road, such as a traveling salesman, for the sale of goods to various persons, has the authority to employ all the necessary and proper means for the accomplishment of the sale which are justified by and consistent with the usages of the trade. The law presumes, and those dealing with the agent have the right to act upon this presumption of the law, that the agent is authorized to sell the goods in the usual manner, and only in the usual manner, and make such contracts thereabout as are reasonable or competent with the usage and custom of the trade in like undertakings, and it is to this extent and this extent only that an agent may be said as a matter of law to be acting within the scope of his apparent authority. That it is the duty of third persons dealing with the agent in contracts of this nature to inquire as to the extent of his authority. 6

6 Am. & Eng. Enc. of Law, page 224.

Judge Story, Commentaries on the Law of Agency, Sec. 126, Sec. 133.

Monson et al. vs. Kill, 33 N. E. 43.

Hartenbower et al. vs. Uden et al. 28 L. R. A. NS .738.

Farmers' & Mechanics' Bank vs. Butchers' & Drovers' Bank, 69 Am. Dec. 678.

Therefore, if the authority which the traveling salesman assumes to exercise in and about the consummation of the sale of such goods is of such an unusual, improbable and extraordinary character as would be

sufficient to place a reasonably prudent business man in dealing with him, upon his guard, the party so dealing will not be justified in disregarding his senses and overlooking the real situation and thereafter seek to hold the principal, upon the theory that the contract was within the agent's apparent scope of his authority. Under such circumstances it is the duty of the party dealing with the agent to either refuse to close negotiations with him at all, or first proceed to ascertain from the principal whether the true scope of his authority is such as will authorize the extraordinary and unusual contract proposed. The principal last mentioned, not only comports with the ends of justice sought to be attained by the established law of principal and agent, but is in fact one of the fundamentals of our entire system of jurisprudence.

The further question to be decided is: A traveling salesman's implied authority does not include authority to contract for advertising his employer's business or goods. The decision finds support in the one reported case which has been found. In *United States Bedding Company vs. V. J. Andre*, 41 L. R. A. NS. 1019, the material facts were:

The defendant had in its employ a traveling salesman who was authorized to solicit orders for and make sales of goods. Among its customers was a retail firm to whom, in shipping goods, it also sent out large posters, those advertisements which could be posted on bill boards. The plaintiff claimed that he had entered into a contract with defendant's salesman whereby he was employed to post said advertisements on his bill-boards. The defendant denied that such contracts were entered into by its salesmen, and blamed that if

it was, he was unauthorized to make it.

The just court of Arkansas, rendered the following decision in the above reported case:

"The agent's implied authority is limited to those acts which are of like kind with the very act he is expressly empowered to do, and from which the authority is implied; but his authority can never be extended by implication to do an act or make an agreement which is beyond the obvious purpose of his employment. The purpose for which a traveling salesman is employed is to solicit orders and make sales of goods. Unless he is specially authorized to do so, he has no implied authority to do any act other than is usually done by other salesmen of like character; that is, to do those things and make those agreements which are necessary and usual to accomplish the purpose of the agency. Being employed for one purpose, he has no authority to do another, either actual or implied.

This learned court further held:

"The power to make contracts for advertising cannot be implied from the power to sell goods and solicit orders, and therefore it is not within the apparent scope of the authority of the traveling salesman in this case to make. A person dealing with an agent is at once put upon notice of the limitation of his authority, and must ascertain what that authority is."

In concluding the court said:

"As a matter of law, therefore, the power to make the contract was not within the apparent scope of the agent's authority."

A further extraordinary feature about this transaction is that the defendant, Samuel Koontz, freely contracted with the agent regardless of inquiry concerning the blank form of contract which the agent carried. the

production of an extra blank after the stereotyped form had been filled out and signed should have put the defendant, Samuel Koontz, on his guard regarding the signing of a separate contract different from the stereotyped form signed at the consummation of the original contract.

In the case of *John vs. Jaycox*, (Wash.) 121 Pac. 854-1913 D 471, Am. & Eng. Anno. Case. the material facts were:

An action was brought to recover a balance due upon a written contract for two hundred talking machines, sold by the plaintiff's agent. The agent caused the defendant to execute a written form of contract which he carried and for executing the same the agent gave defendant a written guaranty that they would sell a certain amount of machines each week. The appellants contend that the memorandum was never a part of the contract because the agent had no authority to make it.

The court in deciding the main question said in part as follows:

"While an agent's authority can hardly be limited by the form of blanks he carries, that circumstance and nature of the business should put a purchaser on inquiry. The apparent scope of his authority was that of a sales agent, and it is upon the powers implied by that relation that any sound decision must rest. To hold as contended by counsel, that the appellant, without knowledge, or ratification, should be estopped to question the guaranty because the respondents had placed themselves, in a position where they must have the machines in reliance upon the guaranty, would be to hold that the principal would be bound in almost every instance by the unauthorized acts of the agent however palpably beyond the scope of his employment."

CONCLUSION

In conclusion the appellant believes he is entitled to a judgment on two

theories; that a traveling salesman may not obligate his principal, as within the scope of his apparent authority, by a positive agreement or contract in connection with the sale of goods, which agreement or contract was without the scope and beyond his express authority, and which was not an ordinary or usual contract, comporting with any custom or usage of the trade; that it was the duty of the appellee, to ascertain the extent and scope of the agen's

authority upon being asked to execute two different and dissimilar contracts relating to the same subject matter in question.

Wherefore the appellant prays that the learned Supreme Court of Notre Dame will remand the case to the trial Court with instructions to grant the appellant a ne wtial.

Respectfully submitted to the Honorable, the Supreme Court of Notre Dame, Indiana, for just consideration and solution.

**BRIEF OF CLIFFORD O'SULLIVAN IN CASE OF DUFF
AS PIONEER STOCK POWDER CO. vs. KOONTZ.**

In the Notre Dame Supreme Court.
Chas. E. Duff, doing business under
the name and style of The Pioneer
Stock Powder Company, Appel-
lant,

vs.

Samuel Koontz, Appellee.

Brief for Appellee.

NATURE OF THE ACTION

This is an action in special assump-
sit by which the plaintiff seeks judg-
ment against the defendant for dam-
ages alleged to have been sustained
on account of breach of contract, the
non-payment of a note alleged to
have been given for the purchase of
Stock Powders and Dips, and assign-
ed to plaintiff upon his becoming the
sole owner of The Pioneer Stock
Powder Company.

WHAT THE ISSUES WERE

The plaintiff filed a declaration in
two counts to which the defendant
filed a general and special demurrer.
The court sustained the demurrer
and the plaintiff then filed an amend-
ed declaration in two counts; the
first count alleging that the plaintiff
became the sole owner of The Pio-
neer Stock Powder Company and all
accounts and notes due the said
company. That he is sole owner of
note set out in declaration. That
said note is due and unpaid.

And for his second count, the
plaintiff alleges that the defendant
and the plaintiff by his agent enter-
ed into a certain agreement in which
the defendant agreed to buy for a
certain amount of powders and dips,
products of the plaintiff company
and the plaintiff agreed to sell and

ship the same. That the plaintiff
has wholly performed his part of the
agreement. That upon demand de-
fendant failed to pay as per the al-
leged agreement.

The defendant then filed his plea
in five counts. The first count was a
general traverse. In his second
count the defendant pleads a written
contract, set out in plea, entered into
by The Pioneer Stock Powder Com-
pany through its agent, whereby it
was agreed that, if the defendant
would take a certain amount of the
products of the said company, he
would be buying the right and would
be allowed to sell the products, and
that the company would map out for
him a certain territory in which he
was to work, and that the company
would send its agent to help him sell
and advertise the said products.
That the defendant was to do noth-
ing until the company should send
its agent. That said written agree-
ment was part of the original con-
tract of which the note was a part
and that The Pioneer Stock Powder
Company's promise to help sell the
products and to send its agent and
to map out a territory in which the
defendant was to work was the sole
and only consideration for his, the
defendant's, signing his promissory
note.

The defendant further alleges that
the goods were shipped to him and
that he housed them and cared for
them and waited for the Pioneer
Stock Powder Company to send its
agent and to map out a territory in
which he was to work. That he sent
a letter to the Company requesting
them to send its agent. That The
Pioneer Stock Powder Company nev-

er did send its agent and never did map out a territory for him as per the agreement. That he shipped the goods back to the Pioneer Stock Powder Company. That he has wholly performed his part of the contract so far as he was permitted to do and was prevented from complying further by reason of the acts of the plaintiff, but he says that The Pioneer Stock Powder Company has wholly failed and refused to keep and perform the conditions imposed on it by the said agreement. Wherefore the defendant says that he has received no part of the consideration for the execution of the contract sued upon.

The defendant alleged payment and failure of consideration for his third, fourth, and fifth count of his plea.

To the defendant's plea the plaintiff filed a replication to the second, third, fourth, and fifth counts and a similitur to the first. The jury brought in a verdict for the defendant. Plaintiff filed a motion for a new trial which was denied by the court. Judgment was rendered and this appeal was brought.

Evidence. (Omitted from publication.)

POINTS AND AUTHORITIES

1. "Express authority of an agent is that which the principal directly grantsto him and this includes implication whether the agency be general or special all such powers as are necessary and proper as a means of effectuating the purpose for which the agency was created."

Dispatch Printing Company vs. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236, 50 L. R. A. N. S.) 74.

2. "Express authority permits the agent to adopt any recognized usage or mode of dealing."

Kaufman vs. The Farley Mfg. Co. 78 Ia. 679; 43 N. W. 612, 16 A. S. R. 462.

Duncan vs. Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 A. S. R. 570.

Rohrbough vs. U. S. Express Co. 40 S. E. 398, 88 A. S. R. 849.

3. "If the principal on being informed of the acts of the agent fails to disavow them within a reasonable time his silence may be considered and as an acquiescence and assent to the acts done and ratification will be presumed."

Union Gold Mining Co. vs. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. Ed. 648; Brook vs. Cunningham, (Ga.) 90 S. W. 1037; Eau Claire-Canning Co. vs. Western Brokerage Co., 213 Ill. 561-73 N. E. 430; Whitely vs. Jones (Ga.) 49 S. E. 600.

ARGUMENT

The counsel for the appellant has in his excellent brief confined the argument in support of his contention to two theories. First that the act of the agent in executing the contract with appellee was not within the implied or apparent scope of his authority and therefore the principal is not bound by such contract; and secondly that the contract in question was so unreasonable and so repugnant to the usual course of conduct pursued by business concerns that the defendant was bound to inquire into the extent of the agent's authority before executing such a contract.

As to the first point we must compliment the learned counsel for his very masterful treatise of the law on the question of the implied powers of an agent and the apparent scope of an agent's authority. However, from

an examination of the facts as disclosed in the record it is apparent that all his lengthy argument is entirely beside the issue and for this reason it will not be our purpose to attempt to refute the points and authorities that he has cited on the question of implied and apparent scope of authority but to show where these decisions and rules of law are entirely foreign to the issue and can have no application to the questions and facts involved in this case.

He has proceeded upon the theory that the acts of the agent in question could only be considered as being within the implied powers of the agent, and has assumed in direct conflict with the evidence in the case that there was no express authority granted to the agent. The defendant in the trial of the case in the lower court never contended or attempted to show that the agent was acting within his implied authority but contended and proved that the agent had express authority to enter into such a contract on behalf of his principal. The best and most competent evidence that can be adduced to show the existence of an agency and to show the nature of such agency is the testimony of the principal for whom the agent acted. In the trial below the defendant brought upon the stand Mr. Martin Bernard who was the principal of this agent at the time the contract in question was entered into. The witness testified that he gave his agent express authority to execute any and all contracts that would tend to increase the business of the company. When asked if contracts as the one in question were directly contemplated by this express authority, he answered in unequivocal language that it was. He testified that this agent and other agents

of the company had on former occasions executed similar contracts and that such contracts were the usage and custom of the company. From such evidence the jury below found that the agent was acting under express authority and the counsel for the appellant is begging the question when he assumes that there was any question of implied or apparent scope of authority involved.

Since it has been shown that the agent was acting under his express powers there is no need to discuss the appellant's second theory, namely that the defendant was bound to ascertain the scope of the agent's authority. The agency and authority actually existed and whether or not the defendant inquired into the nature or extent of this authority can in no way effect the liability of the principal.

The second rule of law that the appellee will advance in support of his contention that the court below was correct in its findings is the doctrine of ratification. In this argument we will endeavor to show that regardless of whether the agent's acts were authorized, the principal is bound upon the theory of ratification. The record will disclose that the principal in this case was informed of the contract that his agent had executed in his behalf. That he took no steps to repudiate the contract and remained silent as to it. That he even expressed his approval of it and said that he considered himself bound by it.

In the case of the Union Gold Mining Company of Colorado vs. The Rocky Mountain National Bank of Central City, Colorado, the facts in brief were these:

An agent of the mining company did in excess of his authority borrow money in the name of the company.

He later informed the company of this act. The company did not repudiate the act of the agent and remained silent on the matter.

The court held that such failure on the part of the company to repudiate the agent's act on learning of it from the agent and its continued silence constituted a ratification of such unauthorized act. In rendering its decision the learned court said:

"If a company is informed of the borrowing of money by its agent in its name and within a reasonable time fails to disavow such acts of the agent, the jury are authorized to consider the company as assenting to what was done in its name."

In a similar case of *Whitley vs. James*, 49 S. E. 600, the facts were these:

An agent of a company did in excess of his authority as agent, extend credit to certain customers of the company. Upon learning of this the company failed to repudiate and remained silent.

The learned court of Georgia in rendering its decision in this case and holding that the principal was bound said:

"Ratification will result by operation of law from the principal's tacit acquiescence in such acts for an unreasonable length of time after notice of agent's conduct. That if after knowledge of what the agent had done the principal made no objection for an unreasonable length of time ratification would result by operation of law."

The rule laid down in the decisions of the above briefed cases was upheld in all of the following cases:

McGeoch vs. Hooker 11 Ill. App. 649.

Argus vs. Ware, 136 N. W. 774.

Halloway vs. Arkansas City Mill, 93 Pac. 577.

Hartwell vs. Equitable Mfg. Co., 97 Pac. 432.

Raymond vs. Palmer, 17 A. S. R. 398.

Russell vs. Waterloo Threshing Machine Co., 116 N. W. 611.

In all of the above cited cases the silence and failure of the principal to repudiate the unauthorized acts of his agent were construed as a ratification by the principal of such acts. The facts as they existed in the case at issue here are directly in point with those just cited. The point of law decided by them is identical with the one involved here, namely whether silence and failure to repudiate on the part of the principal with knowledge of the unauthorized acts of his agent will constitute a ratification of these acts.

The principal himself when put upon the stand in the trial of the case below testified that two days after the execution of the contract in question the agent told him of such contract and explained to him the terms thereof in full detail. He even testified that on that occasion he expressed his intention to recognize the contract as binding upon the company of which he was president at the time. It is quite clear then that the principal had full knowledge of the execution of the contract by his agent and that he was not uninformed of the provisions and details thereof. It also appears from the record that the defendant wrote to the company and demanded that the company carry out its part of the contract.

The record also discloses that the principal never did in any manner whatever repudiate the act of his agent, that he said nothing and did nothing to signify any intention to disavow the execution of the con-

tract. From such action or rather failure to act it must necessarily be presumed that he either intended that the agent should make such a contract or approved of the agent's act. The decisions and authorities seem to be in almost perfect accord that such silence and failure to disavow on the part of the principal when possessing full knowledge of the facts constitute a ratification in pais.

"Where an agency actually exists, the mere acquiescence of the principal may well give rise to the conclusive presumption of an intentional ratification of the act."

"Long acquiescence without objection and even silence of principal amount to conclusive presumption of the ratification of an unauthorized act."

CONCLUSION

In conclusion the appellee believes that the decision of the lower court was correct on two theories; First that the execution of the contract in question was within the express powers of the agent and that there was no question of implied or apparent scope of authority involved in this case; and secondly that whether the agent acted under authority or not, the principal's failure to repudiate the act and his continued acquiescence in the act of his agent constitute a ratification of the act and the principal is bound.

Wherefore the appellee prays that the decision of the lower court be, in all things, affirmed.

All of which is respectfully submitted to the Honorable, the Supreme Court of Notre Dame.

NOTRE DAME CIRCUIT COURT Record

Be It Remembered, That, to-wit: on Friday, September 22, 1920, the Notre Dame Circuit Court was duly organized with Hon. Francis J. Vurpillat as regular Judge presiding, and the other officers of said court duly qualified and acting, to-wit:

Henry W. Fritz, Clerk of the Court and Lawrence Morgan, Sheriff of Notre Dame.

Court was opened in due form and the following proceedings were had and orders made, towit:

In re Jury Commissioners for the year 1920-1921: The court appoints Frank J. Coughlin and George C. Wittried, two competent persons, citizens and residents of Notre Dame, Indiana, to act as Jury Commissioners of said court for the year 1920-1921, who now come into open court, accept said trust and are sworn and qualified for the discharge of the duties of such Jury Commissioners.

The following rules of court were promulgated and ordered to be spread of record: (Here insert)

In re Court Stenographers Court now appoints William S. Allen to be official court stenographer of the court for 1920-1921. Comes said Allen, accepts said trust and is sworn to discharge the duties of court stenographer.

CAUSE NO. 1.

Joseph Flick
vs.

George Wittried

Frank J. Coughlin and
Alden J. Cusick,

Attorneys for Plaintiff.

Gerald Craugh and

James L. O'Toole,

Attorneys for Defendant.

Action on account for \$500. Complaint and affidavit of merit filed.

Defendant files answer in two paragraphs and affidavit of merit.

Plaintiff files motion to require defendant to make second paragraph more specific, which is sustained, and defendant files amended second paragraph of answer, alleging accord and satisfaction.

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

Cause submitted to court, a jury being waived. Trial had, arguments heard.

Court finds for plaintiff and renders judgment for \$500.

CAUSE NO. 2.

Clyde Walsh
vs.

Charles M. Dunn

Charles P. Mooney and
Joseph D. Sanford,

Attorneys for Plaintiff.

Archibold M. Duncan and
George Wittried,

Attorneys for Defendant.

Action in Special Assumpsit. Declaration in one count on a promissory note, demand, \$200. Affidavit of merit filed.

Defendant files general demurrer to the declaration which is overruled, to which ruling defendant excepts.

Defendant files general issue plea of non assumpsit and affidavit of merit. Plea accepted.

Cause submitted to court for trial without a jury. Arguments are

heard and the court announces finding for plaintiff in the sum of \$200 and costs. Judgment accordingly.

CAUSE NO. 3.

James L. O'Toole

vs.

Joseph Sanford, as Administrator,

Charles M. Dunn and

Edmund Meagher,

Attorneys for Plaintiff.

Peter Lish and

Norman Barry,

Attorneys for Defendant.

Action on a claim against the estate of John Doe, deceased.

Complaint in one paragraph against Joseph Sanford, as administrator of the estate of John Doe, deceased.

Defendant filed demurrer to complaint, which plaintiff confesses.

Plaintiff files amended complaint.

Defendant files answer in three paragraphs, general denial, failure of consideration and failure to comply with decedent's estates act.

Plaintiff files motion to strike out the third paragraph of answer which court overrules, to which ruling plaintiff excepts.

Plaintiff files reply in three paragraphs.

Defendant moves to strike out the second and third paragraphs of reply severally. Court sustains motion on ground that paragraphs are argumentative general denials. Plaintiff severally excepts.

Cause at issue is submitted to court for trial, jury waived.

Arguments are heard and court finds for plaintiff for \$300 as against

the administrator of the estate of John Doe, deceased, Joseph Sanford, that said sum is due from said estate and should be paid by said administrator. Judgment accordingly.

CAUSE NO. 4

Henry Blake

vs.

James Washburn

William S. Allen and

Joseph Sanford

Attorneys for Plaintiff.

George D. O'Brien and

Clyde Walsh,

Attorneys for Defendant.

Action in replevin for the recovery of a steer. Declaration and affidavit in replevin filed.

Defendant files plea in two counts, non cepit and non detinet.

Plaintiff files similiter.

Cause submitted to the court without a jury. Trial begun.

Plaintiff closes case in chief.

Defendant moves for nonsuit, which the court overrules, to which ruling defendant excepts.

Trial is concluded and the arguments are heard.

Court finds that the plaintiff is the owner of and entitled to the immediate possession of the steer described in the declaration and that plaintiff have writ of replevin for such property and \$10 damages for its detention. Judgment on the finding.

CAUSE NO. 5

Charles Dressler

vs.

Nellie Cranford and Walter Cranford

This case pending on the trial calendar for trial before a jury.

NOTRE DAME LAW REPORTER
JUNIOR MOOT COURT

The following cases were argued orally by the respective attorneys named on the hypothetical facts stated. Only the cases citèy by the respective parties appear here. These cases will later be developed and submitted for trial in the Nòtre Dame Circuit Court by the lawyers who argued them in this court. The statements of fact and citations follow:

CAUSE NO. 1.

STATEMENT OF FACTS

John Reilly
vs.
Gerald Davenport

Plaintiff parked his limousine in Michigan Street, South Bend, Indiana, at right angles with the curbing, in violaton of a city ordinance. The defendant, while carelessly and negligently driving his automobile, crashed into the limousine and damaged it to the extent of \$1,000, for which plaintiff brings action.

Vincent B. Pater and
Aaron H. Huguenard,
Attorneys for Plaintiff.

Plaintiff should recover, notwithstanding his violation of the city ordinance, for this violation was only a condition and did not contribute proximately to the infliction of the damage. *Berry vs. Borough*, Pa. 43 Atl. 240; *Scheuerer vs. Banner Rubber Co.*, 38 L. R. A. 1207; *Steel vs. Burkhardt*, 6 Am. Rep. 191; *Spoffard vs. Harlow*, 3 Mass. 176; *Railroad Co. vs. Buck*, 115 Ind. 566; *Tackett vs. Taylor*, Ia. 98 N. W. 730; *Clopper vs. Coffey*, 44 Md. 117; *Railroad Co. vs. Price*, Ga. 32 S. E. 77; *Rider Case*, N. Y. 63 N. E.

Franklin E. Miller and
John J. Buckley,
Attorneys for Defendant.

The parking of plaintiff's car in violation of the city ordinance in the crowded, busy Michigan Street, was in itself such a negligent act as contributed proximately to the injury and therefore should bar recovery. *Norris vs. Litchfield*, N. H. 69 Am. Dec. 546; *Meyers vs. Meinrath*, 101 Mass. 36 -3 Am. Rep. 368; *Cranson vs. Goss*, 107 Mass. 309-9 Am. Rep. 45; *Cratty vs. City of Bangor*, 2 Am. Rep. 56; *Lloyd vs. Pugh*, Wis. 149 N. W. 150; *Ludke vs. Burek*, Wis. 152 N. W. 190; *Savett vs. M. & L. Ry. Co.*, 77 Am. Dec. 422; *Day vs. Cleveland, etc., Ry. Co.*, 137 Ind. 206; *Brazil Block Coal Co. vs. Heedler*, 129 Ind. 327.

CAUSE NO. 2.

STATEMENT OF FACTS

James Whitcomb
vs.
Marshall Carper

Plaintiff brings action to recover \$200 paid to defendant as purchase price for a horse, harness and buggy.

Plaintiff was a minor at time of purchase, a married man with wife and child, worked as a day laborer for support of himself and family, and did not use the purchased property except for pleasure riding. Plaintiff, at time of bringing action, had sold the harness and buggy, and the horse had been condemned by the Society for the Prevention of Cruelty to Animals as unfit for use. Notwithstanding plaintiff offered no return of the property he seeks recov-

ery of the money paid by him as stated.

Arthur Keeney and
Harry E. Denny,
Attorneys for Plaintiff.

This is an infant's voidable contract, is not for necessities, and plaintiff may recover without returning the consideration. Nor does the marriage of the infant change his status as infant. *Antonio vs. Miller*, 34 Pac. 40; *Goodman vs. Alexander*, 55 L. R. A. 781; *Guthrie vs. Murphy*, 28 Am. Dec. 681; *Price vs. Sanders*, 60 Ind. 30; *Beichler vs. Guenther*, 96 N. W. 895; *The Rose Case*, 27 Am. Rep. —; *Ryan vs. Smith*, 165 Mass. 303-43 N. E. 109; *House vs. Alexander*, 105 Ind. 109; *Wheaton vs. East*, 26 Am. Dec. 251; *Forda vs. Van Horn* 30 Am. Dec. 77; *N. & C. Ry. Co.*, 78 Am. Dec. 506; *Green vs. Green*, 69 N. Y. 553; *Miles vs. Lingerman*, 24 Ind. 385; *The Lemon Case (Ohio)* 15 N. E. 476; *Wallace vs. Leroy*, 50 S. E. 243-110 Am. St. Rep. 777; *Larkin vs. Foster*, 64 Atl. 1048.

John F. Heffernan and
T. Spencer McCabe,
Attorneys for Defendant.

Plaintiff, by marriage, assumes the contract obligations of an adult, with respect to his family, and for his purchase in this case made for the benefit of his family he is liable. At any rate he cannot disaffirm the contract without return of the consideration. *Glenn vs. Hollopeter*, Cal. 21 L. R. A. 847; *Cochrane vs. Cochrane*, 196 N. Y. 86; *Commonwealth vs. Graham*, 16 L. R. A. 578; *Aldrich vs. Bennett*, 56 Am. Rep. 529; *Houch vs. LaJunta Hdwr. Co.*, Col. 114 Pac. 645; *Coburn vs. Raymond* 100 Am.

St. Rep. 1000; *Taft vs. Pike*, 14 Vt. 306; *Words & Phrases*, vol. 8, pg. 680; *Englebert vs. Pritchett*, 26 L. R. A. 177; *Johnson vs. N. W. Mut. L. Co.*, 26 L. R. A. 187.

CAUSE NO. 3.

STATEMENT OF FACTS

John D. Carson as Admr. of the Estate of Ray Stephens, deceased

vs.

Charles D. Simpson and Edward Williams

Ray Stephens, in his lifetime, made an agreement with Charles D. Simpson to sell him a horse on approval. The understanding was that Simpson should take the horse and try him, and if the horse suited him, give Stephens his note with approved security; but if the horse did not suit him he was to return the horse to Stephens.

A few days after this agreement Stephens was killed. Simpson did not return the horse, but later traded it to the other defendant, Edward Williams.

Plaintiff brings action to recover the horse or its value.

Patrick E. Granfield and
Joseph J. Doran,
Attorneys for Plaintiff.

To support plaintiff's right of action the following cases are cited: *Wolf Co. vs. Monarch Refrigerator Co.*, 96 N. E. 1063; *Fox vs. Wilkenson*, Wis. 113 N. W. 669-14 L. R. A. (NS.) 1107; 2 Benj. on Sales 4th ed. 1051; *Cream Cirt Glass Co. vs. Friedlander*, 84 Wis. 53-21 L. R. A. (NS.) 135; *Dodsworth vs. Hercules Iron Wks.*, 66 Fed. 483; *Brown vs.*

Foster, N. Y. 15 N. E. 608; Vanwin-
kle vs. Crowell, 146 U. S. 42.

William A. Miner and
Clarence Smith,
Attorneys for Defendant.

The trading of the horse by Simp-
son to Williams constituted an ap-
proval of the horse for purchase and
a valid acceptance of the offer to sell,
so as to pass title to the defendants.
Plaintiff cannot therefore recover
property that belongs to defendants.
Mactier's Adm. vs. Frith, 21 Am.
Dec. 262; Bower vs. Detroit Ry. Co.,
20 N. W. 559; Sweeney vs. Vaaghor,
29 S. W. 903; Yale vs. Coddington, 21
Wend. 173; Bradbury vs. Marburry,
46 Am. Dec. 264; Girard vs. Taggert,
9 Am. Dec. 327; Grant vs. Groshaon,
3 Am. Dec. 725; Brackenridge vs.
State, 11 S. W. 630; Stephenson vs.
Repp, 25 N. E. 803; Foster vs. Ad-
ams, 15 Atl. 169.

CAUSE NO. 4.

STATEMENT OF FACTS

James Mansfield
vs.
Daniel O'Conner

James Mansfield, in company with
three others, went upon the farm of
Daniel O'Conner, to hunt. This was
without the permission and knowl-
edge of O'Conner. O'Conner had
signs tacked upon his fences on
which was printed: "No hunting al-
lowed on these premises.

O'Conne rowned and kept a big
shepherd dog. This dog had the
known habit of running to the fence
and barking viciously at passers-by.
On one occasion the dog had gone
through the open gate and bitten a

man, of which fact, O'Conner had
been informed.

Mansfield, on the occasion in ques-
tion, had no knowledge whatever of
the fact that O'Conner had a dog,
until the dog viciously attacked him
and seriously wounded him, biting
him three times in the legs. O'Con-
ner was not at home at the time of
the hunting trip of Mansfield and
knew nothing whatever about the af-
fair until he arrived home later. The
dog attacked and bit Mansfield while
he was on the premises of O'Conner.

Is O'Conner liable to Mansfield or
has he a defense to the action which
Mansfield brings for the injuries sus-
tained on account of the dog bites?

Edwin J. McCarthy and
Mark R. Healey,
Attorneys for Plaintiff.

Defendant is liable for the injuries
inflicted by his dog which he knew
was of a vicious character, even
though the plaintiff may have been
a trespasser. Partlow vs. Hagerty,
35 Ind. 178; Williams Case, 74 Ind.
25; Clanin vs. Fagan, 124 Ind. 304;
Sherfey vs. Bartley, 67 Am. Dec.
597; Woolfe vs. Chalker, 31 Conn.
121-81 Am. Dec. 175; Rider vs.
White, 65 N. Y. 54-22 Am. Rep. 600;
Grasson vs. Hofius, 80 Pac. 1002;
Marsh vs. Jones, 52 Am. Dec. 67;
Glidden vs. Moore, 45 Am. Rep. 98.

Joseph H. Farley and
William E. Krippene,
Attorneys for Defendant.

Plaintiff was a trespasser on de-
fendant's premises and defendant
owed him no duty except not to do
him wilfull injury. Defendant's dog
was kept on his own premises and
was not of such character as would

make defendant liable to trespassers. *Indiana Refining Co. vs. Nobley*, 24 L. R. A. (NS.) 497; *Victor Coal Co. vs. Muir*, 26 L. R. A. 435; *St. Louis R. R. Co. vs. Holsman*, 57 S. W. 770; *Benson vs. Baltimore Traction Co.*, 20 L. R. A. &14; *Muench vs. Heinman*, 96 N. W. 800; *Ritz vs. City, etc.*, 31 S. W. 993; *Galveston Oil Co. vs. Morton*, 7 S. W. 756; *Indpls. vs. Emmelman*, 108 Ind. 530; *Ind. B. & W. Ry. vs. Barnhart*, 115 Ind. 399.

CAUSE NO. 5

STATEMENT OF FACTS

Sadie Thompson
vs.
Carl Meyne

Carl Meyne and his wife were middle-aged people having no children of their own. They lived on a farm in a comfortable country home. Sadie Thompson was a girl of fourteen years, of the general size and health of girls of that age. Sadie went into the home of the Meynes and lived there three years. During the first two years, Sadie went to the country school during school terms of the year. At all other times, including morning and evenings she did the chores and work about a country home where there are horses, cows, chickens, etc., on the farm. Sadie did all kinds of house work, milking, churning, feeding, cleaning, etc. She worked about the kitchen and the rooms of the home. In fact, Sadie did everything she was directed to do.

The Meynes boarded and lodged Sadie and gave her some clothing, which, however, she claims was one pair of stockings, a calico dress and a pair of shoes, but what the Meynes claimed was all Sadie needed in ad-

dition to what she had when she came to their home.

After three years, Sadie left the Meynes. At no time did Sadie ever ask for money and at no time did the Meynes ever give her any money. At no time did Sadie ask for wages or pay for her services and at no time did the Meynes ever ask Sadie to pay them anything for her board and lodging. And when Sadie left the Meyne home, there was nothing said by either as to any charge or account between them.

Three months after leaving the Meyne home Sadie brings action for wages at the rate of two dollars per week for the entire time of her stay at the Meynes.

Paul V. Paden and
Frank M. Hughes,
Attorneys for Plaintiff.

There is an implied contract to pay plaintiff what her services are reasonably worth. *Hodge vs. Hodge*, Admr. (Wash.) 91 Pac. 764-11 L. R. A. 873, and Note on page 888; *Hefron vs. Brown*, 155 Ill. 322-40 N. E. 583; *Caven vs. Musgrave*, 73 Iowa 384.

Paul J. Schwertley and
Raymond J. Kearns,
Attorneys for Defendant.

One living in the household as a member of the family is not entitled to pay for services rendered, nor is there any liability for board and lodging. *Grohan vs. Stanton*, 58 N. E. 1023; *Walker vs. Taylor*, 64 Pac. 193; *Windland vs. Deeds*, 44 Iowa 98; *Smith vs. Johnson*, 45 Iowa 308; *Jackson vs. Jackson*, 31 S. E. 78; *Hall vs. Finch*, 29 Wis. 278; *Andrews vs. Foster*, 17 Vt. 556; *Butler vs. Store*, 50 Pa. St. 451; *Oxford vs. McFarland*, 3 Ind. 156.

TRIAL BRIEFS IN CASE OF
John Reilly vs. Gerald Davenport
Cause No. 1

Junior Moot Court

By

Aaron H. Huguenard for Plaintiff

Franklyn E. Miller for Defendant

STATEMENT OF FACTS

Plaintiff parked his limousine in Michigan Street, South Bend, Indiana, at right angles with the curbing, in violation of the city ordinance. The defendant, while carelessly and negligently driving his automobile, crashed into the limousine and damaged it to the extent of \$1,000, for which plaintiff brings action.

BRIEF FOR PLAINTIFF

Defendant is liable to plaintiff for a tort. Certainly the plaintiff had the right not to be damaged in his property; and certainly there was imposed on the defendant a duty not to cause the destruction of his limousine, as he did.

Defendant is liable for the specific tort of negligence. Negligence, according to many reliable authorities such as Cooley and Chapin, consists in failing to fulfill a legal duty to exercise a proper degree of care, whereby damage results to one to whom such legal duty is owing. Defendant "carelessly and negligently" ran into the plaintiff's limousine.

Has the plaintiff a right to damages? One of the facts given above is that the plaintiff's machine was parked in violation of a city ordinance; that the angle which it formed with the curb was greater than that which the city ordinance permits.

Now, it is a well-known rule of law that no one will be permitted to profit by his own wrong. It would be unreasonable to think that one would be allowed to commit an illegal act

and then as a result of it, enter into litigation and receive a handsome verdict, and we of the plaintiff's side realize this very well. We are ready to admit that if a person's unlawful act contributes *proximately* to his own injury, he may not recover damages of another for a negligent participation in that injury, but the mere fact that he is engaged in an unlawful act is not enough to bar his action unless the transgression of the law has contributed directly to the accident.

Consequently, if the illegal conduct of the injured party proximately causes his injury—remember, proximately causes—he will be without redress. It must be always kept in mind that the illegal conduct must be a proximate or concurring cause, for if the plaintiff's conduct merely renders the injury possible it will be merely treated as a condition. Concerning the defense of contributory negligence, in the case of *Rider vs. Syracuse Rapid Tr. Co.*, 171 N. Y. 139-63 N. E. 836-58 L. R. A. 125, it is said: "Plaintiff's negligence must be proximate cause in the same sense

in which the defendant's negligence must have been a proximate cause in order to give a right of action." In other words, if the plaintiff's act was merely a remote cause or condition, there can be no bar to his recovery.

Perhaps, it would be well for me to go into detail more concerning the words, "cause" and "condition;" or, as sometimes differentiated "proximate cause" and "remote cause."

We find in the law dictionaries, condition defined as "a mechanical antecedent without casual power," cause, defined as "the responsible, voluntary agent, changing the ordinary course of nature." A proximate cause must be a "*causa causans*; not merely a *causa sine qua non*." All courts are agreed that there is an essential difference between a cause and a condition but the difficulty arises in trying to distinguish between them.

In the Railroad Company vs. Price, a Georgia case, 32 S. E. 77, the defendant negligently carried the plaintiff past her destination and the conductor advised her to spend the night at a certain hotel in the town at which she alighted, agreeing to pay her expenses and to carry her back in the morning. It was held that his negligence in carrying her past her station is not to be regarded as a cause of injuries received by her from the explosion of a lamp at the hotel.

Again, where a town negligently permits a tree to remain standing in a street notwithstanding its dangerous condition, which tree is blown down and strikes a motorman who is running his car at an illegal rate of speed, the illegal speed is a condition merely. Berry vs. Borough, Penn., 43 Atl. 240.

I cite these cases to show what the courts have held as conditions or remote causes. In our case, everything hinges upon these two words, condition and cause.

Was the fact that our client's car was illegally parked, a concurring cause of the collision or was it a mere condition? That is the issue. Upon the answer to this question depends the decision. If the car so parked was a concurring cause of the accident, then the plaintiff is without redress. If the car so parked was merely a condition, then the judgment must go to the plaintiff.

No reasonable person would hold that the mere parking of the car was a concurring cause of the accident. For the doctrine of contributory negligence to apply, the plaintiff's negligence must be concurrent of the same kind, immediate, and not something of a prior time. In this case, the plaintiff had already violated the ordinance, his act was of a past time, and it was not of the same nature as the defendant's

In Scheurer vs. Banner Rubber Co., 227 Mo. 347-126 S. W. 1037-28 L. R. A. (NS) 1207, the court says: "If the plaintiff's negligence affords only an opportunity or occasion for the injury, or a mere condition of it, it is no bar to his action." And all we contend is that our case be decided in accordance with this principle.

True it is that the plaintiff's machine would not have been damaged, had it not been located where it was, but it does not follow that it would have gone unharmed, had it been parked in accordance with the city ordinance, for the conduct of the defendant was of such a grossly careless and negligent nature that it more than likely would have been ruined

even had it been a little closer to the curb.

The plaintiff's car is of a limousine type. Suppose it had been an ambulance backed at a right angle to the curb, waiting to receiving one on stretchers. The defendant's car, in its riotous meanderings, would have crashed into the ambulance far more easily than it would into the plaintiff's car, for the latter car was not parked at so blunt an angle. Could the defendant have pleaded contributory negligence or illegal conduct of the plaintiff in the ambulance case? Or, suppose it had been a truck backed at a right angle unloading articles of great weight. Both the ambulance and the truck would have protruded farther into the street than the limousine without constituting an illegal act or an act of contributory negligence. Plaintiff's action in parking his limousine cannot reasonably be considered a concurring cause while in the hypothetical ambulance and truck cases the positions of those machines do not constitute even so much as a remote cause. If the plaintiff's act in this case is not a concurring cause, then it must be a condition, and as such, decision must go to the plaintiff. Let us cite a few cases in point.

In *Steele vs. Burkhardt*, 104 Mass. 59- 6 Am. Rep. 191, this occurred: Plaintiff had his wagon parked at an angle which was prohibited by city ordinance. The defendant carelessly drove upon the plaintiff's horse and injured him. The case is exactly analogous to the present case and the judgment was for the plaintiff. The court said: "The plaintiff did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury." And we are willing to

admit the same here, namely: that the plaintiff did show negligence as to the ordinance but that he did not directly contribute to the injury.

In *Spofford vs. Harlow*, 3 Mass., 176, it was held that though the plaintiff's sleigh was on the wrong side of the street in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury.

In the *Railroad Company vs. Buck*, 116 Ind. 566-19 N. E. 453, a laborer while working on Sunday was injured through defendant's negligence. The defendant plead the fact that plaintiff was violating the Sunday working law. The court said: "Our conclusion is that a person injured through the negligent omission of another, even though he violated the observance of the Sunday law, will not be denied a recovery."

This case while not so similar in facts as the two Massachusetts cases cited is exactly in point in that violation of a statute by the plaintiff will not preclude a recovery where defendant has been negligent, if the plaintiff has not been a proximate cause of the injury.

In *Tackett vs. Taylor*, 123 Iowa 149-98 N. W. 730, an Iowa case, it was held that conducting a machine across a defective bridge in an unlawful manner does not bar recovery unless it contributes directly to the injury.

And so we might go on citing numerous cases, all bringing out this point: Plaintiff can maintain an action for damages caused by defendant's negligence, even though plaintiff does violate an ordinance, provided that he does not contribute directly to the injury. But that these will

suffice to bring out the general principle.

That the plaintiff violated an ordinance is admitted, but we vigorously contend that violation is only an occasion for the injury, or a condition of it, and therefore, decision should be in plaintiff's favor.

BRIEF FOR DEFENDANT

There is no distinction between the violation of a state statute and the infraction of a municipal ordinance; both are, by the law, placed upon the same plane: *Hayes vs. Michigan Central R. R. Co.*, 111 U. S.; *Yanke vs. Lange et al.*, Wis., 170 N. W. 722; 21 Am. and Eng. Ency. of Law 483; 33 Minnesota 323.

The judge should peremptorily instruct the jury that the act of the plaintiff in parking his car in violation of the city ordinance constituted negligence per se: *Lloyd vs. Pugh*, Wis. 149 N. W. 150; *Ludke vs. Burke*, Wis. 152, N. W. 190; *Smith vs. M. B. & T. E.*, 91 Wisconsin 360-64 N. W. 1041-30 L. R. A. 504-51 Am. St. Rep. 912.

The law is uniform to the effect that a person, being engaged in violation of law, cannot recover if his own illegal act was an essential element of his case as disclosed upon all of the evidence: *Norris vs. Litchfield*, 35 New Hampshire, 271-69 Am. Dec. 546; *Meyers vs. Meinrath*, 101 Mass. 366-3 Am. Rep. 368; *Cranston vs. Goss*, 107 Mass. 309-9 Am. Rep. 45; 119 Mass. 66-Rep. 315; *Smith vs. Boston and Maine R. R. Co.*, 120 Mass. 490-21 Am. Rep. 530; *Newcomb vs. Boston Pro. Ass'n.*, 146 Mass. 596-4 Amn. St. Rep. 354; *Cratty vs. City of Bangor*, 57 Me. 423-2 Amn. Rep. 56; *Johnson vs. Town of Irasburgh*, 47 Vt. 28-19 Am. Rep. 111.

The rule of law as applied to an action of tort for injuries inflicted upon the plaintiff while he is engaged in an unlawful act is that if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering. And this, we submit, is the true rule of the law. *Schultz vs. Paul*, Ind. Law Report 10; *Spofford vs. Harlow*, 3 Allen 176; *Kearns vs. Sowden*, 104 Mass. 63; *Steele vs. Burkhardt*, 104 Mass. 59-6 Am. Rep. 191. However, if the jury find that the conduct of the plaintiff either proximately or contributorily affected the injury of which he now complains, he will not be entitled to recover: *Lloyd vs. Pugh and Ludke vs. Burck*, *supra*. In other words, whether or not the act of the plaintiff either proximately or contributorily affected the collision is a question of fact for the jury: *Milw. and St. P. R. R. Company vs. Timothy Kellogg*, Iowa. 94 U. S. 469-24 Law. Ed. 256; *Chapin on Torts* 103; *White vs. Long*, 128 Mass. 598-35 Am. Rep. 402.

In order for the plaintiff to recover he must show that he exercised due care in the prevention of the injury of which he now complains. *Savett vs. Manchester and Lawrence R. R. Co.* 77 Am. Dec. 422; *Heland vs. City of Lowell*, Mass. 81 Am. Dec. 670; *Damon vs. Inhab. of Scituate*, 119 Mass. 66-20 Am. Rep. 315; *Smith vs. Boston & Maine R. R. Co.*, 21 Am. Rep. 538; *Norris vs. Litchfield*, 35 N. H. 271-69 Am. Dec. 546; *Newcomb vs. Boston Pro. Ass'n.* 146 Mass. 596-4 Am. St. Rep. 354.

In the leading case of *Savett vs. R. R. Co.*, *supra*, the court held, that a passenger in a railway car is wanting in ordinary care, if, knowing that the train is moving, he goes out on the platform of a car, and steps there-

from upon the platform of the station while the car is still in motion, and he cannot recover from the railroad company for an injury resulting therefrom.

If a person needlessly and recklessly exposes himself to open and obvious danger by his failure to exercise due care, and thereby suffers an injury as the result thereof, he will be guilty of such negligence as will prevent a recovery for such injury; *Day vs. Cleveland, etc., R. R. Co.*, 137 Ind. 206-36 N. E. 854; *Brazil Block Coal Co. vs. Hoodler* 129 Ind., 327-27 N. E. 741. In the first of these cases the court held, that where a railroad employee, a car repairer, in helping to move a car upon the track, took a position at the draw bar, under a running board, one end of which rested on the car that was being moved and the other end on another car, one of which, when the car had been moved far enough fell on the employee, injuring him, the employee being ignorant of the fact that such board had not been removed, but which he could easily have seen if he had looked, the danger being as obvious to the employee as to the employer—the employee cannot recover; and in such case, it is the duty of the trial court to instruct the jury to find for the defendant, the employer.

A fortiori, if a person exposes his property to open and obvious danger through his failure to exercise due care, as did the plaintiff do in this case, in that he permitted his limousine to be parked in violation of a municipal ordinance, to protrude out and obstruct the public highway for

a period of time exceeding three hours, a highway whereon a heavy traffic was in the course of operation, it follows that he cannot now complain of the injury inflicted upon his property, which injury—in part at least—was attributable to his failure to exercise due care. The law, I take it, requires that men shall use the senses with which nature has endowed them, and when, without excuse, they fail to do so, they alone must suffer the consequences, and they are not excused when they fail to discover the danger if they made no attempt to employ the faculties with which nature has blessed them.

Especially is this true when the law imposes an obligation or duty on an individual and charges him with the duty to exercise due care. *Brazil Block Coal Co. vs. Hoodler, supra*; *Stewart, Admr. vs. Pa. Ry. Co.* 130 Ind. 242-29 N.E. 916; *Pa. Ry. Co. vs. Meyers* 136 Ind. 242-36 N. E. 32.

Therefore when the plaintiff in this case failed to exercise even slight care in the protection of his property, when he neglected to call into operation his reasoning power to work upon the material supplied him by experience, namely, that it was dangerous and an unnecessary risk for a man to allow his property to project into a congested highway, when he absolutely ignored and broke the provisions of the municipal ordinance, he did then and there assume all responsibility for any damages which might be inflicted upon his property through the negligence of some other person.

Franklin Elliot Miller,
Attorney for the Defendant.

ALUMNI
(Contributing Section)

THE LAW AND LAWYERS

By William Hoynes, A. M., LL.D.,
Dean Emeritus

It is commonly said that the legal profession is over crowded. This is a pessimistic generalization.. It is lacking in valid basis. It may be admitted, however, that there is no special dearth of lawyers anywhere, whether in our cities or average towns. There is probably no county seat in any of our states that has not its due quota of them. Statistics indicate that there is one for every 660 persons throughout the country. Early in the last century they were proportionately less than half as numerous. In other countries they compare numerically with the thousands or more as they do here with the hundreds. Their number has increased responsively to the growth and expansion of business, although doubling relatively to the augmenting aggregate of population.

The late war caused a diminution in the trend of young men to the profession and materially abated the alleged prospect of overcrowding it. Moreover, of late years the normal volume of legal business has measurably decreased. This remark is confined to such business as could customarily be counted upon or expected by the ordinary lawyer—the lawyer in general practice. Many disputed accounts of merchants and traders are now referred to and settled by arbitration. Where this is not done they are usually intrusted to collecting agencies, which have their own lawyers to represent them in litigation. Trust companies and corporations generally in the more

populous centers retain lawyers for their special service and pay them annual salaries. To them for advice or action in court are committed matters involving possible or probable litigation. Needless to state, they are almost invariably disposed of apart from the regular profession or lawyers engaged independently in practice. Their fixed policy, however, seems to be in favor of settlement or compromise and the avoidance of litigation. In this respect their course is commendable and in harmony with the precepts of legal ethics.

But there is another class of lawyers, or pseudo-lawyers, who are appropriately styled shysters. They are intrusive and crafty, unscrupulous and brazen. They do not hesitate to seek and openly solicit business. Indeed, sometimes they go further and actually harass prospective litigants in the hope of being retained by them. If they learn of an accident involving personal injury they lose no time in communicating with the victim or his family, offering their services and saying that they will pay all the costs of litigation and take the case on shares, 40 or 50 per cent. to themselves and the balance to the victim or his family. If they hear of a family quarrel, with prospect of a suit for legal separation or divorce, they let it be known promptly by card or personal interview that their services are at command. If an assault or murder be committed, and the perpetrator or his family can

furnish funds for defense, their business cards or personal appeals to be retained in the case quickly follow. Not a few of them make the police court their favorite morning rendezvous, in order that they may be at hand to tender their legal aid to persons arrested during the preceding night for drunkenness, disorderly conduct, and the like. If they are told of some one having a dormant claim susceptible of being twisted into ground work for a suit they seek his acquaintance, express belief in his having a case and urge him to intrust them with it. Of course, all such practices are violative of legal ethics, discreditable to the shysters and derogatory to the profession. Reputable lawyers are now striving to eliminate these buzzards and prevent hereafter their admission to the bar. Trough such practices a spirit of commercialism has crept into the profession in some of the larger cities, and its traditional dignity, chivalry and honor are thus becoming obscured and jeopardized. Hence the solicitude of the American Bar Association and reputable lawyers generally to block the danger and turn to rescue work.

Trust companies and even labor unions cut materially into the legitimate and regular business of the general profession. Such companies now claim and control in notable degree real estate transfers, the settlement of the estates of deceased persons, the guardianship of orphans or other wards, the collection of money and management of funds according to directions of testators and trustees, the transfer of securities and the investment of funds under trust terms, and, in short, things innumerable that formerly passed in the main through the hands of lawyers

engaged in general practice. And as for labor unions the practice seems to be to turn over to certain lawyers in apparent affiliation with them such matters of litigation as concern the membership as a whole or the members individually.

The pessimist may admit that such facts have weight in disproving his assumption that the profession is overcrowded. "But look," says he, "behold the vast number of students in the law schools of the country who are preparing to enter it! It will certainly be overcrowded when they get their diplomas and pass the examination for admission to the bar!"

Another mistake, Mr. Pessimist! Less than 50 per cent of those who study law follow it as a profession. The knowledge they thus acquire is utilized in other pursuits. It is of exceptional value in all lines of business, not to mention other professions, and as the foundation of a broad and practical education. It is safe to say that no branch of study is more serviceable and illuminating in preparing the mind for the acquisition of sound, useful and available knowledge. It enters almost unconsciously but controllingly into the mind, and imparts prudence to thought and guidance to action. It teaches the mind to investigate and examine the problems and difficulties referred to it for practical consideration and to pursue the path of calm reflection and discerning wisdom in reaching their solution. It guides to sound discretion in business affairs, showing with seeming intuition when a contract has been validly made, when a wrong has been done or may be avoided in tort, or when a lawless act has been perpetrated or threatened in the realm of crime. It opens and presents to the

observing mind the whole vast domain of nature's organic laws and operations and man's countless activities.

Inscrutable in many respects though it be to our hampered vision, yet it is the most interesting and inviting vista to which the human eye may turn in the whole plan of mundane life. Knowledge of the fact seem to be instinctive, and it is reasonably obvious that the law offers the surest and most practicable means of journeying safely and creditably through the mazes of human life. Its helpful guidance is a trusty mentor that leads not astray. Is it surprising, therefore, that so many apply themselves to its study, even without purpose to engage in its practice, viewing it as a matchless factor in sound educational equipment?

Though they finish, let it be repeated, the prescribed course of study in law schools and receive diplomas evidencing the fact, yet from 50 to 60 per cent of them turn to other professional walks and the occupations innumerable they decide to select. Their knowledge of the law bespeaks for them high standing and exceptional success in the fields of their ultimate choice. Many even of those admitted to the bar, as in the case of President Wilson, see surer ground of success and advancement in other lines of activity, and act accordingly, yielding to the impulse of following the latest alluring call.

The man destined, however, to become a power in the law decides unalterably to stick to it. The hardships he must encounter and the difficulties he must overcome may seem unbearable, but he does not become faint-hearted nor is his courage abated. His clothes may become

thin and threadbare, but he complains not of cold and seems to ignore their shabbiness. His larder may be empty and his food the coarsest and cheapest procurable, but the pinch of hunger does not affect him and the simplest food is a feast before the great and dominating passion he cherishes for his beloved Themis—the Law. He knows that it is within the common experience to wait many months and tedious years for success, and he is willing, goodnaturedly to get into line and wait his turn. Health may fail, but the spirit does not, in a young man of this type. He reads, works, observes and studies to the full measure of his strength. He takes to heart and cultivates the qualities likely to make him popular, respected and trustworthy. He knows that character makes the man and is the stamp which unquestionably passes current everywhere, so he seeks to base his own on the pedestal of honesty, reliability, truthfulness and efficiency. He aspires to become learned, efficient, successful and conspicuous in the law, and to this end thus visualizes in mental picture as to traits and character his inspiring exemplar of honorable achievement and acclaimed greatness in the profession.

My exemplar in law is fundamentally and invariably a gentleman, although in this respect all the learned professions are or should be in kinship. He is liberally educated and fully aware of the obligations he sustains to his profession, fellow-citizens and society. He is alert and prompt in the discharge of the duties he assumes, punctual and reliable in the performance of his professional functions, deliberate in judgment

and conscientious in conforming to the trust and confidence reposed in him. By nature, inclination and civic study he is fond of his country and ready to respond to its call in forum, field or council whenever emergencies arise and dangers seem imminent. As a representative of the law he aims to be unbiased in his estimate of men. In dealing with them he is modest, kindly, genial and altruistic, and thus easily obtains access to their confidence and abiding claim on their good will. If in his way right be assailed by wrong his sense of justice impels him instinctively by word and act to side with the right and repel the wrong with requisite force and valor. He mingles unassumingly with his fellow-citizens and is ready always to bear his share of the common burden, as well as to proclaim and advocate or defend all reasonable measure looking to the public welfare. In doing so he serves with alacrity in any capacity that the occasion may demand. The mean passion of envy and the odious vice of duplicity find no room in his frank and manly nature. In the discharge of his varied duties, civic and social, he aims to be just and honorable. He makes no promise that he cannot or does not intend to fulfill. Honesty is his pole-star, and he abhors the thought of cheating, deceiving or misleading any man. He believes that religion is the soul of the law, complementary to it at every angle, and he endeavors to square his thoughts and acts conformably to its teachings. He views the law as a noble science, not as a mere art, and conscientiously dedicates to it his life and best services. He would make and keep it impartial, efficient and trustworthy—the palladium of right, the embodiment of justice

and the preserver of peace—in short, a blessing indispensable to society and mankind. He desires his profession to be as learned in fact as it reputedly is in name. He knows that his acts, whether good or bad, will be imputed to it in some measure, and finds in this consciousness an added stimulus to think, speak and act the part of a gentleman, whether in the forum on the hustings or in the public mart. His professional work is characterized by forethought and careful preparation, so that he may not betray ignorance and suffer humiliation before the court and jury, embarrass the judge and consume time not his own in correcting or amending with judicial leave mistakes in his pleadings, trespassing on the time of other lawyers and the public by delaying the regular procedure of the court through his inexcusable negligence and blundering, forfeit the confidence of his client and probably lose his case through negligence and incompetency.

The aspiring and reflecting student might have added many other traits of character to his ideal picture of a great and honored lawyer before his eager vision. At any rate, so far as they go, they promise efficiency, popularity, success and distinction in the profession. The student's visualized exemplar beckons inspiringly to all learners of the law.

A LETTER

Hoynes College of Law
University of Notre Dame
Dear Colonel Hoynes:—

The November issue of the Notre Dame Law Reporter will contain for the first time the Alumni Section. In this section it is contemplated that in each issue there may appear some

article contributed by an alumnus of the Law School.

There is a unanimity of opinion that the first contribution to this section would most appropriately and satisfactorily come from the Founder of the Law School—that is yourself; that a few lines from your pen would afford the greatest interest and pleasure possible to the alumni. You are the one man whom every alumnus knows and reveres, and a word from you would supply the November issue of the Reporter with its most acceptable feature.

As one of the many alumni who have gone out from your school I think I may fairly speak for them all in assuring you that a contribution from your pen would be very joyfully and gratefully received. Any article you may choose to submit, whether personal, reminiscent, descriptive, advisory or purely legal in character, will be gladly printed. May we not receive something from you by the 15th of November?

With assurances of the Law Faculty's considerations of respect and particularly of my own sincere personal regard, permit me to subscribe myself,

Your grateful alumnus,

FRANCIS J. VURPILLAT,

For the Law Reporter Staff.

To Col. William Hoynes,

Dean-Emeritus, Hoynes College of Law, Notre Dame University,
Notre Dame, Indiana.

CLASS OF '20 AT THE BAR EXAMINATIONS

Their Letters and Reports

Following are the letters and reports of several members of the Class of '20, coming immediately aft-

er successful examinations for admission to the bars of the several states. They bubble over with genuine enthusiasm, pride, happiness and gratitude.

ILLINOIS

Chicago, Ill., July 27, 1920

Hon. Frances J. Vurpillat, Dean,

College of Law,

Notre Dame, Ind.

My Dear Judge:

It is my pleasure and also my good fortune to be able to tell you that I have just successfully passed the Illinois Bar Examination. The examinations were held on July 13 and 14 and I just received my notice yesterday, so you can appreciate how much relieved I am after two weeks of very anxious waiting.

Allow me to express to you and to the faculty of law the gratitude that I feel for the instruction and preparation that I received while a student in the College of Law at Notre Dame. I assure you that I attribute my success entirely to the very able schooling and guidance given me by you and the other members of the law faculty.

During the days of the examination I had an opportunity to talk to men from almost all the big law schools of the country (450 took the examination), and I can honestly say that the impressions I received convinced me that Notre Dame's course in law is the most complete and thorough of them all. The court work especially is unequalled anywhere and I hope that next year this part of the work will be carried on even more extensively according to the plans that I know you have formulated for it.

Hoping that you have been enjoying the summer and that the press of

law business will not be too heavy to prevent me from running down in the fall to visit The Hoynes College. (Little fear of the latter)

I am

Respectfully

Clifford O'Sullivan.

October 18th 1920.

Hon. Francis J. Vurpillat, Dean,

College of Law,

Notre Dame, Indiana.

Dear Judge:

I am enclosing the questions asked at the recent bar examination held at Springfield, Ill., on October the 8th and 9th last. I trust that the same will give you an idea of the severity of the test. The Chicago Bar Association recently informed me to the effect that fifty-two candidates out of the class of two-hundred-ten passed. I am pleased to state that Notre Dame went over for a touchdown, for both Frank Hurley and myself tackled the questions with the old school spirit.

While at the hotel in Springfield many of the men inquired after the one session, why the smile? I believe it followed the session in which pleadings seemed to be the favorite. I told them I had a good course in it, so why shouldn't I give vent to my feelings. Bets were made at the hotel that I passed.

This firm was extremely pleased with the outcome, and I was assigned a case today in which a chorus girl is my client. I expect to attend the home-coming game on the sixth of November and I should like to have a chat with you. Regards to all the boys.

Sincerely,

Leo J. Hassenauer.

NEW YORK

455 Fulton Street

Waverly, N. Y. Aug. 14, 1920.

Hon. Francis J. Vurpillat, Dean,

Hoynes' College of Law,

University of Notre Dame.

Notre Dame, Indiana

Dear Judge Vurpillat:

Today I was notified by the State Board of Law Examiners that I successfully passed the bar examinations held at Albany, N. Y., on June 29th and 30th. I will be sworn in before the Court of Appeals at the opening of the fall term next month.

Judge, let me take this way to thank you, the other professors in the law school, and Notre Dame for the training which enabled me to pass the bar examination. I can never speak too highly of the classes at Notre Dame, and especially of the importance of the work in moot court.

With every good wish, I am

Respectfully yours,

Francis J. Clohessy.

NEW MEXICO

East Las Vegas, N. M.

September 7, 1920.

Judge F. J. Vurpillat,

Notre Dame, Ind.

My Dear Judge:

I take great pleasure in advising you that I have successfully passed the bar examination in this state. There were nine aspirants to the legal profession here and five out of that number failed. The Chairman of the Board of Examiners informed me that I have a splendid paper, and that another young man and I were tied for first place.

The examination dealt almost entirely with substantive law. The sub

September 1, 1920.

jects of contracts, equity, wills, negotiable instruments, real property, evidence, and common-law pleading, were the most important, especially the last, they gave us a thorough exam. on that subject, and I assure you I did not pass up one question.

I wish to thank you and all the members of the faculty for the assistance and co-operation and learning through which I was enabled to pass with flying colors. * * * *

With very best wishes for the continued success and growth of the best law school in the country, I am

Very respectfully yours,

L. V. Truder.

INDIANA

Like the Iowa boys, the Indiana members of the Class of '20, after successfully passing their final examination for degree, set out to attain admission to the bars of their respective courts.

Arthur B. Hunter, Edwin A. Fredrickson and Michael Edward Doran, were examined by the Committee of the St. Joseph County Bar Association at South Bend, Indiana, and were found worthy of admission to their Bar Association. That these men from Indiana are capable of passing any bar examination in the States is conceded by the Class of '20 and all who know them.

Francis J. Murphy has successfully passed the examination of the Tippecanoe County Bar Association and been admitted to the practice at Lafayette, Indiana.

Harry Richwine has been admitted to the bar at Anderson, Ind.

A letter of another capable Indiana boy follows:

Dear Judge:

* * * * I was admitted on the 23rd July and opened up on the 26th. The examination committee was one of the most severe in the county, and the examination was the hardest given in many years, according to Judge John Morris, one of the examiners. Contrary to the general custom, my exam. was a written one, and most peculiar.

There were fourteen questions, each of which was to be fully briefed, not merely answered, but citing authority and writing the matter up in the general form of a brief. I had, however, the privilege of a library, the only condition being that I do the work myself. After they had been examined, I was told that only three men had passed that exam. since it has been existing form. These were Judge Vesey, one of the biggest corporation corporation lawyers in town, a young man in Vesey's office, and myself. Besides these victorious three twenty-five others have had the same thing to do, but sorry to say these men were not successful. If you desire I will send you a copy of these questions some time. They occupied three sheets of legal cap, single spaced and some of them were ringers, too. * * * *

Ever sincerely yours,

Lawrence S. Stephan.

IOWA

Immediately after their successful final examinations for graduation from the Law School in June, and before receiving their degrees, Humphrey L. Leslie, Richard B. Swift, Clement Mulholland and Ralph Bergman went to Des Moines, Iowa, where they took the bar examination.

From their glowing reports upon their return to the University, it seemed these men were as much "looked up to" and sought out by the fifty applicants at that examination as are N. D.'s football team on the gridiron. They scored very high, one scoring third, with the others very close to him. Reports indicate that the men made themselves and the University conspicuous. A joint telegram from Des Moines announced their success and gave expression to the quartette's praise of Notre Dame's College of Law and its course.

A recent letter of Clement Mulholland of Fort Dodge, follows:

Fort Dodge, Iowa, August 29.

Dean Francis J. Vurpillat,
University of Notre.

Dear Judge:

I received your letter stating that you were going to inaugurate an LL. M. course this coming year and I regret very much to say that it will be impossible for me to be with you, although I would like nothing better than to go back to the old school and continue the work under you; but I have decided to take up banking as my life work and I figure that the sooner I get started and get the actual experience in this new field the better it will be for me. * * * *

Dick Leslie and "Del" Smith are the only two members of the class of 1920 that I have kept track of since leaving Notre Dame. I believe that they both intend to practice in Des Moines and no doubt "Del" told you about his plans while he was at summer school.

I hope that you are successful in enrolling a large number of fellows in this new course * * * * You can rest assured that I will be an active

campaigner for your law course at Notre Dame. I just heard the other day that I got third place in the Bar exams. in June, and I think that all the credit should go to the school and the law faculty. The man who got first place was a middle aged man who had been a court reporter or clerk of court (I forget which) for about 25 years. The one who got second place was a girl, the daughter of the assistant attorney general of Iowa. I have received no official notice of this but a friend of mine here in Fort Dodge said that it came out in the Des Moines Register & Leader a few days after the examination.

Very sincerely,

Mulholland.

NEW JERSEY

November 8, 1920.

Mr. Francis Vurpillat,

Dean of the College of Law,
University of Notre Dame,
Notre Dame, Indiana.

Dear Sir:

I am enclosing herewith check for \$2.00 for one year subscription to the Law School Reporter. I was glad to hear of the publication and I believe it will do a lot for the Law School and the University at large.

Everything is running along smoothly with me; and thanks to the examination upon which I wasted so much profanity in 1919, I was able to pass my Bar Examination at the first attempt, being one of the 31 per cent. who were successful on the examination I took. However, I will expect to see you in June, and I will tell you all about it then.

Yours very truly,

Andrew L. McDonough.

POINTS, PERSONAL, PROFESSIONAL, POLITICAL About the Alumni

Harry H. Kelly, LL.B. '17, attended the home-coming. Harry is engaged in the practice of the law as a member of the firm of Kelly & Kelly of Ottawa, Ill., the other members of the firm being his father and his brother, Emmett Kelly, LL.B. '19. Harry lost his leg in the world war, from which he was mustered out as first lieutenant. In the recent election Lieutenant Kelly was elected States Attorney of his district.

The race for prosecuting attorney in St. Joseph's County, Indiana, in the recent election was a free-for-all for the Alumni of the Law School. In the primary George A. Schock, LL. B. '17, and Samuel Feiwell, LL.B. '18, were opposing candidates for the Democratic nomination, while Floyd B. Jellison, LL.B. '15, received the Republican nomination. Schock was the successful candidate in the primary, but in the Republican landslide that followed, Jellison was elected to the office.

Emmett Mulholland, LL.B. '16, and Clement B. Mulholland, LL.B. '20, are doing a Land Office business with offices at 300 Snell Bldg., Fort Dodge, Iowa. Emmett has engaged as his chief assistant in the office, at home and everywhere, his daughter, born September 21st. The Des Moines Register and Leader reported Clement B. Mulholland to have attained third place in the recent bar examination. Good for two good boys—men we mean.

Vincent Giblon, LL. B. '18, and Joseph T. Riley, LL.B., '18, shook hands across the dean's desk in the Hoynes College of Law on the occasion of their visit at home-coming time. These are two first magnitude

stars of the constellation of '18. Giblin in the office of the president of the American Bar Association in Jacksonville, Fla., while Riley has been practising law in Grand Rapids and Muskegon, Michigan. Recently, however, Riley has been hobnobbing with state and national politicians in Michigan as a member of the state republican organization.

Louis Finske, LL.B., '19, has opened law offices in the National Bank Building, Michigan City, Indiana, for the general practice of the law in his home town. Louis is an earnest, capable and industrious fellow and will merit success.

Robert C. Carr, Ph.B. and Law, '17, is practising law as a member of the firm of Johnson & Carr, Central Life Bldg., Ottawa, Illinois. Notre Dame has a large contingent of successful lawyers in and about Ottawa. His brother, Joseph D. Carr, entered as a law student this year.

Walter L. Clements, LL.B., '18, finds time apart from his law practice to launch an agricultural journal for St. Joseph County, Indiana. Walter's office is in South Bend.

Henry B. Snyder, LL.B., '15 and Chas. Patrick Maloney, LL.B., '16 recently formed a partnership for the practice of law in Gary, Indiana. Their offices are located at 738 Broadway. A good firm and a good field.

William C. Henry, LL.B., '16, a notable orator and law student of his time, visited here during home-coming week. Will is with the firm of Busby, Weber, Miller & Donovan, 1639 National Bank Bldg., Chicago.

Hugh T. Lavery, LL. B., '19, has begun the practice of law in Bridgeport, Connecticut. Hugh was for

two years a reliable member of the varsity pitching staff as well as a successful student of the law.

Thomas J. Hoban, LL.B., '18, one of the bright lights of his class, has opened offices for the practice of law at 16 Chicago Street, Elgin, Illinois.

Louis H. Hellert, LL.B., '18, has built up a lucrative law practice for himself at old Vincennes, Indiana. His office is in the American Bank Building.

Arthur J. Hughes, LL.B., '17, was recently married in Washington, Illinois, to Miss Frances Mahle. Mr. Hughes will be remembered as an exceptional student, not only of the law, but of arts as well, from which department he also took a degree. When we last heard of Mr. Hughes he was a successful member of one of the prominent law firms of Chicago. We sincerely wish both Mr. Hughes and his bride health, wealth and happiness.

A law firm which is fast forging to the front in prominence and recognized ability in Northern Indiana is the firm of Vaughan & Vaughan of Lafayette, Indiana. Charles E. Vaughan, LL.B., '14, and Vincent D. Vaughan, LL.B., '17, comprise the firm. Quite recently Charles E. Vaughan and Miss Mary A. Reifers were married in Lafayette. We wish the law firm continued prominence and the married firm long life and happiness.

We have recently received communications from two law men whose last names in rhyme or assonance gave us no little trouble during our first semester as a member of the law faculty. They are George F. Frantz, LL.B., '17 and Albert J. Kranz, LL.B. '17. Frantz is a member of the law firm of Clementson & Frantz, Lancaster, Wisconsin. Kranz

has law offices of his own in the Nicholas Bldg., Toledo, Ohio.

Andrew L. McDonough, LL.B., '18, who was a long distance runner in the law course, as well as on the track, writes an interesting letter about his bar examination experience in New Jersey following his profane experience in the final examination for degree here. Andrew has successfully launched into the practice of law, with offices in the Babcock Bldg., Plainfield, N. J.

William E. Bradbury, LL.B., '16, was a welcome visitor recently. He is a member of the law firm of Bradbury & Bradbury of Robinson, Illinois, where William's father has long been a widely known and honored member of the Illinois bar. William himself has come into prominence by his brilliant and successful conduct of some important cases. He is a brother of J. Stanley Bradbury who is in the second year of the law course in our Law School.

Associated with their father in the practice of the law are Joseph B. McGlynn, LL.B., '12 and Daniel McGlynn, LL.B., '18. The elder McGlynn is an old and honored member of the Illinois Bar, and together with the capable and aggressive young members of the firm, still directs a large and growing practice.

George E. Herbert, LL.B., '18, of Hoopston, Illinois, is attaining prominence and success in the practice of the law.

Our reporter observed in attendance on the Notre Dame-Purdue game at time of the home-coming, the following alumni of the Law School: Francis O'Shaughnessy, '00; Fred L. Steers, '11, both of Chicago, and Michael Fansler, '14, of Logansport, Indiana.

NEWS OF THE CLASS OF '20

Richard B. Swift writes that he has begun the "starvation period" and for that reason could not avail himself of the proposed LL.M. course. Dick's office is in the Laurel Building, Muscatine, Iowa, is the finest in the city and is already housing a complete working library. Richard admits that he has a petition in the district court, a divorce case set for trial and the executor of a large estate as a client. Verily, only a Swift, Richard B., could do so well. Success will be his.

We have just seen the following professional card which was clipped from a local paper: "Francis J. Murphy, Attorney-at-Law, Fourth and Columbia Streets, Lafayette, Indiana." These are glad tidings from Murphy of an early and successful start. We trust he may not be dismayed upon receiving this issue of the Reporter to learn that his first appeal to the supreme court has been lost. Despite his excellent trial and appellate brief in the case of the St. Joseph Loan & Trust Company vs. The First National Bank, the Supreme Court of Notre Dame affirmed the decision. Good, Francis J.

Lawrence S. Stephan has opened a law office for himself at 617 Calhoun St., Fort Wayne, Indiana, and is already in the active practice. As official stenographer of the Notre Dame Circuit Court, a commencement orator, a business manager of the 1920 Dome, general utility man, as well as an excellent student, Stephan's success is assured.

We are informed that Humphrey L. Leslie and Delbert D. Smith have decided upon the formation of a partnership for the law practice in Des Moines, Iowa. We confidently feel

that they will succeed in this venture as they did at Notre Dame.

Arthur B. Hunter, one of the leaders of the class, is rendering excellent service in the law offices of McInernys, Yeagley & McVicker of South Bend, Indiana. We know this from a recent talk had with the senior member of the firm in which he spoke in terms of the highest praise of Mr. Hunter's work, ability and prospects.

Michael Edward Doran, one of the star men of the class, is maintaining his law office in the Farmers Trust Bldg., South Bend, Indiana, and we know he has made an excellent start and is doing well.

Edwin A. Fredrickson, one of the exceptional men of the Law School, has begun the practice of law in the office of G. A. Farabaugh of South Bend, Indiana. His appearance in a recent trial in the Superior Court was spoken of in very complimentary terms. Mr. Fredrickson is also engaged as an instructor in the Law School, having assigned to him the subjects of agency, partnership, negotiable paper and insurance, for a period of one hour each day for the year.

Harry Richwine and Maurice F. Smith have returned for the LL.M. course.

Harry P. Nester, Walter R. Miller and Edwin C. Donnelly have qualified for taking the Ohio bar examination in December.

Joseph O'Hara is working in the law offices of James Hamilton Lewis, in the Rookery Building, Chicago, and is preparing to take the Illinois bar examination next month. Joe writes: "It gives me great pleasure to hear of the successes of that famous class of '20. I think each of them shares with me the knowledge

of what we owe to our instructors during our three years of study, and I am sure they, not all of course, will write their names on the scroll which lies under the title success." Joe will take the December Illinois bar examinations.

Francis T. Walsh is in the offices of the Board of Review of Livingston County, Pontiac, Illinois. He says he is studying daily in the law office and confidently expects to succeed at December bar examination in Illinois.

The letters of Leo J. Hassenauer, Lawrence S. Stephan, Clifford O'Sullivan, Thomas V. Truder, Clement Mulholland and Francis J. Clohessy, which appear in this issue, speak for themselves of the brilliant successes of the Class of '20.

Leo J. Ward is reported to be in the law office of Hon. Joseph Scott, laetare medalist, Los Angeles, California.

We have no word from Alfonso Anaya, Emmett Rohyans and George Murphy.

LAW REPORTER SUBSCRIPTIONS

Receipt of two dollars in payment for the 1920-1921 subscription to the Law Reporter from each of the following named alumni, is here acknowledged, to-wit: John R. O'Connell, Thomas J. Walsh, James E. Deery, William P. Breen, Donald M. Hamilton, Ralph S. Feig, Paul J. Donovan, Curry & Curry, Harry G. Hogan, F. Henry Wurzer, Hugh J. Daley, Fred L. Steers, Joseph B. McGlynn, Timothy Ansberry, James P. Fogarty, W. A. Guilfoyle, James L. Hope, E. P. Carville, Robert C. Carr, Thomas J. Hoban, Fred L. Maheffey, Richard B. Swift, Patrick M. Maloy,

William J. Granfield, Henry B. Snyder, George F. Frantz, Frank X. Rydzewski, Vaughan & Vaughan, W. J. Hines, Wilmer O'Brien, M. J. McGarry, Clement Mulholland, Andrew L. McDonnough, William C. Henry, Louis H. Hellert, John G. Mott of Los Angeles, Albert J. Kranz, Joseph B. Murphy.

PROPAGANDA

With the sanction of the Rev. James A. Burns, C. S. C., President of the University and with the hearty cooperation of the Rev. William A. Maloney, C. S. C., the College of Law has launched a campaign among its graduates to secure additional serviceable volumes for the law library. What the Law School desires particularly just now are the state reports of the various states up to the point or number where the West Publishing Company's reporter system takes them up. Our school is so rapidly growing into a national school, that is, with enrollment made up of students from so many states of the Union, that we feel the necessity of having the reports, digests, codes of practice, pleading form books, statutes, etc., of their respective states.

We believe there are hundreds of volumes of this character on the shelves of the alumni themselves or that might be readily picked up,—books in good second-hand condition, that have been perhaps replaced with later editions, such as statutes and codes, which, when supplemented with the subsequent acts of the legislatures, would serve to good advantage in the law school, and indeed, not be needed by the alumnus. We believe that many such valuable volumes might be procured for the Law School "for a mere song," if only we

might get to singing. We have already received the Pennsylvania, Ohio and the Iowa reports.

The dear alumni can make no mistake in sending to the good, old Law School, their new codes, form books, and even the first numbers of their state reports to the point indicated, for they can readily supply themselves with other new volumes. Or, if they prefer, they might find for us the good second-hand books as suggested. The city or state alumni association of the country can accomplish much for the Law School in this manner through concerted action.

Any of the books here enumerated will be gladly received or any information appreciated which may lead us to the state reports to be procured. The donor's name and the donation will be entered of record in the special acquisition book of the law library kept for the purpose.

GRATEFUL ACKNOWLEDGEMENT

The University and, in particular, the College of Law, hereby make grateful acknowledgement to the following Notre Dame lawyers for their respective gifts to the Law library, to-wit:

James P. Fogarty, LL.B., 1900, of Philadelphia, Pa., 109 vols. Pennsylvania State Reports.

John C. Shea, LL.M., '17, of Dayton, Ohio, 119 vols. Ohio and Ohio State Reports.

Richard B. Swift, LL.B., '20, of Muscatine, Iowa, as principal donor, with others whose names will be reported later, 110 vols. Iowa Reports.

CONCERNING THE LAW SCHOOL

"The Law School of Notre Dame University opened auspiciously this year with an enrollment of two hundred and twenty students coming from thirty states of the Union, Porto Rico, Chili and the Philippines.

Numerous and important changes were made in the last year, beginning a new era for the school. The Hoynes College of Law, a new and distinctive law building for the exclusive use of the school, was occupied. This is a modern structure providing four large rooms, library, court room and three class rooms, all equipped with American, steel pedestal, tablet arm, chairs.

Col. William Hoynes, for many years dean of the Law School, has been proclaimed dean-emeritus and lecturer on international law. Judge Francis J. Vurpillat, acting dean for three years, has been made dean and continues as professor of constitutional law, procedural law and the courts. Judge Gallitzen A. Farra-
baugh and Professor John P. Tier-
nan remain with the school. Two
members have been added to the fa-
culty, Asst. Professor, James P. Cos-
tello of Pennsylvania, graduate of
Dickinson Law School, and a prac-
ticing lawyer of twenty years, to
whom has been assigned common-law
actions and forms, contracts and cor-
porations; Edwin A. Fredrickson,
a practicing lawyer of South Bend,
Indiana, a student in the Universi-
ty of Michigan and a graduate of
Notre Dame Law School, who has
been made instructor in agency, part-
nership and negotiable paper.

The four year course has been modified to prescribe a pre-law year of college work which is equivalent of a year and a half of the regular

arts courses. To the three year course of law one is eligible who has attained sophomore standing in any recognized college. Classes in the Principles of Liability and Study of Cases have been added to the freshmen schedule.

The complete and thorough system of courts, trial and appellate, inaugurated by Judge Vurpillat, has proven a very effective and popular addition to the school. Another valua-

ble new feature of the school is the Notre Dame Law Reporter, a quarterly publication launched with the April and June Numbers. The Reporter is devoted to the interests of the law students and alumni and is primarily their work. It contains the decisions of the Supreme Court of Notre Dame, circuit court records and various other departments. It contains a law list of Notre Dame Lawyers of the country.

D I R E C T O R Y

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Citizens National Bank Bldg.
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530 Higgins Bldg.
Leo B. Ward,
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San Francisco—
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2619 Scottwood
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Edward Yockey,
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105 Milwaukee St.

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Superior—

Sherman May,
2016 Hammond St.

CUBA

Ceinfuegos—

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