

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.