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**ESSEX COUNTY CIRCUIT COURT.**

Action at Law.

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CLAUDE NEWBERRY,

Plaintiff,

vs.

10

UPSALA COLLEGE, a corporation,

Defendant.

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**Notice of Appeal and Ground, Filed  
Dec. 8, 1928.**

*To Gabrielson, Conover & Stasse, Esqs., Attorneys for Defendant:*

20

TAKE NOTICE, that the plaintiff appeals from the whole of the judgment of non-suit entered in this cause to the Court of Errors and Appeals, the court of last resort in all causes in New Jersey, on the ground that the Circuit Court erred in granting a judgment of non-suit in favor of the defendant and against the plaintiff.

Dated, October 31, 1928.

30

GREEN & GREEN,  
Attorneys for Plaintiff.

HARRY GREEN,  
Of Counsel.

Service acknowledged Nov. 2, 1928, Gabrielson,  
Conover & Stasse.

40

**Judgment.**

ESSEX COUNTY CIRCUIT COURT.

44532.

10

CLAUDE NEWBERRY,

Plaintiff,

vs.

UPSALA COLLEGE,

Defendant.

*Gabrielson, Conover & Stasse, Attys. for Deft.:*

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Judgment on non-suit in the above entitled action was rendered on the twenty-third day of October, A. D., nineteen hundred and twenty-eight, in favor of the defendant Upsala College and against the plaintiff Claude Newberry for the sum of Seventy-six dollars and sixty cents. Costs of suit. Judgment entered and signed October 23, 1928.

30

WILLIAM S. GUMMERE,

Judge.

JOHN H. SCOTT,  
Clerk.

Book 105, page 487.

40

**Summons, Filed Dec. 12, 1927.**

*The State of New Jersey to Upsala College, a corporation:*

YOU ARE SUMMONED to answer the annexed complaint of Claude Newberry, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Court, at Newark within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

WITNESS, Nelson Y. Dungan, Esq., Judge of the said court, at Newark, this 7th day of November, nineteen hundred and twenty-seven. 20

GREEN & GREEN,  
Attorneys.

JOHN H. SCOTT,  
Clerk.

30

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**Complaint, Filed Nov. 12, 1927.**  
**ESSEX COUNTY CIRCUIT COURT.**  
 Action at Law.

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—————◆—————  
 CLAUDE NEWBERRY,

Plaintiff,

VS.

UPSALA COLLEGE, a corporation,

Defendant.

20

—————◆—————  
 Plaintiff, residing in the City of East Orange,  
 County of Essex and State of New Jersey, says  
 that:

1. At the time or times herein stated, and prior thereto, plaintiff was an athletic coach and physical director, particularly a football coach of high standing and reputation throughout the country.

30

2. Defendant was and still is a corporation organized and existing under the laws of the State of New Jersey, having a college in the City of East Orange, County of Essex and State of New Jersey.

3. Defendant employed the plaintiff as an athletic coach and physical director for the college year commencing in September, 1925, and ending in June, 1926.

40

4. On or about June 1, 1926, plaintiff and defendant entered into an agreement wherein

*Complaint.*

and whereby defendant engaged the plaintiff to continue to act as such athletic coach and physical director and take charge of and conduct all classes in gymnastics and supervise and direct the physical training of the students of the defendant college, and to do any and all things incidental to such work of an athletic coach and physical director as may be required by the said defendant, for a period of three years commencing June 1, 1926, at a salary of \$2,600.00 per annum, payable in 9 equal installments during the college year, and said plaintiff also to receive board during such college year. The college year commences September 14th of one year and ends June 14th of the following year.

5. Plaintiff entered upon the performance of his duties as such coach and director, and continued in the performance thereof until June, 1927.

6. Plaintiff performed such duties in accordance with the terms and conditions of said agreement.

7. On or about June 1, 1927, defendant, without any just cause or reason, discharged the plaintiff from his said position, and refused to pay him his salary in accordance with the terms and conditions of said agreement, and also refused to give him board, thereby breaching said agreement.

8. Plaintiff has always been ready, able and willing, and has always offered to continue in the said services and employ of the said de-

*Complaint.*

defendant in the capacity aforesaid, and on the terms aforesaid, until the expiration of said agreement.

10 9. Defendant did not and would not continue the said plaintiff in its said service and employ until the expiration of said agreement.

10. As a result, plaintiff has lost and been deprived of salary, profits and advantages, and board, which he otherwise might and would have derived and acquired from being continued in the said service of the said defendant.

20 11. As a further result, plaintiff has suffered and sustained injury and damage to his reputation as an athletic coach and physical director, and as a football coach among the schools, colleges and universities of this country, as a result of which he has been unable to obtain employment as such coach by reason of his summary dismissal by the defendant and the unlawful breach of his agreement, which damage directly and naturally resulted in the ordinary course of events from the breach of said agreement for  
30 which he will claim special damages.

Plaintiff demands as damages from the defendant the sum of \$25,000.00, and at the trial of this action plaintiff will ask that moneys accruing to him as salary and expenses for board up until the time of trial shall be included in said damages in accordance with the rules of the Supreme Court.

GREEN & GREEN,  
Attorneys for Plaintiff.

*Complaint.*

Claude Newberry v. Upsala College.

Essex Co. Cir. Crt. Summons and Complaint.  
Ret. 20 days.

Served the within summons and complaint  
personally upon Dr. Erickson, president of Up- 10  
sala College, within named defendant, by de-  
livering to him a true copy thereof with ten  
days' notice annexed at the College Building,  
Prospect Street, E. O., N. J., Nov. 14, 1927.

By ALBERT H. FREEMAN,  
Spec. Deputy.

Ret. to clerk, Nov. 17, 1927. \$4.02. 20

State of New Jersey,  
Essex County—ss.:

ALBERT H. FREEMAN, Special Deputy Sheriff  
of the County aforesaid, being duly sworn, on  
his oath deposes and says that on the 14th day  
of Nov., A. D., 1927, he delivered personally to  
the said defendant Dr. Erickson president of 30  
Upsala College, a true copy of the within sum-  
mons and complaint, with a ten days' notice  
endorsed thereon.

ALBERT H. FREEMAN.

Subscribed and sworn to this  
15th day of November, A. D. 1927.

HARVEY W. KEOUGH,  
Notary Public of N. J.  
My commission expires June 1, 1932. 40

**Notice of Motion, Filed Dec. 8, 1927.**

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

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CLAUDE NEWBERRY,

Plaintiff,

vs.

UPSALA COLLEGE, a corporation,

Defendant.

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*To Green & Green, Attorneys for Plaintiff:*

20

Gentlemen:

30

Please take notice that on Saturday December 3rd next at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the Honorable William A. Smith, Judge of the Essex Circuit Court, at the Court House in the City of Newark, Essex County, New Jersey, for an order striking out and setting aside the service of the summons made in the above entitled action on the ground that the service of the said summons was made upon a person who was not an officer of the defendant.

GABRIELSON, CONOVER & STASSE,  
Attorneys for Defendant.

40

**Affidavit of Karl J. Olson.**

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

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CLAUDE NEWBERRY,

10

Plaintiff,

vs.

UPSALA COLLEGE, a corporation,

Defendant.

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State of New Jersey,  
County of Essex—ss.:

20

KARL J. OLSON, of full age being duly sworn according to law on his oath deposes and says that he resides at No. 236 North Walnut Street, East Orange, New Jersey, that he is Treasurer of the Board of Trustees of Upsala College, a corporation organized and existing pursuant to the provisions of an act of the State of New Jersey entitled "An Act to incorporate societies for the promotion of learning" revision approved April 9, 1875, and the supplements thereto and amendments thereof; that the management of said college is entrusted to said Board of Trustees; that the President of said Board is Abel Ahlquist, No. 19 Bassett Street, New Britain, Connecticut; that the Secretary of said Board of Trustees is Reverend Arthur B. Hjelm of No. 68 Wachusett Street, Worcester, Massachusetts; that said Carl G. Erickson is not an officer of the said Board of Trustees, that he is President of the Faculty of

30

40

*Order, Filed Dec. 8, 1927.*

Upsala College but not President of the corporation known as Upsala College which is the defendant in this action.

KARL J. OLSON.

10 Subscribed and sworn to before me this  
25th day of November, 1927.

ETHEL B. HOFFMAN.

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**Order, Filed Dec. 8, 1927.**

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

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CLAUDE NEWBERRY,

Plaintiff,

vs.

UPSALA COLLEGE, a corporation,

Defendant.

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30 This matter coming on in the presence of  
Gabrielson, Conover & Stasse, attorneys for the  
defendant, and Green & Green, attorneys for the  
plaintiff, on a motion for an order striking out  
and setting aside the service of the summons made  
in this action on the ground that the service of  
said summons was made upon a person who was  
not an officer of the defendant;

40 It is on this 3rd day of December, 1927, ordered  
that the said service be and the same hereby is  
stricken out and set aside.

*Affidavit of Merits.*

It is further ordered that the appearance of said defendant, Upsala College, be and the same hereby is entered to said action and that the said defendant shall have 10 days from the date of this order within which to file its affidavit of merits and 20 days from the date of this order within which to file its answer, counterclaim or to take such other action as it may be advised with reference to the complaint filed in this action. 10

WM. A. SMITH,  
Judge.

**Affidavit of Merits, Filed Dec. 13, 1927.**

ESSEX COUNTY CIRCUIT COURT. 20

Action at Law.

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CLAUDE NEWBERRY,

Plaintiff,

vs.

UPSALA COLLEGE, a corporation,

Defendant. 30

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State of New Jersey,  
County of Essex—ss.:

KARL J. OLSON, of full age, being duly sworn according to law on his oath deposes and says that he is Treasurer of the Board of Trustees of Upsala College, the defendant in the above entitled action; that he is familiar with the matters at issue in the above entitled action and is 40

*Answer.*

authorized to make this affidavit; that he believes that said Upsala College has a just and legal defense to said action on the merits of the case.

KARL J. OLSON.

10 Subscribed and sworn to before me this  
12th day of December, 1927.

ETHEL B. HOFFMAN,  
Notary Public of New Jersey.

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**Answer, Filed Dec. 23, 1927.**

20 ESSEX COUNTY CIRCUIT COURT.

Action at Law.

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CLAUDE NEWBERRY,

Plaintiff,

vs.

UPSALA COLLEGE, a corporation of New Jersey,  
30 Defendant.

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The defendant, a corporation of the State of New Jersey says that:

FIRST DEFENSE.

1. It denies the first paragraph.
- 40 2. It admits the second paragraph.

*Answer.*

3. It denies the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh paragraphs.

4. The defendant did not employ the plaintiff upon the terms alleged. The terms of plaintiff's employment are contained in a written agreement dated June 1, 1926, a true copy of which is hereto annexed, made a part hereof and marked "Exhibit A". 10

5. After the execution of said contract, and before the alleged breach, the plaintiff misconducted himself in the said service by wilfully disobeying the reasonable orders of the defendant by it given to the plaintiff in the course of said service, by habitually neglecting and failing to act as athletic coach and physical director of the defendant, by habitually neglecting and failing to take charge of and conduct all classes in gymnastics of the defendant, by habitually neglecting and failing to supervise and direct the physical training of the students of the defendant, by habitually neglecting and failing to do other things incident to the plaintiff's work as athletic coach and physical director as required by the defendant, by habitually neglecting and failing to take charge of the gymnasium classes of the defendant, by habitually being late for the practice of football, basketball and baseball teams, by habitually neglecting and failing to enforce the training rules of the different athletic teams of the defendant and personally keeping late hours with individual members of said teams, by habitually neglecting and failing to enforce rules of the college which defendant had requested plaintiff to enforce and by personally breaking said rules, 20  
30  
40

*Answer.*

by violating the rules of the defendant by lodging  
a woman in the men's dormitory over night, by  
neglecting and failing to enforce discipline in the  
buildings and on the campus of the defendant, and  
in neglecting and failing to create a spirit of co-  
10 operation and team spirit among the students and  
the members of the athletic teams, by neglecting  
and failing to place the best men on the teams and  
instead putting his own favorites on said teams,  
and by neglecting and failing to show any real  
interest in his said work as athletic coach and  
physical director or in the college life in general,  
and the defendant therefore notified the plaintiff  
that it was not satisfied with his services and  
later discharged the plaintiff from said services  
20 which is the alleged breach.

## SECOND DEFENSE.

1. The defendant repeats paragraphs 1, 2, 3, 4  
and 5 of the First Defense.

2. The defendant was induced to make the  
alleged contract by the plaintiff impliedly, on or  
prior to June 1, 1926, representing and warrant-  
ing to it that he, the plaintiff, was then reasonably  
30 competent to perform the services for which he  
was engaged under the said contract, whereas the  
plaintiff was not then nor has he since been  
reasonably competent to perform the said service;  
and the defendant therefore rescinded the said  
contract and dismissed plaintiff from its said  
service which is the alleged breach.

GABRIELSON, CONOVER & STASSE,  
40 Defendant's Attorneys.

## EXHIBIT A, ANNEXED TO ANSWER.

THIS AGREEMENT, entered into this 1st day of June, nineteen hundred and twenty-six, between, CLAUDE NEWBERRY, of the City of East Orange, County of Essex, and State of New Jersey, party of the First Part, and UPSALA COLLEGE, a corporation of the State of New Jersey, with its principal place of business located in the City of East Orange, County of Essex, and State of New Jersey, party of the Second Part: 10

WITNESSETH, in consideration of One Dollar (\$1.00) and the covenants herein contained, it is agreed as follows:

1—The party of the First Part agrees to act as athletic coach and physical director and take charge of and conduct all classes in gymnastics and supervise and direct the physical training of the students of the party of the Second Part, and to do any and all things incident to such work of an athletic coach and physical director as may be required by the said party of the Second Part. 20

2—Said party of the First Part agrees to perform said services for a period of three years from the date hereof at a salary of Twenty-six Hundred Dollars (\$2600.00) per annum, payable in nine equal installments during the college year; the said party of the First Part is to receive his board during the college year which is from September 14th until June 14th of each year. 30

3—The said party of the Second Part agrees to pay said salary and to furnish said board for the said period of three years as above set forth on 40

*Exhibit A, Annexed to Answer.*

condition of the performance of all of the terms  
of this agreement by the party of the First Part.

10 IN WITNESS WHEREOF, the said party of the First  
Part has hereunto set his hand and seal, and the  
said party of the Second Part has caused its Cor-  
porate Seal to be hereto affixed and attested by  
its Secretary, and these presents to be signed by  
its President, the day and year first above written.

CLAUDE NEWBERRY (L. S.)  
UPSALA COLLEGE,  
By ABEL AHLQUIST,  
President.

20 In Presence of:

C. G. ERICKSON.  
Attest:

ARTHUR O. HJELM,  
Secretary.  
(Seal)

30

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Reply, Filed Feb. 8, 1928.

ESSEX COUNTY CIRCUIT COURT.

Action at Law.

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CLAUDE NEWBERRY,

Plaintiff, 10

vs.

UPSALA COLLEGE, a corporation,

Defendant.

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Plaintiff, in reply to answer filed by defendant,  
says that:

REPLY TO FIRST DEFENSE.

20

1. He denies that part of paragraph 4 which states that "the defendant did not employ the plaintiff upon the terms alleged".

2. He denies paragraph 5.

REPLY TO SECOND DEFENSE.

1. Plaintiff repeats paragraphs 1 and 2 of 30  
Reply to first defense hereof.

2. He denies paragraph 2.

GREEN & GREEN,  
Attorneys for Plaintiff.

We consent to the filing of the within Reply as  
within time.

GABRIELSON, CONOVER & STASSE, 40  
Attorneys for Defendant.

**Testimony.**

ESSEX COUNTY,  
CIRCUIT COURT.

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CLAUDE NEWBERRY,

Plaintiff,

vs.

UPSALA COLLEGE,

Defendant.

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Newark, N. J., October 22nd, 1928.

20 Before—HON. WORRAL F. MOUNTAIN, and a Jury.

## APPEARANCES:

For the Plaintiff appear, GREEN & GREEN, ESQS.  
(Harry Green, Esq., of Counsel).

For the Defendant appear, GABRIELSON, CONOVER  
& STASSE, ESQS. (Mr. Conover, of Counsel).

30 (A jury was duly empaneled and sworn.)

(Counsel then opened the case to the jury.)

ARTHUR J. LEAMOND, a witness called on behalf  
of the plaintiff, having been first duly sworn,  
testified as follows:

*Direct examination by Mr. Green:*

Q. Mr. LeaMond, what is your full name? A.

40 Arthur J. LeaMond.

*Arthur J. LeMond—for Plaintiff—Direct.*

Q. What is your position at the present time?

A. I am a member of the sport staff of the Morning Telegraph, and contribute to several magazines.

Q. As a member of said sport staff, do you follow college football games? A. I have for seven years. 10

Q. Were you connected with the Newark News, of Newark, during the years 1925, 1926 and 1927?

A. I was from January 1, 1920 to May 1, 1927.

Q. Did you know Upsala College, East Orange, during that period? A. I did.

Q. What were your duties with the Newark News? A. At the time mentioned I was in charge of all amateur sports of the Newark Evening News, and in charge of college sports. 20

Q. Your duties at that time embraced the following of sporting and athletic activities? A. Yes, sir.

Q. Were you familiar with the athletic affairs of the college during that time? A. I was fairly familiar with them, yes.

Q. Were you familiar with any of the officials of the college, particularly of those in charge of athletics? A. I happened to know Professor Erickson and Mr. Aldwin, son of L. I. Aldwin. 30

Q. Was he a member of the faculty of the school? A. I think he was.

Q. Did he have charge of the sporting activities during that time of Upsala School?

Mr. Conover: Objected to.

The Court: I will admit it.

A. I understood he was manager.

Q. During the year 1925, were you familiar with football activities of Upsala College? A. I 40

*Arthur J. LeaMond—for Plaintiff—Direct.*

was familiar with the schedules played and somewhat with the record and material at hand.

10 Q. Do you know at the present time what high schools Upsala College was playing? A. They were playing teams that were utterly out of their class.

Q. For example, in 1925, what school teams were they playing, preparatory, high schools, universities and so on? A. I don't understand the question.

Q. Were they playing colleges or universities? A. They were playing with colleges. I don't remember their playing universities.

20 Q. In 1925, did you have occasion to talk to Mr. Aldwin about football and athletic activities of Upsala College? A. I did.

Q. What was the occasion of that talk? A. Some time during the summer of 1925, I should say in August, a man came in the office, and was introduced to the sporting editor of the Newark News and said he was Mr. Aldwin, manager of athletics at Upsala College. He talked with me, because I was in charge of college sports, and mentioned that he hoped to turn out a good college team at Upsala.

30

Mr. Conover: I object to this question because it is prior to the date of the contract, and has no bearing on whether Mr. Newberry's services or the teams they were playing were out of their class or what their conditions were. The contract is dated June 1st, 1926.

Mr. Green: It is all by way of preliminary.

40

The Court: It is outside of preliminary.

*Arthur J. LeaMond—for Plaintiff—Direct.*

It is giving a background but is not necessary.

Mr. Green: I want to show the connection of Mr. Newberry.

The Court: Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Q. Do you know who recommended Mr. Newberry to Upsala College, at the outset?

Mr. Conover: I object.

The Court: Objection sustained. It has nothing to do with the contract. This is an action on a contract. Get down to the contract. 20

Q. Did you know what the general reputation of Mr. Newberry as a football coach in the early part of the year 1926 was?

Mr. Conover: I object.

The Court: Objection sustained.  
(Argument.)

Q. Mr. LeaMond, from your experience as a sport writer connected with the Newark News during the years you have mentioned, can you tell us what you know about Mr. Newberry as a football coach, and athletic coach? 30

Mr. Conover: I object to that on the ground that it has no bearing on this contract. It doesn't make any difference what his reputation was. He was hired to do 40

*Claude Newberry—Plaintiff—Direct.*

certain work. The question is whether he did it or not, and whether we were justified in firing him.

The Court: Objection sustained.

10 Plaintiff's counsel prays an exception to this ruling of the Court.

Exception granted as ground of appeal.

---

CLAUDE NEWBERRY, the plaintiff, called as a witness, first being duly sworn, testified as follows:

20 Mr. Green: Is there any objection to offering the contract dated June 1st, 1926, between Claude Newberry and Upsala College, in evidence?

Mr. Conover: You may offer it.

Mr. Green: I offer in evidence agreement date June 1st, 1926, between Claude Newberry and Upsala College and ask that it be marked as an exhibit.

(Paper referred to received and marked Plaintiff's Exhibit 1.)

30 (Mr. Green then read Plaintiff's Exhibit 1 to the jury.)

Q. Mr. Newberry, after the making of this contract, did you enter upon the performance of your duties? A. Yes, sir.

40 Q. Will you tell us just when you commenced to perform your duties, and just what you did under the contract? A. I entered upon the duties in September, 1925—

*Claude Newberry—Plaintiff—Direct.*

Q. No, we are talking about this contract? A. Oh, 1926.

Q. You were connected with the school prior to this contract?

Mr. Conover: I object to that.

10

A. I served a year before, and at the end of the first year, was given a contract for three years.

Q. With regard to this contract that I just read to the jury, will you tell us when you entered upon the performance of your duties? A. In September, 1926.

Q. Just what duties did you perform? A. My duties were to coach football, baseball and basketball, and to take charge of physical training.

20

Q. Just what did you do in September, 1926, and thereafter, with regard to your duties under the contract? A. I coached football, baseball and basketball, the girls' basketball team, and took charge of physical training.

Q. Tell us in connection with football just what you did? A. In football we practiced daily, played games Saturdays after the first game—trained for a week—after the first game we had games every Saturday, and in baseball we practiced all during the week, except we had two games a week, Wednesday and Saturday. In basketball we practiced when we could get the use of the court. One year we used the school court and another year the high school court. The girls had practice in the gym.

30

Q. Your contract also calls for services on your part as physical director. What did you

40

*Claude Newberry—Plaintiff—Direct.*

do as physical director? A. We had gym class four days a week. The first year——

Q. Pardon me. Talk about the first year of this contract; not the year before, but under this contract? A. Gym class four days a week, mornings; boys, twice a week, and girls, twice a week; beginning at 8:00 o'clock and 8:45.

Q. Did you have a gymnasium? A. A very small gymnasium.

Q. Did you take charge of all classes in gymnastics? A. We didn't have the apparatus for gymnastics. I took charge of physical training.

Q. Not gymnastics? A. No, we didn't have apparatus for gymnastics.

Q. Did you receive any instructions or orders from anybody in regard to coaching the various athletics? A. No, I was hired to take charge of that.

Q. Did anybody tell you just what you were to do? A. No, sir.

Q. That was left entirely to yourself? A. Yes, sir.

Q. You practically initiated——

Mr. Conover: I object to that as leading.

Q. This practice by the various teams, you took sole charge of that without any instructions from anybody connected with the school? A. Yes, sir.

Q. The contract says "conduct all classes in gymnastics". You say you gave physical training? A. Yes, sir.

Q. For a period of a week? A. Yes, sir.

*Claude Newberry—Plaintiff—Direct.*

Q. And three-quarters of an hour each day?

A. We started at eight o'clock and had to dismiss them about ten minutes of nine when the next class started.

Q. In connection with physical training, was there anything else that you did under the contract? A. Nothing else under the contract, except to take charge of athletics, and to take charge of the girls' basketball. 10

Q. Did you conduct all classes in gymnastics?

A. Yes, sir. That was physical training. We didn't have apparatus for gymnastics.

Q. Did you supervise the physical training of the students at the college? A. Yes, sir.

Q. Were you requested or required to do any other work along those lines in addition to what you have already stated? A. No, sir. 20

Q. Now you entered upon the performance of your duties 1926? A. Yes.

Q. And did you also take charge of the training of these teams? A. Yes, sir.

Q. And were you instructed as to what training rules and regulations were for the players?

A. No, sir. I made my own training rules.

Q. You formulated your own? A. Yes, sir.

Q. Were you directed by any college authority to change those, or follow any other rules and regulations? A. No, sir. 30

Q. Let us get back to your football team. Tell us what you did in connection with the football training? A. We had practice that year.

Q. First of all, did you create a football team?

A. Yes, sir, all the candidates were called out for the football team.

Q. Did you train your candidates for football?

A. Yes, sir. 40

*Claude Newberry—Plaintiff—Direct.*

Mr. Conover: I object. Let him tell.

Mr. Green: I thought we would get along a little quicker.

10 Q. Tell us all you did in connection with the football team? A. At first the candidates were called upon for the football team. A week after the time of calling, we had one week of practice for the first game, which was hardly enough, but we played the first game and managed to win it with one week's practice.

Q. Did you arrange the schedule? A. No, sir.

Q. That was arranged by the college authorities? A. By some one else.

20 Q. Did you follow the schedules supplied for you? A. Yes, sir.

Q. Tell us something about the schedule, what class you were in? A. We played St. Lawrence and Susquehanna, City College of New York, Drexel, New York Aggies, and most of the colleges were out of our class. Manhattan was much greater in size.

Q. You left off one week after you started training for the first game? A. The first game.

30 Q. Who was that with? A. The first game was with—I don't recall.

Q. Did the team win or lose? A. We won that game, yes.

40 Q. Tell us about these other games? A. We played the City College of New York, and Newark student bodies of several thousand. I had eighty boys. We played the City College of New York in the Stadium. The score was 6 to 0 in our favor, and in the last few minutes they made a touch down and it stood 7 to 6. St. Lawrence University—

*Claude Newberry—Plaintiff—Direct.*

Q. What size is that university? A. There was several hundred in attendance, and practically all the boys came out on the field squad, and the man who was quarter-back was as big as I am. We had 14 men. I didn't have a substitute man to put in the game. A man, when the game started, had been injured the Saturday before, and had weak ankles, and in playing the game, we tried to do the best we could, but didn't have one substitute. We played the game on our own field. The score was nothing to nothing, and the quarter-back gave them 3 to 0, with a minute and a half to play. They lined up the first or second scrimmage, and a fellow ran about thirty yards to a touchdown, and at the last it was 9 to 0. We played the New York Aggies—

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20

Q. Who are they? A. Agricultural College.

Q. What is their size? A. It was a small school. We played in the Stadium. I think there was no score. We lost several games by close scores in the last few months. We found difficulty in beating, because we didn't have a substitute to put in, because he was injured and there was nobody to take his place.

Q. Did you also organize basketball? A. I had charge of the basket and baseball.

30

Q. Tell us what you did in the organization of basketball? A. That team we played the schedule given to us.

Q. How many games did you play? A. Somewheres between sixteen and twenty games. Each year we played Yale.

Q. What kind of a season was 1926? A. We had a fairly good season.

Q. Did you train men in connection with

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*Claude Newberry—Plaintiff—Direct.*

basket ball as well as in football? A. Yes, sir, laid down the training rules.

Q. Were those training rules altered or changed by anybody? A. By anybody, no.

Q. Were they left to your own discretion?

10 A. Yes, sir.

Q. What other teams did you organize under the contract? A. Baseball.

Q. In the spring of 1927? A. Yes, sir.

Q. Tell us something about that activity? A. The same conditions prevailed, we were handicapped for lack of material.

Q. Did you organize a baseball team? A. Yes, sir.

20 Q. What kind of a schedule did you have, and what duties did you perform? A. We had a very strong schedule. It was absolutely too hard for us. We played the City College of New York, Amherst, Temple University, Manhattan College, the University of Delaware, and St. John's College in Brooklyn.

Q. How did the baseball team open out? A. We were handicapped by a pitcher, had another man that wasn't so good.

Q. Did you have a good record for that season?

30 A. Yes, sir, considering conditions. Sometimes we had three games in four days.

Q. Did you train those men yourself? A. Yes, sir.

Q. Were you on the job every day during the school year? A. Yes, sir.

Q. Were you in the dormitories during that period? A. Yes, sir.

Q. You had a room there? A. Yes, sir.

Q. Did you also board there? A. Yes.

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*Claude Newberry—Plaintiff—Direct.*

Q. Did you continue during that college year, starting September, 1926, until June, 1927? A. Yes, sir.

Q. In addition to the football, baseball and basket ball, what other athletic activities did you organize during that year? A. The girls' basket ball team. 10

Q. Did they have a schedule? A. Why, I had a girl appointed manager, and she tried to arrange games. I did also. It seemed to be a hard proposition. The girls' games played mostly college games, like New York University, and Normal schools. I tried to arrange games myself.

Q. Did you organize the playing of those games? A. Yes, sir. 20

Q. They were played under your supervision as athletic coach? A. Yes, sir.

Q. What other games did you organize? A. Just football, baseball and basket ball.

Q. Did you perform any other duties as physical director in addition to your conducting these classes? A. Not at all.

Q. During the entire year you were at the school, did you receive any oral or written instructions as to how you were to conduct your athletic activities and duties as physical director? A. No, sir. 30

Q. Did you organize all these activities yourself? A. Yes, sir.

Q. Didn't some official of the school tell you just how and when to conduct them? A. No, sir.

Q. Mr. Newberry, tell us something about yourself; how old are you? A. Twenty-nine.

Q. Are you a college man? A. Yes, sir. 40

*Claude Newberry—Plaintiff—Direct.*

Q. What university did you go to? A. Syracuse University.

Q. What preliminary school did you go to? A. Neptune High School.

Q. At Asbury Park? A. Yes, sir.

10 Q. Where were you born? A. Manasquam, New Jersey.

Q. Did you play football at Neptune High School, New Jersey? A. Yes, sir.

Q. How many years? A. Three years at Neptune, and three years at Syracuse.

Q. Did you complete the course at Syracuse? A. I left at the end of the third year for the Army.

Q. When were you in the Army?

20 Mr. Conover: I object to all this. It doesn't make any difference whether he was in the Army or not. The only question is whether he carries out the contract.

The Court: I don't think it does.

Q. After you got out of the Army did you do any coaching? A. I coached Neptune High School for four years.

Q. What other schools?

30 Mr. Conover: I object to all this. It has no bearing on whether he performed his work as a coach. He is qualified as an expert.

The Court: Objection sustained.

Q. At the time you came to Upsala, you were football coach at some other school?

Mr. Conover: I object.

40 A. Yes.

*Claude Newberry—Plaintiff—Direct.*

The Court: I will admit it, hoping that you won't ask any more light.

Q. Please tell us the time when you first appeared to have any difficulties in regard to your contract at the school? A. I believe it was in March, 1927. 10

Q. Will you tell us just what that was? A. Why, I received notice that Dr. Erickson, President of the College, wanted to see me in his office. I went over to see him, and he told me that there was dissatisfaction with my services——

Q. Speak a little louder, there, please. A. He told me there was dissatisfaction in the results gained in athletics.

Q. Did he tell you that generally, or specifically what the dissatisfaction was? A. He said the teams had been losing and the players and students thought that the best results were not obtained, and he requested me to resign. 20

Q. Is that the sum and substance of the entire conversation? A. He also said he heard there had been girls visiting me in the dormitory. I told him that was so.

Q. What else did you tell him at that time, and he tell you, in general? A. He asked me to resign. He said that if I remained another year we would have another disastrous season. 30

Q. Did he assign any single reason why you should resign? A. He thought that the spirit that had been losing so many games, if I stayed another year we will lose games because that spirit was such that we would not have a successful season.

Q. So that the reason which he gave was be- 40

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cause you did not have such a successful football season the preceding fall? A. Yes, sir.

Q. And you say he said something about having heard something said about your having had women in the dormitory? A. Yes, sir.

10 Q. You admitted that? A. Yes, sir.

Q. Did he tell you when he heard about your having women in the dormitory? A. No, sir.

Q. Did you tell him just what the occurrence was, or didn't he ask you? A. I don't think he asked me. I told him there had been girls, at different times, that friends of mine used to bring girls—

Q. Did you explain it to him? A. I don't think I explained it to him.

20 Q. Did he tell you at that time you had violated any orders? A. There were no orders given to me.

Q. I mean did he tell you about some other orders you had violated? A. I don't think he did.

Q. What was your answer to his asking you for your resignation? A. I told him I would resign if they paid me the balance due under the contract.

30 Q. What was his reply? A. I don't think he gave me a definite reply, but he said he didn't think they would do that.

Q. That was the end of the interview? A. Yes, sir.

Q. That was the only interview up to that time with Professor Erickson or any other authority of that school in regard to your conduct as athletic coach and physical director? A. Yes, sir.

40 Q. You received no particular instructions? A. No, sir.

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Q. And you were not required to do anything in addition to what you did? A. No, sir.

Q. After this interview with Dr. Erickson, did you have further— A. I received a letter containing the substance of our interview.

Q. What did you receive after that? A. A letter from the law office of Gabrielson, Conover and Stasse, asking me to come down in their office. 10

Q. Did you go down? A. Yes, sir.

Q. What did he tell you about the matter? A. He told me they were not satisfied at the college.

Q. About what? A. About the athletics.

Q. Did he mention any particular athletics? A. He didn't mention any particular branches, but he said athletics. 20

Q. What did he want you to do? A. He said he thought it would be best for both if I resigned. I told him I would not resign, because I didn't think it was just under the conditions. I should resign if they paid the balance of the contract.

Q. When was the conversation with Mr. Conover? A. Sometime in the spring, I think in April, but I don't remember the exact date.

Q. What occurred after that? A. During the baseball season we finished that, I think it was the day of commencement, I saw an article in the Newark News saying I had been ousted. 30

Q. You say you saw the article in the Newark News saying you had been ousted? A. Yes, sir.

Q. Had you been informed before you saw the article that you had been ousted? A. No, sir.

Q. I show you what purports to be a newspaper article, and ask you whether that is the article you 40

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saw in the Newark News you have just mentioned?

A. Yes, sir.

Q. Can you tell us approximately when that appeared in the Newark News, what month? A. It was in June.

10 Q. June, 1927? A. Yes, sir.

Q. You say that is the first intimation you had that you had been ousted? A. Yes, sir.

Q. What did you do after you noticed the newspaper clipping? A. I called on Dr. Erickson. He said he didn't know anything about it, it was not authorized by him.

Q. Did you call and see anybody else about it? A. No, sir.

20 Q. Did you call and see Mr. Conover about it? A. No, sir.

Q. Did you write to him? A. Well, after I left there I wrote Mr. Conover, asking him about that. He wrote me a letter in regard to it.

Mr. Conover: I object to what was said in the letter.

Q. During the college year 1926 and 1927, were you paid your salary every month? A. Yes, sir.

30 Q. During that same period were you given your room and board every month? A. Yes, sir.

Q. And when the college year of 1927 and 1928 came around, what did you do in regard to this contract—did you have another position at that time? A. Which season was that?

Q. The following season, the college season? A. After I finished at Upsala?

Q. You finished Upsala in June, 1927? A. Yes.

40 Q. Did you come back in the fall? A. I was going to return, but I received a letter from Dr.

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Erickson saying they had engaged another coach——

Mr. Conover: I object to what was said in the letter.

The Court: Have you got the letter there? We will adjourn to 2:00 o'clock and meanwhile you can look for the letter. 10

(At this point a recess was taken to 2:00 o'clock in the afternoon.)

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AFTER RECESS.

Present:

(The Court, jury and counsel as before.) 20

CLAUDE NEWBERRY resumed:

*Direct examination by Mr. Green:*

Q. The last question before the noon recess dealt with a letter. I show you a letter which purports to have been sent to you by Arthur O. Hjelm, secretary of the Board of Upsala College, dated July 10th, 1927, and ask you if you received that letter? A. Yes, sir. 30

Q. Are you familiar with the handwriting of Mr. Hjelm? A. I believe it is his handwriting.

Q. Is that letter in his handwriting, and the signature appended thereto? A. Yes, sir.

Q. Who was Mr. Hjelm? A. Secretary of the Board of Upsala College.

Mr. Green: I offer in evidence letter dated July 10th, 1927, addressed to Mr. 40

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Claude Newberry and purporting to be signed by Arthur O. Hjelm, Secretary of the Board of Upsala College.

(Letter referred to received and marked Plaintiff's Exhibit 2.)

10 Mr. Green: May I have your Honor's permission to read this letter to the jury?

The Court: Yes.

(Mr. Green then read the letter to the jury.)

Mr. Green: Mr. Conover, have you a letter that Mr. Newberry wrote to Dr. Erickson, referred to in this letter?

Mr. Conover: I have one here of May 13th, to the Executive Committee.

20 Mr. Green: That is by Mr. Newberry?

Mr. Conover: Yes.

Q. Mr. Newberry, I show you a letter purporting to have been written by yourself, dated May 13th, 1927, and ask you if you wrote that letter?

A. Yes, sir.

30 Q. Can you tell us whether that is the letter that is referred to in Mr. Hjelm's letter where he says that at a meeting of the Executive Committee of the Board, May 16th, 1927, a communication from you was read by Dr. Erickson. Is that the communication?

Mr. Conover: I object to that as calling for a conclusion.

Mr. Green: I am willing to withdraw that.

40 Q. Did you write any other letter about that time to either the Executive Committee of the

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college or Dr. Erickson? A. I don't think so, no, sir.

Mr. Green: I offer in evidence, letter dated May 13th, 1927, written by Mr. Claude Newberry to the Executive Committee of the Board of Trustees, under date of May 13th, 1927, and ask to have it marked as an exhibit. 10

(Letter referred to, received and marked Plaintiff's Exhibit 3.)

(Mr. Green then read the paper to the jury.)

Q. Prior to the receipt of the letter of July 10th, 1927, marked Exhibit 2, did you receive a written communication from Upsala College advising you that your contract was being terminated as of the end of the college year ending in June, 1927? A. Prior to which letter? 20

Q. Prior to the receipt of the letter of July 10th, 1927? A. I did not, no.

Q. Prior to the notice that you said appeared in the Newark News in June, 1927, did Dr. Erickson tell you that your services were at an end in June, 1927? A. He didn't tell me up until June at no time before June, no. I received a letter from him during the summer. 30

Q. Up until June did he tell you your services were at an end? A. No, sir.

Q. Did any official of the college tell you that at a meeting of the Board held February 9th, 1927, the following resolution was adopted: "Voted that in view of a number of very apparent infractions of his contract as athletic coach, Claude Newberry be asked to tender his resignation at the 40

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close of the school term." Were you informed of such a resolution prior to the receipt of this letter of July 10th? A. I don't think so.

10 Q. Prior to the receipt of this letter did you know that representatives of the college had been authorized to engage another coach? A. Prior to when?

Q. To the receipt of a letter dated July 10th, 1927, marked Exhibit P-2? A. No, sir, I didn't know it until the middle of the summer.

Q. So this letter is the first—

Mr. Conover: I object.

Mr. Green: What is the objection—may I finish the question?

20 The Court: You are leading this witness all of the time.

Mr. Green: I don't want to lead him. I will ask the question in a different way.

30 Q. At the risk of repetition, I would like to ask this question so as to make it clear: Prior to July 10th, 1927, did you receive any written or oral communication from the college, or a representative thereof, that your contract was being rescinded, effective in June, 1927?

Mr. Conover: I object to that as leading.

The Court: I will admit it.

Mr. Green: Just answer that.

A. No, sir.

Q. After the receipt of this letter dated July 10th, 1927, did you make any effort to procure a position for the purpose of maintaining yourself?

40 A. Yes, sir, on various—

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Q. Just a minute. Please state what efforts you made to get another position? A. I wrote to different teachers agencies, and received application blanks to fill out. These application blanks referred to I was to fill out various positions that I held formerly—

10

Mr. Conover: Please speak a little slower.

A. (Continued.) The application had to state the places I was engaged before, and I had to state Upsala College, how long, who was in charge of the school, and of course they would write, I imagine, for a reference.

Q. How many such applications do you make?

A. Between 8 and 11.

20

Q. And those applications were for what positions? A. As coach, athletic, physical director.

Q. Did you obtain a position as a result of those applications? A. No, sir.

Q. What other efforts, if any, did you make to get a position either as a coach, physical director, or anything else? A. Well, I answered different ads in regard to other positions.

Q. For example what? A. Why, I answered an ad in regard to insurance.

30

Q. Anything else? A. In regard to salesman in New York.

Q. Did you obtain any such position? A. I obtained a position in an insurance company, but didn't stay there very long.

Q. How long did you stay there? A. I stayed there a matter of probably six weeks.

Q. What salary did you receive? A. I received \$27 and commission.

40

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Q. What was the commission? A. When you figure up your lapses at the end of the time probably you owed the company something.

10 Q. Did you owe the insurance company money at the end of the six weeks? A. At the end of the time I practically made nothing. People lapsed their policies. It came against me.

Q. What did you do to earn money during the period September, 1927, to June, 1928? A. September, 1927?

Q. September a year ago until June last past, what did you do to make money? A. I was working at insurance, and managing a service station for Bennett.

20 Q. How long was the last? A. From January 1st to the latter part of May.

Q. What did you receive from Mr. Bennett? A. \$40 a week.

Q. From May 1st? A. From the latter part of May, May 25th or 26th.

Q. What did you do after that and until June 14, 1928? A. I was down to Asbury Park working on the beach.

Q. During the summer months it was your custom to work at Asbury Park? A. Yes, sir.

30 Q. You did that every summer during the school period? A. Yes, sir.

Q. What did you do, Mr. Newberry, from September 14, 1928, up to the present time? A. September 14, 1928?

Q. Yes, up to the present. A. Well, selling automobiles for the Chrysler Company at Asbury Park.

Q. On salary? A. No, on a commission basis.

40 Q. Have you sold any cars? A. It is very slow at this time.

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Q. You don't get a salary? A. No, sir.

Q. Tell us what you have earned from September 14, 1928, down to the present time as such a salesman? A. Nothing from the Chrysler Company.

Q. In the meantime, you are making efforts to get a position elsewhere? A. If I hear of an opportunity. 10

Q. Did you do anything during the year of this contract—

Mr. Conover: I object to anything prior to the contract.

Q. (Continued) During the year of this contract, in addition to your duties as athletic coach and physical director, what else did you do? A. I played professional football. 20

Q. Also professional football since you were ousted from this position? A. Yes, sir.

Q. When do you play professional football? A. Sundays.

Q. You did that during the year you were at Upsala? A. Yes, sir.

Q. That doesn't interfere with your duties as coach and physical director? 30

Mr. Conover: I object to that as leading.

The Court: You lead continuously, one question after another. It keeps counsel on the other side objecting.

Mr. Green: I am willing to reframe it.

The Court: Ask him what he did. Let him tell us.

Q. During this year you were in Upsala what, 40

*Claude Newberry—Plaintiff—Direct.*

if anything, did you do in addition to your work at the school? A. Played professional football.

Q. What days did you play professional football on? A. Sunday.

10 Q. Did the college authorities know you were doing that? A. I believe they did.

Q. Did you receive compensation for that? A. Yes, sir.

Q. You have been playing professional football ever since? A. Yes, sir.

Mr. Conover: I object to these questions as leading.

The Court: Go ahead.

20 Q. If you were permitted to resume your duties at Upsala College are you in a position to do so at the present time? A. Yes, sir, I intended to resume at the end of the following September, if I hadn't been ousted. I received a letter from Dr. Erickson telling me that another coach had been engaged, and I was to understand that I was not to report.

Q. During the year you were at school you were occupying a room in the dormitory? A. Yes, sir.

30 Mr. Conover: I object to that.

Q. Did you also receive anything else from this school in addition to that? A. I was given my room for taking charge in the dormitory, keeping order in the dormitory.

Q. What else in addition to the room did you receive? A. I received a salary as coach.

Q. Anything else? A. Meals and board.

40 Q. Did you pay anything for those meals? A. Not that year of the contract.

*Claude Newberry—Plaintiff—Cross.*

Q. Did you pay for this room given you at the dormitory? A. No, sir.

Q. Since September 14, 1927, have you paid your own room and board? A. Yes, about \$15 a week.

Q. Where have you resided since that time, during the school year? A. Since when? 10

Q. I mean September 14th, 1927, and June 14, 1928? A. I resided in East Orange up to May, and since that at Asbury Park.

Q. What did you pay for your room? A. Room at \$15 a week.

Q. You have been paying the same thing since the beginning of this present school year? A. Yes.

Q. What are you paying at the present time? 20  
A. \$15.

Mr. Green: If your Honor please, may I call your Honor's attention to the second defense answer (reading). In view of that defense I would like to be given the opportunity of showing that he was reasonably competent.

The Court: Do it on rebuttal.

Mr. Green: I will be given that opportunity on rebuttal? 30

The Court: You have the right on rebuttal.

*Cross examination by Mr. Conover:*

Q. From June 1, 1926, until the time that you left, you were acting as proctor in the dormitory and known as the academy dormitory?

Mr. Green: I object to that. There is nothing in the contract that calls for that. 40

*Claude Newberry—Plaintiff—Cross.*

If he did, he did so by virtue of a special contract.

Mr. Conover: He has just testified himself that he received his board for keeping order in the dormitory.

10

The Court: I will admit it.

(Plaintiff's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Q. You were proctor during that period in the dormitory? A. I was given my room in the dormitory for acting as proctor.

Q. You had access to all the different rooms at all the different times? A. Yes.

20

Q. Was there any set of regulations posted up in the different rooms as to the conduct of the students? A. I believe one or two were posted in the building, but not in where I was.

Q. You saw one or two? A. There was a poster in the building.

Q. You saw what was on the poster? A. Yes, sir.

Q. You did? A. Yes.

30 Q. I show you a copy of the rules and regulations of Upsala College for the years 1925 and 1926 and I ask you if that was posted——

Mr. Green: What years?

Mr. Conover: 1925 and 1926.

Mr. Green: I object to that. That is not during the college year, for which the contract provided.

The Court: It is what rule was posted, irrespective of the date.

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*Claude Newberry—Plaintiff—Cross.*

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. No, sir, I don't remember seeing anything like that.

10

Q. I don't mean in that form, but the substance of what was in there.

The Court: Hand him the paper. I don't think it is a proper question.

Mr. Conover: I will withdraw the question.

The Witness: I never saw that before.

Q. Was there a rule or a notice posted in the room that no noise was to occur in the building at any time during study hours after 7:30 P. M., that complete quiet must be maintained? A. The rule said something about quiet being maintained, yes.

20

Q. Did that poster you saw contain the rule and regulation containing a provision that men visitors are not allowed in the girls dormitory either inside the building or on the veranda, except during visiting hours? A. I believe it was in the poster, but the men did any time they felt like it.

30

Q. Was there also a regulation that girls are not permitted to visit the boys dormitory except by special permission and under proper chaperonage? A. There probably was one there.

Q. Did you see those same notices posted in some of the rooms during the college year of 1926 and 1927? A. I once—I remember seeing those posters, not in every room, but I remember see-

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*Claude Newberry—Plaintiff—Cross.*

ing the posters containing regulations about quiet and noise.

Q. And the girls? A. Yes.

Q. And they were there during the year 1926 and 1927? A. I remember seeing a poster, I have  
10 seen a poster.

Q. You received your room free for acting as proctor in the dormitory?

Mr. Green: I object to that. The written instrument says that he was to receive his board for the full year in addition to his salary, and this proctor business and this room business does not appear in the action for which we are suing.

20 Mr. Conover: His own witness has already testified that he received board for taking care of the dormitory and maintaining order. And the contract merely states that he received board. Board is not room.

Mr. Green: They rescinded that contract. They tried to justify that rescission by showing that he also acted as proctor, and that he violated the rules of silence. Even if he did violate that rule I don't see  
30 how it can justify the rescission of his contract.

The Court: The motion is, as I understand it—the witness testified that he occupied a room in the dormitory and received board in addition, and said he occupied the room for acting as proctor. The contract says nothing about the room, but says that the college will furnish board.

40 Mr. Green: Now what is their reason for introducing that element? If it is to

*Claude Newberry—Plaintiff—Cross.*

justify the rescission I don't think it is material in this action. That appears to be a special arrangement.

The Witness: I think I can explain that.

The Court: I will admit the question. 10

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Question read.) A. I received my room. yes, sir.

Q. You had a Victrola in the room, didn't you, Mr. Newberry? A. Yes, sir, I did have a Victrola.

Q. And you played that Victrola on many occasions after 7:30 in the evening? A. Why, during study hours I didn't play it. The Victrola may have been played during study hours when I wasn't in the room. I never played it myself during study hours. If somebody came in after the hours were done and were noisy I went down and quieted them. After that if somebody was noisy I would get up and tell them that everybody was trying to sleep, and try to quiet them down. 20

Q. Do you want us to understand that you never played the Victrola— 30

Mr. Green: I object to that.

The Court: The objection is overruled. Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I would say that I did play it after 7:30 in the evening on Saturday and Sunday evenings, when there were no study hours. I didn't play the 40

*Claude Newberry—Plaintiff—Cross.*

Victrola to disturb anybody. When there were no study hours on Saturday evenings and Sunday evenings I did play.

Q. Did you receive complaints about playing the Victrola that disturbed the students? A. No, sir.

10 Q. Not one? A. I never knew of one about my playing the Victrola. There was no noise made, but there may have been a complaint.

Q. Did you ever sing any evening after 7:30? A. I am not such a good singer.

Q. Did you ever sing after 7:30 in the evening? A. I may have sung after 7:30, not so anybody could hear it. It would not have been very good if they did.

20 Q. Didn't some of the students complain about your singing? A. If they heard me they had a cause, but never——

Q. It could have been quite loud and they could have heard you? A. No, sir, never I sang after 7:30 so loud as to disturb them.

Q. When was this occasion that you had two young ladies in your bedroom all night? A. When did that occur?

30 Q. Yes. A. That occurred during the fall of 1927. A girl friend of mine who I met on the shore——

Q. Just answer when it was. A. It was in the fall of 1927.

Q. Sometime in November, was it? A. I couldn't say. Probably it might have been in November.

Q. It was the night before some football game, wasn't it? A. No, sir, it was not the night before some football game, no, sir.

40 Q. Is that your signature (showing a paper to the witness)? A. Yes, sir.

*Claude Newberry—Plaintiff—Cross.*

Q. I show you a letter from yourself to Dr. Erickson dated January 20, 1927. Do you remember writing a letter about that time? A. I remember writing that, yes.

Q. And that letter was written after you had had a conference with Dr. Erickson about the dissatisfaction of the school over your coaching, wasn't it? A. This letter here? 10

Q. Yes. A. What date is that?

Q. January 20, 1927. A. I remember writing the letter, probably that is the one.

Q. During that conversation Dr. Erickson had spoken to you about the women you had had in your room? A. At that first time, yes.

Q. You admitted that you had had them there? A. Yes, sir. 20

Q. And didn't you tell him that you had met these friends by appointment in New York City? A. Yes, sir.

Q. And they were coming over to see a football game? A. I don't remember about that. There wasn't any football game the next day.

Q. Just read that last paragraph and the top of the next paragraph (referring to a paper). A. Yes, but at that time there was no football game the next day. 30

Q. You said in that letter— A. They intended to come over to a football game. but when they came there was not any game.

Q. Did you have permission from any of the college authorities to lodge those women in that room?

Mr. Green: I object. It doesn't appear that he had to have any permission. As a matter of fact the rule or regulation referred to by Mr. Conover is to the effect 40

*Claude Newberry—Plaintiff—Cross.*

that if they had permission and proper chaperonage.

10 The Court: Your claim is that in the face of this rule Mr. Newberry allowed some girls or women to occupy his room for the night, or something of that kind, in his absence, or while he was somewhere else?

Mr. Conover: No, we don't find that he was in the room all night. He was during late hours, and then he left.

The Court: And occupied some other room the rest of the night?

Mr. Conover: Yes.

The Court: Let me see those rules (taking same).

20 Q. Where was your room?

The Witness: On the second floor.

The Court: I will admit the question. Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Witness: I considered that I was in charge of the dormitory.

30 Mr. Green: I object. Yes or no.

The Court: No.

40 The Witness: I was put in charge of the dormitory. I considered if I gave permission, if the students came there and asked me to give them permission to bring their mothers and sisters, I gave it to them. If they didn't, there was nothing ever said about it. I was in charge, and I thought if anybody came to me and said his mother wanted to come to my room, I allowed it,

*Claude Newberry—Plaintiff—Cross.*

because I was the one that granted permission.

Q. You didn't have any permission——

Mr. Green: I object to that. The question was not answered that way. 10

The Court: Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Was there anybody present in the dormitory to chaperone the two women you had there that night? A. I was there until about 10:30.

Q. Who else besides you was there? A. Another fellow whose girl requested to be there—Carew. 20

Q. He was the manager of a football team? A. Yes, sir.

Q. And he played in the game immediately following this evening? A. No, sir, there was not a game the following day. At that time he was not playing on account of an injury to his ankle and was convalescent, and was not playing in the game, and there was no game the next day.

Q. He is still in the squad? A. Yes, sir. 30

Q. All the people on the squad was supposed to be there by ten o'clock? A. 10:30, unless they had permission. Sometimes somebody had permission to be off, and go somewhere, to the library, and I would extend it to eleven o'clock if necessary.

Q. And that night when the women were in there you were playing the Victrola? A. Not that night.

Q. After 7:30? A. If it was during the week it would be disturbing somebody. 40

*Claude Newberry—Plaintiff—Cross.*

Q. Tell me to the best of your knowledge whether you were playing it that night? A. I could almost say positively I was not playing it after 7:30.

10 Q. You had women in your dormitory on another occasion? A. A year, about, after a football game, a man and a girl I hadn't met and my girl came to a football game, and the girls came and stayed in my room until I took a shower and got dressed. At various times we did that.

Q. Did you have consent from the college authorities to have the women in your bedroom on those occasions?

Mr. Green: I renew my objection.

20 The Court: Overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I didn't ask anybody else's permission, because I thought I was in charge of the dormitory.

Q. Was any chaperone present on those other occasions? A. No chaperone besides myself, no.

30 Q. And this night when the two women slept in your bedroom all night, you had arranged with the women to go in the womans dormitory and sleep there? A. Yes, I had.

Q. And the reason you did that was because you realized it was against the rules to take them in your room? A. No, sir, that is not the reason. They were coming over and knew they had to stay somewheres so I asked the girls to get accommodations in the girls dormitory. The matron said certainly. They came and went to  
40 the girls dormitory to wash up, and the girl who

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I had not met before came to the girl I knew, and seemed to be very sarcastic, and at night I told her to go up to the dormitory, and the girl whom I had not met until that day said, "I am not going up there on account of the old lady. I am going to say here." I said, "You can't do that. That is the place for you, go up there." She insisted on staying there, so I said all right. She was a very stubborn girl and a funny girl, too. That was the way I had arranged for them to go there, and wanted them to go up there. I had arranged for that. 10

Q. Now on your direct examination you said that the first knowledge that you had that the college was dissatisfied with your services as a coach and physical director was when? A. The first knowledge that anybody notified me was when Dr. Erickson and I had a conference. 20

Q. When was that? A. I don't remember the exact date.

Q. On your direct examination didn't you say it was— A. I think it was in March.

Q. In June? A. No, the first time Dr. Erickson reported I think was along in March. It wasn't in June, the first time.

Q. You said the first difficulty was in March, in 1927. That is not true? A. That is the first time Dr. Erickson called me in. 30

Q. Hadn't you had a conference with Dr. Erickson on January 20, 1927, which you refer to in this letter: (Reading) "In regard to our interview this morning I wish to make the following statement" (showing a paper to the witness). A. The first time Dr. Erickson spoke to me about it was in March. 40

*Claude Newberry—Plaintiff—Cross.*

Q. Didn't you have an interview with him on January 20, 1927?

Mr. Green: About what?

10 Mr. Conover: About their dissatisfaction with his services as coach.

Mr. Green: There is nothing to show there was any dissatisfaction in January. It might have been something else.

The Court: Suppose there was, they have a right to ask about it.

Mr. Green: The witness is entitled to know. He says about this difficulty. What does the difficulty refer to?

20 The Court: I think your last objection is frivolous. The witness is able to take care of himself. You understand on cross examination what is proper. I don't like to have you get all these statements in before the jury. You are asking leading questions again and again and it puts the counsel on the other side in an embarrassing position. He can't object all the time. He has a right to ask this witness anything on cross examination that was brought out by the examination in chief.

30 He may not ask it to satisfy you, but on re-direct examination you can turn around and ask the witness to clear up anything within reason, that you think needs straightening out. Take an exception and go ahead.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

*Claude Newberry—Plaintiff—Cross.*

Q. On January 20, 1927, didn't you discuss with Dr. Erickson the different complaints and dissatisfaction concerning your services as coach to the different athletic teams? A. I can't recall the date.

The Court: Mr. Newberry, if you do not understand the question do not hesitate to tell counsel so. I don't mean your counsel, but the opposite counsel. If he puts any question to you that you do not understand ask him what that means.

The Witness: Yes, sir. I can't recall the date. I remember having a conference with Dr. Erickson.

Q. I show you a letter from you to Dr. Erickson, dated January 20, 1927, and I ask you if you wrote that letter? A. That was after the interview? I wrote that letter.

Q. It is all in your handwriting? A. Yes, sir.

Q. Does that refresh your mind as to whether you had an interview with him concerning— A. I apparently did have one with him.

Q. At that interview he discussed with you charges that you had been absent from football practice? A. In the interview, yes, sir.

Q. And he discussed with you charges that you had been tardy, is that right? A. Yes.

Q. And you admitted to him that you had been? A. I admitted that I had been tardy twice, but invariably I was down to the field when practice is called at four o'clock. Invariably I was there at three; once somebody had to get a uniform—and invariably I was on the field at three o'clock. From three to four, and the fellow

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that came down to assist me in coaching was there. The only time they had to practice was from three to four and I was paying attention to them.

10 Q. He discussed with you also charges that you had been late at the gymnasium class? A. Yes, we discussed that, yes sir.

Q. Did he discuss with you charges that you had been absent at the gymnasium class? A. Yes, we discussed that, and I have been absent twice.

Q. Just answer the question. Did you admit to him that you had been late at the gymnasium class? A. On one or two occasions I had been tardy a couple of minutes.

20 Q. Haven't you been tardy as much as half an hour? A. No, sir.

Q. Never once? A. Not that I can recall.

Q. You won't say you never had been? A. I would say I was absent twice, once at a funeral, and another time I was sick.

Q. He also discussed with you your failure to enforce the football training rules? A. We discussed that.

30 Q. You knew some of the fellows were breaking training? A. Yes, they didn't start the games.

Q. And some of them you didn't punish for breaking training? A. If somebody broke training and I didn't know it I couldn't punish him. If I knew it I didn't start the game and use him until I had to.

40 Q. You were in trouble, that is true, about training hours? A. On some other nights, Saturdays and Sundays I would take some of the fellows along that had permission to stay out. During the week——

*Claude Newberry—Plaintiff—Cross.*

Q. Who gave them the permission to stay out after half-past ten? A. I did. On Saturday and Sunday nights I gave them permission.

Q. You discussed with Dr. Erickson your failure to develop inexperienced players? A. I did. We discussed that, but I didn't say I failed to develop the inexperienced players. 10

Q. You knew there was some dissatisfaction, didn't you? A. According to Dr. Erickson there was.

Q. And according to some of the members of the team? A. Well, I know there was one fellow in basketball who told me at one of the games when we were playing Fordham, New York, when he was sitting on the bench, and he said, "Now, why don't you put me in?" I said, "I will put you in if I have to have somebody." Finally I gave him a chance and I didn't see anybody else on the floor, but he thought so. The fellows thought they were better than somebody else, but I was the one to decide that. 20

The Court: You had absolute control over the men to put them on and take them off?

The Witness: Yes, it was up to me. I put the best men I had to work on the team. 30

Mr. Conover: I ask that the letter of January 20, 1927, be marked in evidence.

Mr. Green: Mark it for identification.

(Letter referred to marked Exhibit A for Identification.)

Adjourned to Tuesday, October 23, 1928, at ten o'clock A. M. 40

*Claude Newberry—Plaintiff—Cross.*

SECOND DAY.

Tuesday, October 23, 1928.

(Continued pursuant to adjournment.)

10 (Present, counsel as before stated.)

CLAUDE NEWBERRY resumes the stand.

*Cross examination by Mr. Conover:*

Mr. Conover: I ask that these rules and regulations be marked for identification, referring to the years 1925 and 1926.

20 (Papers referred to marked Exhibit B for Identification.)

Q. Well, you had this conference on January 20, 1927, with Professor Erickson? A. Yes, sir.

Q. Was that the first time you knew there was dissatisfaction with your work as athletic coach and physical director? A. The first time that anybody spoke to me about it?

30 Q. When was the first time that they requested you to resign? A. I believe that was the time I had the conference with Dr. Erickson.

Q. You mean January 20th? A. I guess that was the time, the time I had the interview with Dr. Erickson.

Q. Did he later write you a letter requesting you to resign? A. I believe he did.

Mr. Conover: I ask that counsel produce letter of March 23, 1927.

40 Mr. Green: I have the original letter,

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but I want to offer an objection as to the admissibility of the letter in evidence.

Mr. Conover: I asked for the production of it.

Q. I show you a letter written by C. G. Erickson to Claude Newberry dated March 23, 1927, and ask you if you received that letter? A. Yes, sir. 10

Mr. Conover: I would like to have it marked for identification.

(Letter referred to marked Exhibit C for Identification.)

Q. When did you reply to that letter? 20

Mr. Green: I object, unless it appears he did reply.

Q. Did you reply to that letter? A. I believe I did.

Q. When? A. I couldn't remember—recall the date.

Q. I show you a letter purporting to be written by Claude Newberry to President Carl Erickson dated May 9, 1927, and ask you if you wrote that letter to Dr. Erickson? A. Yes, sir. 30

Mr. Conover: I ask to have it marked for identification.

(Paper referred to marked Exhibit D for Identification.)

Mr. Conover: I ask for the production of a letter dated May 20, 1927, written by 40

*Claude Newberry—Plaintiff—Cross.*

Gabrielson, Conover & Stasse, to Claude Newberry.

Mr. Green: Mr. Newberry says he received the original.

10 Mr. Conover: I ask that it be marked for identification.

(Letter referred to marked Exhibit E for Identification.)

Q. I show you a letter dated June 18, 1927, purporting to be written by Claude Newberry to Mr. Conover, and ask you if you wrote that letter?

A. Yes, sir.

20 Mr. Conover: I would like to have it marked for identification.

(Letter referred to marked Exhibit F for Identification.)

Mr. Conover: I ask for the production of the letter dated July 6th, 1927.

(Letter produced.)

30 Q. I show you a letter from Gabrielson, Conover & Stasse to Claude Newberry, dated July 6, 1927, and ask you if you received that letter? A. I received that, yes.

Mr. Conover: I would like to have it marked for identification.

(Letter referred to is marked Exhibit G for Identification.)

40 Q. I show you a letter dated July 7, 1927, purporting to be signed by Claude Newberry, ad-

*Claude Newberry—Plaintiff—Cross.*

dressed to J. Howard Conover, and ask you if you wrote me that letter? A. Yes, sir.

Mr. Conover: I ask to have it marked for identification.

(Letter referred to marked Exhibit H 10 for Identification.)

Q. Did you call at my office in East Orange in response to my letter of May 20, 1927? A. Did I call at your office?

Q. Yes. A. Yes, sir.

Q. And at the end of that time did you discuss with me the complaints that were made in regard to your service at Upsala College? A. We discussed that.

Q. And at that time did you admit to me that you had been absent from football practice on several occasions? A. No, sir.

Q. Did you admit that you had been late at football practice? A. I admitted there might have been a couple of times when I had to have a meeting with the sporting people and was a few minutes late, but it was an exception.

Q. Did you admit to me that you had been absent from basketball practice three or four times? A. No, sir, I admitted there might have been two or three times, because the boys were practicing with the East Orange team and the girls had our own teams, and in giving the boys practice I was a few minutes late in getting to the girls.

Q. You were absent from the gym class on a number of occasions? A. I was absent twice, once at my aunt's funeral and another time I was sick.

20

30

40

*Claude Newberry—Plaintiff—Cross.*

Q. Did you not admit to me that you had been absent three or four times? A. I don't know as I said three or four. I know twice, two occasions I was absent, once at my aunt's funeral and another time I was sick. I had an alternate take charge at that time.

10 Q. As a matter of fact you came to the basketball practice, and gym class a half an hour late sometimes? A. No, sir.

Q. Not once? A. Basketball practice, you say?

Q. Yes. A. I won't say I was half an hour late, no, sir, unless it was on an occasion when I had a team at the high school, when I was told by the authorities it was at 4:30. I had told the squad to be there at four o'clock, and if I told them 4:30

20 somebody might have been late after five o'clock, but I was never late to practice like that.

Q. At this interview with me did I suggest to you that it would be better for you if you voluntarily resigned? A. Did you suggest to me?

Q. Yes. A. I think you did suggest that.

Q. And you refused to resign? A. Yes, sir, I did.

Q. And at that time did you not admit to me that under the conditions as they existed at that

30 time that it was impossible for you to do any good work as athletic coach and physical director? A. I didn't say that, I said it was hard to get. I arranged to train a small bunch, who wouldn't train as they should. I found it hard to discipline all of them, and a few that I knew were not training I disciplined those. I imagine some were not training because of the way they showed up on the field, by their condition, but those I knew I disciplined.

40

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Q. Didn't you say at that time that you realized there was general dissatisfaction in your work?

A. No, I didn't say there was general dissatisfaction.

Q. Didn't you say it was impossible for you to get good cooperation from the boys? A. I didn't say that. I said there was some boys that would not train. 10

Q. You are positive now that you didn't say that it was impossible for you under the existing conditions to do any good work as physical director?

A. I don't believe I said that.

Q. Would you say you did not? A. I believe I did not make that remark. I said as far as getting the best results under the conditions, the fellows were not training as they should. 20

Q. Didn't you tell me at that time that you would be perfectly willing to resign, because you realized that you could not do any good work there and the only reason you would resign was because of the newspaper article that came out and injured your reputation? A. I believe I said I would resign if they were satisfied to pay me the balance due.

Q. (Question read) A. Those articles had injured my reputation— 30

Q. Please answer whether you stated that. Did you make such a statement to me? A. I believe I made a statement that I said the articles had injured my reputation, and I would not resign.

Q. Didn't you state to me that you would have to resign because you realized that you could not do as good work there as physical director and athletic coach? A. I don't believe I made that remark.

Q. Didn't you write a letter to the executive 40

*Claude Newberry—Plaintiff—Cross.*

committee of the Board of Trustees dated May 13, 1927, in which you stated that there seems to be general dissatisfaction with those connected with Upsala College in regard to my work and the results obtained in that case? A. I believe I did. And then I had a conference with Dr. Erickson, I believe.

Q. On what date did you have these two ladies in your bedroom overnight? A. I don't recall the exact dates.

Q. It was in the fall of 1926, was it? A. It was 1926, I believe, 1926, or 192—the fall of 1926, I believe it was.

Q. Was it in October or November of that year? A. I couldn't say.

Q. Was it in one of those months? A. It was during the fall. I couldn't say.

Q. It was in the football season? A. Yes.

Q. And they planned to come over to attend a game? A. They had planned to come over to attend a game, yes, sir.

Q. Was it before the C. C. N. Y. game that they came? A. I couldn't say whether it was before or after that they came.

Q. Was it before the Manhattan College game? A. I couldn't say, sir, just when it was.

Q. What games did Carew play in the fall of 1926? A. 1926, he played in the Hobart game. He was taken out during the second time. I know he played with Hobart.

Q. What date was that game? A. I couldn't recall the date, sir. He left here a day or two before the game came off.

Q. Was it after this Hobart game? A. I can't recall what game.

Q. You as athletic coach were given the time

*Claude Newberry—Plaintiff—Cross.*

schedule for that year? A. Yes, sir. We played the City College of New York, Hobart, St. Lawrence University, Drexel, Susquehanna University.

Q. What position did Carew hold on occasion?

A. He played guard.

Q. Was he captain? A. No, sir.

10

Q. How many games did he play in? A. I don't know. He was injured quite a bit, and didn't play many games, I don't believe. He was injured various times, and had weak ankles.

Q. Was he injured early in the season or late in the season? A. At different times he had different minor injuries that kept him from playing. I don't know whether it was early or late. I know at various times he was incapacitated.

Q. The C. C. N. Y. game you kept four regulars out of that game? A. Yes, sir, we lost the game by one point.

20

Q. Why were they kept out? A. Because they were four people who had not been keeping up their training, I believe.

Q. You believe? A. I had reason to believe. I knew that there were fellows who had not been keeping training.

Q. Did you keep other fellows out of games who you had reason to believe were not keeping training? A. In basketball and baseball.

30

Q. Football—did you keep the other fellows out of football? A. The fellows that I saw or had reason to believe were not, yes, sir, until I had to use them. I couldn't afford to fire them because I had such a small squad.

Q. At the beginning of the season you had a much larger squad than later on? A. Always, at the first call they all came out.

40

*Claude Newberry—Plaintiff—Cross.*

Q. There was quite a number of fair prospects that dropped out after the beginning of the season? A. There were some fellows that I considered fair prospects, who said they couldn't afford it because they had a job and had to take it.

10 There were cases like that that occurred. At St. Lawrence I didn't have a substitute line. One had a job and couldn't afford to leave. He left on Thursday night and insisted on being away on Saturday. He had a job. We had to play the game without a substitute line.

Q. These games you said were out of the class at Upsala, those different games you told us about were very close scores, weren't they? A. There were one or two cases that were close because  
20 those were fellows who had——

Mr. Green: I don't think he ought to be hemmed in to yes or no.

The Court: I agree with you.

A. (Continued.) We had probably five or six games on the schedule which would be absolutely out of our class, but most of the games we happened to have full strength we put up good opposition during the first half or three quarters. Some  
30 of the men got hurt the last quarter and couldn't stand up against the opposition, because they had a number of substitutes to put in, but some of the other games, like Hobart, we lost twenty to nothing, I believe it was. The St. Lawrence University, that year we lost nine to nothing. The fellows were injured and we had nobody to replace them.

Q. Do you consider a score of nine to nothing  
40 an indication that the team was away out of your

*Claude Newberry—Plaintiff—Cross.*

class? A. The team was away out of our class when you consider the numbers. They had about forty-five men.

Q. Does the score indicate that they were away out of your class? A. I wouldn't say the score indicated that. It was nine to nothing. 10

Q. Did you have any scores at all during the reason of 1926 that indicated the teams were out of your class? A. Susquehanna University.

Q. What was the score? A. I think something like 20 to 6.

Q. Don't you think a score like that with Harvard and Yale— A. Yes, sir, but consider the size of the college. They had eighty-six.

Q. The score doesn't indicate it was out of the class? A. It indicates the college is out of the class. 20

Q. What was the score in the Aggies game, January, 1926. A. 1926 I believe the score was nothing to nothing, with about a minute to play, and the Aggies completely—

Q. What was the score of the Manhattan game November 1, 1926? A. I can't recall, and I think they beat us. I can't recall the score. I know they won the game, but I can't recall the score.

Q. What was the score of the St. Lawrence game? A. In 1926 the second was 9 to nothing. 30

Q. What was the score of the Susquehanna game? A. I believe that was 20 to 6, something like that.

Q. And what was the score of the Drexel game? A. That was practically even the first half. In the second half one man had his arm broken. He was one of the best men in the back field. I think at the beginning of the second half his arm was broken. And one or two other fellows were in- 40

*Claude Newberry—Plaintiff—Cross.*

jured, and the last quarter they ran up the score.

Q. In the St. Lawrence game on your direct examination you said you had no substitute to put in. A. I had two or three substitutes in the back field, but no substitute line.

10 Q. Isn't Parsons a line man? A. He was taken in on the trip for the substitute.

Q. Was Johnson a line man? A. Who is Johnson?

Q. Didn't you have a line man by the name of Johnson? A. There was a Johnson came along on the trip, a substitute half.

20 Q. Did he also play line? A. I never used him in the line, as I recall. We had two substitute half backs, one was Johnson, and I think the other was a fellow named Brundage, that was a substitute half back.

Q. You said you worked at Bennett's Service Station from January 1st, 1928, to May 26, 1928? A. Yes, sir.

Q. At \$40 per week? A. Yes, sir.

Q. Why did you leave there? A. I left there the 26th, because I always worked at Asbury Park as a life guard in the summer time.

30 Q. You worked from the 26th to what date as a life guard? A. I really started about the day before Decoration Day, just about the 29th of May. I worked there all summer until about September 15. I worked there every summer.

Q. What did you get? A. What did I get during the summer?

Q. On this job? A. \$50 a week, and a bonus at the end of the season.

Q. What was the bonus? A. \$100 each year.

40 Q. Then from September 25th, 1928, to the

*Claude Newberry—Plaintiff—Cross.*

present time what have you been doing? A. September 25th this year?

Q. Yes. A. Working as an automobile salesman.

Q. For the Chrysler people? A. Yes, sir.

Q. Do you get a drawing account? A. No, 10  
sir, a straight commission.

Q. Have you sold a single automobile? A. I have several prospects, but have not made a sale.

Q. You have no income from them? A. No.

Q. Have you been working with an insurance company for some time? A. This fall I started some insurance. I made about twelve or fourteen dollars in insurance this fall before I went to Chryslers. 20

Q. Did you get a drawing account there? A. No, sir.

Q. Now, from June, 1927, where did you work? A. June, 1927, I worked at Asbury Park, where I worked every summer.

Q. And up to what date did you work? A. I easily worked up to the 14th or 15th of September.

Q. In 1927 you got the sum of \$50 per week? A. Yes, sir.

Q. And \$100 per month at the end of the season? A. Yes, sir. 30

Q. Do you get board and room also? A. No, sir.

Q. From September 15, 1927, what was the next job after September 15, 1927? A. 1927—at the end of the summer I came up to South Orange, the Musconetcong Estate.

Q. From what date to what date? A. Sometime in the summer around September 18th, I can't 40

*Claude Newberry—Plaintiff—Cross.*

give the exact date, the 18th or the 20th of September.

Q. To what date? A. To about, I believe, some time in November.

10 Q. The 1st or the end of November? A. I couldn't recall. I stayed there until I came back to real estate. It wasn't going so good.

Q. You left voluntarily? A. Yes, sir.

Q. What salary did you get while you were there? A. Strictly commission.

Q. What commission did you make? A. Why, seventeen per cent. commission on each sale.

Q. How many sales did you make? A. Several people made a deposit, and later didn't go through with the deal, I didn't get anything on them.

20 Q. What did you get? A. I imagine for the time I worked there my income amounted to about, well, I would say, under a hundred dollars while I was there.

The Court: For the entire time?

The Witness: Yes, sir.

Q. Did you have any bank account? A. I didn't need one at that time.

30 Q. Did counsel tell you that you had to testify to what you earned at the different jobs?

Mr. Green: I object.

The Court: Sustained.

Q. From November, 1927, what was the next job after that? A. November, 1927, why, I believe I went to the Metropolitan Insurance Company.

40 Q. Between what dates were you working for them? A. I can't recall the date I started, but

*Claude Newberry—Plaintiff—Cross.*

it was after I left, a few weeks, Musconetcong, I heard of a vacancy and two or three weeks, and I finally started in.

Q. Did you have a drawing account there? A. It was \$24 a week, yes, sir, but if you had any lapses of the policies it came out of the \$24. 10

Q. How long did you work for them? A. I can't tell you exactly, but I believe it was something like five or six weeks. About five weeks, I think.

Q. Did you work with them until January 1, 1928? A. I don't think I—I didn't work—I was two or three weeks for them. I left them before I went to work for Bennett.

Q. Did you work for them until just before you went to Bennett's? A. A few weeks in between. 20

Q. You went to Bennett's January 1? A. Around January 1. I can't recall, but in regard to the insurance there was a lot of lapses in my territory, and of course, it was taken out of my salary.

Q. What did you get out of this, net? A. I can't tell you what I received after the lapses came out.

Q. Have you any records from which you could tell. A. I haven't any now, no. I had a sheet, 30 but I haven't got it now.

Q. Did you do anything else since you left Upsala during this interval? A. I can't recall.

Q. Didn't you sell candy for awhile? A. I sold candy one week, yes.

Q. What did you get out of that? A. That was strictly commission. I got that one week—I think I made around \$20.

Q. Who were you working for? A. The Standard Candy Company. I worked there one week. 40

*Claude Newberry—Plaintiff—Cross.*

They sold out the business, or something happened, and the business went on with somebody else.

Q. On your direct examination you said you were on the job every day? A. I said what?

10 Q. You were on the job every day. A. You mean at Upsala?

Q. Yes. A. I admitted I was away once, at my aunt's funeral.

Q. So you weren't on the job every day? A. I beg your pardon?

Q. You weren't on the job every day? A. I said I was absent at the time of my aunt's funeral, one day.

20 Q. When you conducted basketball practice how many people would you have on a side? A. Five people on the team at the time.

Q. Sometimes you would have eight or ten on the side? A. Eight or ten on the side?

Q. Yes. A. Not playing at the time. The side. Of course, I had several substitutes.

Q. Did you have them practice quite frequently? A. Yes.

30 Q. More than five on a side? A. If there were about twelve men, instead of having them sit around I would have six on a side.

Q. And sometimes seven or eight on a side? A. Not in regular practice.

Q. But they would play that way, seven or eight on a side? A. Not regularly, varsity practice. Sometimes in the gym class, if there were seven or eight that wanted to play basketball on the side, two sides with sixteen, the time remaining would be short and all would get a work-out in gym class.

40 Q. Didn't you ever practice with the Orange

*Claude Newberry—Plaintiff—Cross.*

Y. M. C. A. when you didn't show up at all? A. I don't believe we ever practiced with the Orange Y. M. C. A.—

Q. Did you ever practice at the Armory? A. We did in 1925.

Q. Did you ever put your suit on and go out and show the fellows how to play basketball? A. 10  
At various times I got a basketball suit and practiced and worked with him. In football I was invariably in a football suit. Lots of times I had to use a ball suit, yes.

Q. Was that when you were getting the work out, or showing them how the game should be played? A. Basketball I showed them how to play, because you can't do it with a stiff collar and I had to rush up to the girls' practice. Lots 20  
of times I wouldn't have time to get a basketball suit. At the beginning of the season we had to have a basketball suit in order to do it properly.

Q. What teachers' agencies did you write to? A. Schermerhorn, New York. Fisk. I think the Allied, was one, and one in Philadelphia. Bryant Teachers' Agency. There was one or two others that I heard of that I answered, that I didn't know very well myself.

Q. That makes six. You told us you wrote to eight or eleven? A. I wrote to six or eight different people in regard to a position. I wrote to other agencies. I sent a letter in. 30

Q. Did they ever ask you to report to any place in response? A. They never asked me to report. They sent me application blanks. Of course I had to put in the various people I had worked for, including Upsala.

Q. Did you ever receive any reply from them at all, except the acknowledgment of their applica- 40

*Claude Newberry—Plaintiff—Cross.*

tion? A. I received a reply back from the head master of the school that I was supposed to apply for a position where I worked at before.

10 Q. That is the only communication you ever had from him? A. Well, that was the only communication except, except some time later they would notify me that the position was filled.

Q. Did they give you any reason why they didn't take you? A. I don't recall right now.

Q. That is true of all these applications you made? A. The only ones that I can recall that notified me the position had been filled, there was a place I might have replied to that said the present coach was going to remain and they decided to keep him.

20 Q. On your direct examination you said you received no letter prior to July 10, 1927, requesting you to resign.

Mr. Green: He didn't say that. He said he didn't receive any formal notification that he was ousted until that time.

Mr. Conover: My notes are that he didn't receive any request to resign.

The Court: What was the question?

30 Mr. Conover: That he didn't receive any letter requesting him to resign prior to July 10, 1927, which I think was the letter from the secretary of the Board of Trustees.

Mr. Green: Exhibit P2.

The Court: He can answer the question whether it was the first.

40 Mr. Green: Of course, this is not a request for his resignation. It is telling him that another coach had been selected.

*Claude Newberry—Plaintiff—Cross.*

Mr. Conover: I am not referring to that letter. I am referring to this second one.

The Court: He can answer if he said it.

Q. (Question read.)

The Court: I will let you say whether you said that. 10

The Witness: I don't believe I said that, sir.

Q. When was the first time you received a letter requesting you to resign? A. I can't recall the first time I received a letter requesting me to resign? The first letter from Dr. Erickson stating the different provisions about the Board meeting, I don't know if they stated it or not. The first letter I received from him was after the Board meeting. I believe it was the first one I received. 20

Q. Let us get this straight, so the jury will know. Is that the first letter you received (showing paper to the witness) requesting you to resign? A. I can't recall receiving a letter before that one.

Q. What is the date of that letter? A. I don't remember whether there was one in January or not. This is March 23, 1927. 30

Q. Did you have any job after you left Upsala College where you received \$27 per week? A. Well, I can't recall any except—

Mr. Conover: That is all.

Mr. Green: May I reopen the direct examination for the purpose of breaking up that item of \$15 or \$16 a week for room and board; in other words, I want to ask one or two questions to separate that. 40

*Claude Newberry—Plaintiff—Re-direct.*

The Court: You may ask him any question as to the meaning of anything he has stated.

*Re-direct examination by Mr. Green:*

10

Q. Mr. Newberry, on direct examination in response to questions by me, you stated that you were obliged to pay a certain amount for board and rooms after you left Upsala? A. Yes, sir.

Q. Do you recall the total amount you stated? A. It would be about \$15 per week.

Q. Will you tell us what part constituted board and what part constituted room? A. The room was \$6 a week.

20 Q. And the balance was what? A. For meals.

Mr. Green: \$6 and \$9.

*Re-cross examination by Mr. Conover:*

Q. Did you get your room and your meals at the same place? A. No, sir.

Q. Where did you get the meals? A. I would buy the meals out.

30 Q. At different restaurants? A. Yes, sir.

Q. You would just pay for each meal as you got it? A. I always paid for what I got.

Q. Did you pay for each meal as you got it? A. Yes, sir.

Q. Did you always eat at the same place? A. No, sir.

Q. You just ate out at restaurants? A. Yes, sir.

Q. What was the figure you gave? A. About \$9.

40 Q. Did you keep any record of what you paid?

*Claude Newberry—Plaintiff—Re-cross.*

A. I made in some weeks, an account of so much that I spent, nine or ten dollars a week.

Q. Did you put down each week? A. I didn't do that every week, but I tried to keep within a certain amount.

Q. You roomed on what floor of this Academy Building? A. On the second floor, I think. 10

Q. And where were the two bath rooms with reference to your room?

Mr. Green: If your Honor please——

The Court: The same objection.

Mr. Conover: If the Court please he opened it up on re-direct examination. I didn't suppose he would be so technical with me.

The Court: He has a right to keep it out, if he wants to keep it out. The question you are asking is not a proper question. 20

Mr. Conover: I think it has a bearing, your Honor, on the question of those rules about having women in the dormitories, and where these women would have to pass in going from the room that he had been in.

The Court: The only question which you have the right to recross examine on are those questions that are directed to how much his room cost him and how much the meals cost. 30

Mr. Conover: We admit that. We admit on the question of re-cross that it is technically correct.

The Court: That is all that I am called on to rule on.

Mr. Green: That is the plaintiff's case.

Mr. Conover: If the Court please, I wish at this time to make a motion for a non-suit on the ground that the plaintiff himself has admitted that he broke rules of the college by having these women in the boys' dormitory. The rule provides 40

*Claude Newberry—Plaintiff—Re-cross.*

10 that the girls are not permitted to be in the boys' dormitory except by special permission and under proper chaperonage. He admits that he did not have that permission, and that there was no chaperon there. He admits that he saw these regulations posted in a number of places in the dormitory, so there is not any question about his having notice of them, and as to that particular rule he admits that that rule was one of the rules that were posted in the dormitory.

(Argument.)

The Court: I will grant your motion, and you may have an exception.

20 Exception noted as ground of appeal.

30

40

### Exhibit P-1.

THIS AGREEMENT, entered into this 1st day of June, nineteen hundred and twenty-six, between, CLAUDE NEWBERRY, of the City of East Orange, County of Essex, and State of New Jersey, party of the First Part, and UPSALA COLLEGE, a corporation of the State of New Jersey, with its principal place of business located in the City of East Orange, County of Essex, and State of New Jersey, party of the Second Part; 10

WITNESSETH, in consideration of One Dollar (\$1.00) and the covenants herein contained, it is agreed as follows:—

1—The party of the First Part agrees to act as athletic coach and physical director and take charge of and conduct all classes in gymnastics and supervise and direct the physical training of the students of the party of the Second Part, and to do any all things incident to such work of an athletic coach and physical director as may be required by the said party of the Second Part. 20

2—Said party of the First Part agrees to perform said services for a period of three years from the date hereof at a salary of Twenty-six Hundred Dollars (\$2600.00) per annum, payable in nine equal installments during the college year; the said party of the First Part is to receive his board during the college year which is from September 14th until June 14th of each year. 30

3—The said party of the Second Part agrees to pay said salary and to furnish said board for the said period of three years as above set forth on 40

*Exhibit P-2.*

condition of the performance of all of the terms  
of this agreement by the party of the First Part.

IN WITNESS WHEREOF, the said party of the  
First Part has hereunto set his hand and seal,  
and the said party of the Second Part has caused  
10 its Corporate Seal to be hereto affixed and at-  
tested by its Secretary, and these presents to be  
signed by its President, the day and year first  
above written.

CLAUDE NEWBERRY (L. S.)  
UPSALA COLLEGE,

By ABEL AHLQUIST,  
President.

In Presence of:

20 C. G. ERICKSON.

Attest:

ARTHUR O. HJELM,  
Secretary.

(Seal)

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**Exhibit P-2.**

30

68 Wachusett St.,  
Worcester, Mass.  
July 10, 1927.

Mr. Claude Newberry,  
Asbury Park Bathing Co.,  
Asbury Park, N. J.

My dear Mr. Newberry:-

40 Upon my arrival home after a few days absence  
from the city a letter from Dr. C. G. Erickson was

*Exhibit P-2.*

received in which he says you have been waiting for some communication from the Board of Trustees of Upsala College in reference to their action relative to your coachship at the institution.

May I say that the reason why no communication has been sent you by me is the fact that the Board instructed Dr. Erickson to negotiate with you just as it was he who on behalf of the Board negotiated with you at the time of your coming to the institution. 10

However, since you desire it I shall be pleased to send you the resolutions of the Board pertaining to your case.

At a meeting of the Board held February 9, 1927 the following resolution was adopted: "Voted that in view of a number of very apparent infractions of his contract the athletic-coach, Mr. Claude Newberry, be asked to tender his resignation to be effective at the close of the present school-term." 20

At a meeting of the Executive Committee of the Board May 16, 1927, a communication from you was read by Dr. Erickson. It was voted to refer your communication to the legal advisor of the institution.

Acting upon instructions given it by the Board at its annual meeting June 13, 1927 the Teachers' Committee at a meeting June 27, 1927 called another coach who will assume his duties at the beginning of next school-year, i. e. in September 1927. 30

May I add that the Board has never authorized the publication of any of its actions relative to your matter and it deplores very much the fact that the newspapers did get hold of it. The Board disclaims any responsibility for the publishing of your dismissal though, of course, if it had chosen 40

*Exhibit P-3.*

to do so it would have been acting within its rights. Realizing the injury it might do your future, however, the Board did not publish the matter and it deplores for your sake very much that the matter leaked out.

10

Yours very truly,

ARTHUR O. HJELM,  
Secretary of the Board of Upsala College.

**Exhibit P-3.**

20 BOARD OF ATHLETIC CONTROL  
Upsala College  
East Orange, New Jersey

Claude Newberry  
Director of Athletics

May 13, 1927.

The Executive Committee,  
Board of Trustees.

30 Dear Sirs:

Due to the fact that there seems to be general dissatisfaction among those connected with Upsala College, in regard to my work and results obtained in athletics, I wish to submit the following suggestion:

I have a contract which has two more years to run and if the board wishes to make a change, upon the receiving of my two years salary I will  
40 surrender my contract.

*Exhibit P-3.*

In order not to lose financially, I would suggest that the Board appoint Capt. Ted Forsberg as player coach of basketball and a member of the faculty advisor of basketball.

I would suggest Leonard Jacobs varsity pitcher as a player coach, or whoever should be elected captain for next year, and a member of the faculty who knows baseball to act as a faculty advisor. 10

In football I would suggest Capt. Bill Wooley or the Board could appoint a man on part time for football only one who would take the position at a very modest sum with the understanding if satisfactory results are received, he would receive the position the following year. There are several men in the Oranges who would gladly take the position, men who have played college football and are in business and would be glad to coach football on the side. 20

I would suggest that the students who act as player-coach be given their tuition as an inducement to take the responsibility, especially in the case of Jacobs whom I understand will not be returning to Upsala next year as he can't afford to pay his way and without him this year Upsala would be hard pressed for a pitcher. 30

I feel that these players that I have mentioned have had enough experience and would with co-operation bring results.

Several teams that we have played the past two years have had player-coaches.

Very respectfully,

CLAUDE NEWBERRY.



*Exhibit D-B.*

## REGARDING ABSENCES FROM RECITATIONS.

A student is allowed as many absences from any class during each term as there are recitations per week in that class.

In the College each unexcused absence above the allotted number will add one half credit to the requirements for the student's graduation. For instance, four over-cuts will raise the requirements for graduation to 128 credits. 10

Whenever a student has incurred an absence for what he considers good reasons, he must within one week petition the Dean for an excuse; and if the Dean finds the reasons valid, he shall issue a written excuse, which must be presented to the teacher in whose class the absence was incurred. An absence, for whatever reason incurred, which has not been excused within the specified time, will remain unexcused. 20

In the Academy an unexcused overcut means failure in that subject for the term.

All students who have registered for the Secretarial course come under College rules, all students registered for the one year Commercial course come under Academy rules. 30

## REGARDING ABSENCES FROM CHAPEL AND SUNDAY SERVICES.

The Chapel services will be held in the Gymnasium from 11:40 to 12 a. m. each school day.

Each student is allowed ten unexcused absences per term, only four of which can be from Sunday services.

If a student incurs more than ten absences in all, or more than four absences from Sunday 40

*Exhibit D-B.*

services during one term, he will be suspended from school for two days.

Every student must at his registration give the denomination to which he belongs and the church where he is to worship while attending college.

- 10 Report of attendance at Sunday services must be deposited on the first Monday or Tuesday following. Students who fail to report will be marked absent.

## DORMITORY REGULATIONS.

- 20 Students must keep their rooms clean and in order. Beds must be made before students leave their rooms in the morning. No nails or tacks may be driven into the walls. No writing is allowed on walls, wood-work, or on either side of door. Any damage done to room or furniture must be paid for by the occupants of the room.

No loud noise shall occur in the building at any time, and during study hours, after 7:30 p. m., complete quiet must be maintained.

- 30 Students are expected to use no more electric light in their rooms than is necessary; to extinguish all lights when they leave their rooms; and to retire at a reasonable hour at night, ordinarily not later than 11 o'clock, when all lights in room must be turned out.

Students must be in their rooms within twenty minutes after the close of programs at the College.

- 40 Whenever a student must leave the dormitory and campus to attend an outside function, and must stay away during the evening, permission must be obtained from the Committee on Social Activities, and notice must be given to the Preceptress or Proctor.

*Exhibit D-B.*

Fire escapes are for emergency use only, and may not be used at any other time, either for entrance or exit.

Visiting hours at the Girls' Dormitory from 3 to 5 p. m. on Thursdays and from 2 to 5 p. m. on Sundays. Men visitors are not allowed at the Girls' Dormitory either inside the building or on the veranda, except during visiting hours. Girls are not permitted to visit Boys' Dormitories except by special permission and under proper chaperonage. 10

Any student who persists in violating the rules and proves to be an undesirable occupant of the Dormitory, will be requested to vacate his room.

20

30

40



New Jersey Court of Errors and Appeals.

CLAUDE NEWBERRY,  
*Plaintiff-Appellant,*

vs.

UPSALA COLLEGE,  
a Corporation,  
*Defendant-Respondent.*

*Action at Law.*

On Appeal from  
Essex County  
Circuit Court.

**BRIEF OF PLAINTIFF-APPELLANT  
CLAUDE NEWBERRY.**

***Statement.***

This is an appeal by the plaintiff, Claude Newberry, from a judgment of non-suit rendered by the Essex County Circuit Court, in favor of the defendant, Upsala College, and against the plaintiff.

***Facts.***

The uncontroverted facts may be tersely stated as follows:

Claude Newberry (hereinafter referred to as "plaintiff") was employed by Upsala College (hereinafter referred to as "defendant") during the scholastic year commencing September, 1925, and ending 1926, as athletic coach and physical director, under an oral contract. On or about June 1st, 1926, after plaintiff had completed his first year of service, plaintiff and defendant entered

into a written contract of employment for a period of three years (Case, p. 79, Ex. P-1).

Plaintiff entered into the performance of his duties under said contract in September, 1926, and continued to perform same until the following June. Plaintiff, during that scholastic year, took complete charge of football, baseball, basketball for both men and women, and physical training, in accordance with the terms of said contract, and during that period defendant paid him regularly for services as provided.

Shortly after the close of the scholastic year ending June, 1927, plaintiff was summarily dismissed by defendant. The first intimation had by plaintiff of his dismissal was an article appearing in the "Newark Evening News", during the month of June, 1927 (Case, p. 34, ll. 1-12).

Shortly thereafter, plaintiff was notified by defendant, through letter of Arthur O. Hjelm, Secretary of the Board of Upsala College, under date of July 10th, 1927 (Case, p. 81, Ex. P-2), that another coach had been engaged in plaintiff's place. Said letter of July 10th contained a statement that at a meeting of the Board of Upsala College, held February 9th, 1927, a resolution was passed that the plaintiff be asked to tender his resignation, to be effective at the close of the present school term. Said letter also stated that this matter was further considered by the Board on May 16th, 1927, and that at another meeting on June 13th, 1927, the Board had instructed the Teachers' Committee to call another coach to assume plaintiff's duties at the beginning of the next scholastic year.

Said letter, outside of the newspaper article, was the first official notice that plaintiff had that the Board of Upsala College had acted affirmatively on the question of his dismissal. Notwith-

standing the above, although the Board acted to discharge plaintiff from his duties, plaintiff was never informed thereof, and continued to receive his salary under contract of hiring.

Under a separate oral arrangement, plaintiff agreed to act as proctor, and take charge of boys' dormitories, in consideration of obtaining a room in said dormitories. There is no provision for the above in the written agreement of employment, as said contract merely provides for plaintiff to receive board.

On one occasion during the month of November, 1926 (this date is stated to be November, 1927, in the testimony, and is apparently an error) (Case, p. 48, ll. 29-36), plaintiff allowed two women to occupy his room in the dormitory (Case, pp. 50, 51). He occupied another room on another floor. The circumstances under which the women were present in plaintiff's room were entirely regular, and it does not appear that their conduct, or the conduct of plaintiff, was other than honorable, and this is readily admitted by the defendant. There was no testimony to show that this happening had any direct bearing upon the written contract of employment, or interfered in any way with the services rendered by the plaintiff.

As previously stated, the plaintiff was placed in charge of the boys' dormitories, and in that capacity regulated the conduct of the occupants of said dormitory.

Defendant had copy of rules and regulations dated 1925-26, marked exhibit (Case, p. 58, ll. 15-20; Case, p. 84, Ex. D-B).

Defendant based its application for non-suit on the ground that plaintiff violated said rules and regulations (Case, p. 77, ll. 36-40; Case, p. 78, ll. 1-20), and the Court, although there was no testimony to the effect that said rules and regulations

applied to plaintiff, and defendant's testimony to the contrary, that said rules did not apply to him, as he was in charge of the dormitory (Case, p. 50, ll. 27-40; Case, p. 51, ll. 1-2), granted non-suit to defendant and against the plaintiff.

### ***Ground of Appeal.***

The Circuit Court erred in granting a judgment of non-suit in favor of the defendant and against the plaintiff.

### **POINT ONE.**

**Plaintiff sustained his burden by showing that he gave full and faithful service to the measure of the ability that was in him.**

This action is based upon a written contract of employment (Case, p. 79, Ex. P-1), which contract clearly sets forth the terms of said employment, and the duration thereof. Plaintiff entered upon the performance of his duties and continued in the discharge thereof in a full and faithful manner.

### **POINT TWO.**

**Rules and regulations did not apply to plaintiff.**

The duty placed upon plaintiff to take charge of the boys' dormitory arose out of an oral agreement entirely separate and apart from the main contract of employment. Besides, said agreement was

merely incidental to his main duties. From the testimony, nothing appears to show that in the making of said verbal agreement it was laid down as a condition that he be governed in his conduct by any particular set of rules and regulations. On the contrary, plaintiff testified, and there is nothing to dispute the testimony of plaintiff, that he was in absolute charge of the dormitories, as proctor.

At this time, we refer your Honors to the case of *Walker v. John Hancock Insurance Co.*, 80 N. J. L. 342, in a case involving a written contract of service, which case was non-suited by the trial Court.

At page 343, top, Justice Swayze, speaking for the Supreme Court, states:

“Since the plaintiff was non-suited, we must accept his statement of the contract as true.”

Defendant's counsel, on cross examination of plaintiff, attempted to show that plaintiff was guilty of an infraction of certain rules, marked Exhibit D-B (Case, p. 84, Ex. D-B). Examination of said rules shows that same expressly refer to students of the University. The last paragraph clearly and conclusively indicates this, and reads as follows:

“Any *student* who persists in violating the rules, and proves to be an undesirable occupant of the dormitory, will be requested to vacate his room.” (Italics ours.)

And even then rules do not provide for dismissal, but only for vacating of room.

This case does not involve any question of moral

misconduct. Defendant does not so charge or even so intimate (Case, p. 50). Plaintiff occupied another room on another floor, and the manager of the football team was also present, and at 10:30 P. M. plaintiff and said captain left room. And the reason they stayed in his room and not in the girls' dormitory is because one of the girls had a quarrel or something with matron, and would not stay there (Case, pp. 50-53).

In the first place, we contend that rules did not apply to plaintiff, and, assuming they did, the mere fact that the two women occupied plaintiff's room for the night (plaintiff being elsewhere) did not justify plaintiff's dismissal, and the termination of his contract.

In the leading case of *Larkin v. Hecksher*, 51 N. J. L. 133, the Supreme Court said:

"The causes which justify the discharge of servants employed for a certain time, by express agreement, or by implication, are said to be various, and depend much on the nature of the particular employment. They are generally reduced to these classes: Wilful disobedience of a lawful order; gross moral misconduct; habitual negligence or other serious detriment to the master's interest; incompetence or permanent disability from illness. They must be in some way connected with the duties of the service. Instances will be found collated in Schoul. Dom. Rel., par. 612; Wood M. & S., par. 109 &c.; Sm. Mast. & S., par. 139, and cases there cited."

At most, the situation presented upon this phase of the case, raised a question of fact for the jury to determine, first, whether the plaintiff was bound by the rules, which we contend governed students, and expressly referred to students only, and sec-

only, assuming they found plaintiff was governed by said rules, whether his conduct, although honorable and admittedly so, was such that it related to his duties under, and constituted a breach of, the separate written contract of employment, which justified his discharge.

On the above alone, plaintiff contends that he established a *prima facie* case, and the trial Court erred in granting non-suit against him.

### POINT THREE.

**Assuming that plaintiff was in fact guilty of breach of contract, said breach was waived or condoned by the subsequent action of the defendant.**

The incident which is made the basis for the non-suit occurred during November, 1926, approximately eight months prior to the time of plaintiff's dismissal. All the facts and circumstances surrounding this incident were known to the defendant during these eight months, and in fact, defendant, by Dr. Erickson, discussed the matter with plaintiff during January, 1927, six months prior to plaintiff's dismissal (Case, p. 49, ll. 1-10).

On February 9th, 1927, the Board of Trustees of defendant passed a resolution to ask for plaintiff's resignation. Despite the above, defendant did not advise plaintiff thereof, but continued to employ him up to June, 1927, and paid him in accordance with the terms of said written contract.

Surely, if plaintiff's conduct was such a gross violation, the defendant would not have allowed him to continue in his capacity as athletic direc-

tor, and if we assume that this was a serious breach, then it is apparent that after due consideration, and with full knowledge of the facts, defendant condoned his action by continuing payments under the contract.

The law has long been that a master may waive or condone a breach of the servant's contract by retaining the servant after knowledge of the breach, and continuing to pay him wages.

We have exhausted New Jersey law in the matter, and have finally resorted to cases in other jurisdictions. The following cases are reported in 49 A. L. R., at page 489:

In the case of *Tickler v. Andrae Manufacturing Co.*, 95 Wis. 352, 70 N. W. 292, the Court said:

"It could not be well doubted that the master may waive and condone such breach of contract as relates to the quality of service, by retention of the servant after knowledge of the breach, and by paying the stipulated wages at the stated times, without objection or protest on that account; at least, that when unexplained or unexcused, such retention for a long time after knowledge of such payments should be at least *prima facie* evidence of such waiver and condonation, and sufficient to sustain a finding by the jury of waiver and condonation of the breach."

The same rule is laid down in the case of *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46, and the case of *Jones v. Vestry of Trinity Parish*, 19 Fed. 59, also *Leatherberry v. Odell*, 7 Fed. 641.

In these cases, it is uniformly held that these questions of condonation were properly ones for the jury. Where so great a length of time has elapsed between the alleged offense and the dismis-

sal, there is no such clear state of facts that the trial Judge can take the question to himself as a matter of law.

In *Roberts v. Brownrigg*, 9 Ala. 106, 18 R. C. L., page 517, the Court, after conceding drunkenness to be a justification for dismissing an overseer of a plantation, proceeded thus:

“But if the intemperance was not habitual, we think a single offense of this kind would be considered as overlooked and forgiven, if he was afterwards permitted to remain on the plantation. It could not be tolerated that the employer should pass over such offense until such period as suited his convenience, and then give this as a reason for putting an end to the contract. \* \* \* The obligations of good faith require that the employer should act promptly when any just cause exists for putting an end to the contract.”

See also:

*Jonas v. Field*, 83 Ala. 445;  
*Jordan v. J. R. Weber Moulding Co.*,  
 77 Mo. App. 577.

Also, in 8 L. R. A. (N. S.), 1004, the rule is stated as follows:

“It is for the jury, and not for the Court, in an action for damages for an alleged wrongful discharge, to determine whether or not the employer had pardoned or condoned an offense of the employee warranting a discharge. *Dunkell v. Simons*, 15 Daly, 352, 7 N. Y. Supp. 655, reversing 25 N. Y. S. R. 862, 5 N. Y. Supp. 417; *Murray v. O'Donohue*, 109 App. Div. 696, 96 N. Y. Supp. 335.”

On the question of condonation alone, the defendant should have been compelled to put in its case, and the case should have been allowed to go to the jury.

We contend, and it is apparent from the exhaustive cross examination of plaintiff by defendant's counsel, that the real objection to plaintiff, and the cause for terminating his contract, was because he did not "over-night" produce a winning team with the meager material that he had on hand; the alumni were displeased, and that the matter of women being in the dormitory was a mere belated pretext or excuse picked up by the defendant and counsel to justify their illegal cancellation of the contract of employment, when they realized that the mere fact that he did not produce a winning team was not legally sufficient.

### CONCLUSION.

*Plaintiff therefore respectfully submits that the trial Court erred in granting motion to non-suit plaintiff, and that judgment of non-suit should be reversed, and venire de novo awarded.*

Respectfully submitted,

GREEN & GREEN,  
*Attorneys for Plaintiff-Appellant.*

HARRY GREEN,  
*Of Counsel.*

55 FEB. T. 1929

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

CLAUDE NEWBERRY,

*Plaintiff-Appellant,*

*vs.*

UPSALA COLLEGE, a corporation,  
*Defendant-Respondent.*

*Action  
at Law.*

*On Appeal  
from Essex  
County  
Circuit  
Court.*

### **BRIEF OF UPSALA COLLEGE, Defendant-Respondent.**

#### **Statement of Facts.**

The action in the Essex County Circuit Court was founded upon an alleged breach of a contract whereby the defendant employed the plaintiff as an athletic coach and physical director under a contract dated June 1, 1926, between the plaintiff and defendant (Case, pp. 79, 80; Case, pp. 4, 5, 6). The defendant's promise to pay plaintiff the salary of \$2,600 per annum and to furnish board for the period mentioned in the contract was on condition of the performance of all of the terms of said agreement by the plaintiff. The defendant denied all of the paragraphs of the plaintiff's complaint except its incorporation and in the fifth paragraph of the first defense of its answer in addition to alleging many habitual neglects and failures of plaintiff to carry out the terms of this contract, also alleged that the plaintiff misconducted himself in the defendant's service by wilfully disobeying the reasonable orders of the defendant, by habitually neglecting and failing to enforce rules of the college which defendant had requested plaintiff to enforce, and by personally breaking said rules, by violating the rules of the

defendant by lodging a woman in the boys' dormitory over night. Defendant also alleged in said fifth paragraph of its first defense to the said plaintiff's complaint that it was not satisfied with the plaintiff's service and later discharged the plaintiff from said service, which is the alleged breach (Case, pp. 12, 13, 14):

Defendant's second defense alleged that plaintiff was not reasonably competent to perform the services which plaintiff impliedly represented and warranted that he was reasonably competent to perform (Case, p. 14).

Plaintiff's reply to the first and second defenses was merely a denial of the new matter in the answer. He did not plead any waiver or condonation of the breaches of his contract (Case, p. 17). Such alleged waiver or condonation is not within the scope of the issues raised by the pleadings nor does the record disclose that it was raised in the court below.

Under the terms of said contract of June 1, 1926, plaintiff agreed with defendant to act as athletic coach and physical director and take charge of and conduct all classes in gymnastics and supervise and direct the physical training of the students of the party of the second part, and to do any and all things incident to such work of an athletic coach and physical director as might be required by the defendant (Case, pp. 79, 80).

Plaintiff received a room in the boys' dormitory free of charge for his services in acting as proctor, taking charge of and keeping order in said dormitory (Case, p. 42, l. 32; p. 44, l. 15; p. 46, ll. 11, 12; p. 47, ll. 14, 15; p. 50, l. 28; plaintiff's brief, p. 3, l. 6).

Plaintiff admitted that the rules and regulations (Exhibit D-B, Case, pp. 84, 85, 86) were posted in the boys' dormitory, that he saw one or two of them, that he saw what the regulations were (Case, p. 44, ll. 18-28); that the rules and regulations contained a provision that men visitors were not allowed at the girls' dormitory either inside the building or on the veranda except during visiting hours; that there was also a regulation that girls were not permitted to visit the boys' dormitory except by special permission and under proper chaperonage, and that the same regulations were posted in the rooms during the years 1926 and 1927 (Case, p. 45, ll. 32-40).

Plaintiff admitted many times in his testimony that during the month of November, 1926 (incorrectly given as November, 1927, in the testimony, Case, p. 48, ll. 26-40; Case, p. 64, ll. 15, 16), he had two young ladies in his bedroom all night (Case, p. 31, ll. 26-28; p. 32, ll. 7-10; p. 48, ll. 26-40; p. 49, ll. 1-20; p. 64, ll. 15-22; plaintiff's brief, p. 3, l. 12); that he had had girls in his room at different times (Case, p. 32, l. 15; p. 52, ll. 9-28); that he admitted that he did not have permission to have said girls in his room on any of said occasions (Case, p. 49, l. 34 to p. 51, l. 15; p. 52, ll. 9-28); that there was nobody present in the dormitory to chaperon said girls on any of said occasions (Case, p. 51, ll. 16-19; p. 52, ll. 27, 28).

The plaintiff also admitted that on the night when the two girls slept in his bedroom all night in November, 1926, he had arranged with the girls to go to the girls' dormitory and sleep there, that he had asked the girls to get accommodations in the girls' dormitory, that the matron had arranged for the accommodation, that

he had told the girls that they could not stay in his room, that it was no place for them, and that they should go up there (the girls' dormitory), that he wanted them to go to the girls' dormitory (Case, p. 52, l. 29 to p. 53, l. 16; p. 64, ll. 15-22).

Plaintiff first stated in his direct examination that Dr. Erickson, the president of the college, had conferred with him for the first time in March, 1927, concerning the general dissatisfaction with his services and had complained about the plaintiff's having had girls visit him in his dormitory and at that time had requested plaintiff to resign (Case, p. 31, ll. 10-30; p. 32, l. 27). He later admitted that said interview with Dr. Erickson, the president of the defendant, occurred on January 20, 1927 (Case, p. 58, l. 23 to p. 59, l. 31; Exhibit P-2, Case, p. 36, l. 9; p. 80). Plaintiff admitted that on about March 23, 1927, he received a letter from Dr. Erickson, the president of the defendant, requesting him to resign as athletic coach and physical director (Case, p. 58, l. 35, to p. 59, l. 31). Plaintiff admitted that in April, 1927, he received a letter from Gabrielson, Conover & Stasse, attorneys for the defendant, requesting him to call at their office; that he went to the office; that Mr. Conover told him that the college was not satisfied with his services; that he requested the plaintiff to resign; that plaintiff refused to resign unless he was paid the balance of the contract (Case, p. 33, ll. 10-26; Case, p. 61, l. 12; p. 62, ll. 22-27; p. 63, ll. 27-30).

On May 13, 1927, plaintiff wrote a letter to the Executive Committee of the defendant in which he admitted that there was general dissatisfaction among those connected with the defendant in regard to his work and the results obtained in athletics and offered to surrender his

contract upon receiving two years' salary in advance (Exhibit P-3, Case, p. 82; Case, p. 36, l. 23, to p. 37, l. 17; Case, p. 63, l. 40, to p. 64, l. 11).

During March and June, 1927, defendant was constantly negotiating with plaintiff to induce him to resign voluntarily (Case, pp. 58-61). On February 9, 1927, the Board of Trustees voted that in view of the number of very apparent infractions of his contract the coach, Mr. Claude Newberry, be asked to tender his resignation to be effective at the close of the present school term (Case, p. 81, ll. 18-23).

The motion for a non-suit was based on the ground that the plaintiff himself had admitted that he broke the rules of the college which were an implied term of his contract, by having girls in the boys' dormitory; that the rules provide that girls are not permitted to be in the boys' dormitory except by special permission and under proper chaperonage, that the plaintiff admitted that he did not have that permission and that there was no chaperon there; that he admitted that he saw these regulations posted in a number of places in the dormitory so that there was not any question about his having notice of them and that as to the particular rule prohibiting girls from visiting the boys' dormitory, he admitted that that rule was one of the rules which was posted in the dormitory (Case, p. 77, l. 36, to p. 78, l. 14).

## POINT ONE.

Plaintiff did not make out a prima facie case justifying its submission to the jury by showing that he gave full and faithful service to the measure of the ability that was in him.

The plaintiff must perform not only the specific things which are expressly mentioned in his written contract but also such other terms as are implied by law. In every contract of service it is implied that the employee shall obey the lawful orders of the master at least so far as they are reasonably and not arbitrary and capricious. *Larkin v. Heckscher*, 51 N. J. L. 133, 16 Atl. 703, 3 L. R. A. 137; *Walker v. John Hancock Mutual Life Insurance Company*, 80 N. J. L. 342, 79 Atl. 354, 355, 356 (E. & A.); *Walker v. John Hancock Mutual Life Insurance Company*, 75 N. J. L. 281, 68 Atl. 113; *Bloomfield v. N. Y. & N. J. Telephone Company*, 68 N. J. L. 207, 52 Atl. 240; *Day-Elder Motors Corporation v. Hexter*, 92 N. J. L. 258, 110 Atl. 591; affirmed on the opinion below 111 Atl. 926; *Allen v. Aylesworth*, 58 N. J. E. 349, 44 Atl. 178.

At line 10 of page 5 of plaintiff's brief he misrepresents by stating that *Walker v. John Hancock Mutual Life Insurance Company*, 80 N. J. L. 342, involved a *written contract* of service. In the second sentence of Justice Swayze's opinion he says:

“His own account of the contract, which was an *oral one*, is that \* \* \*

A few sentences later the Court said: “Since the plaintiff was non-suited we must accept his statement of the contract as true.” This was a correct statement of the law as applied to a case of a non-suit on an oral contract but has

no application to this case where the action was founded on a written contract. The written contract would speak for itself. The plaintiff's statement of what the contract was would not establish the terms of the contract.

In *Walker v. John Hancock Mutual Life Insurance Company*, 80 N. J. L. 342, 79 Atl. 354, the Court of Errors and Appeals held that the trial judge rightly ordered a non-suit and affirmed the judgment of non-suit which was based on an admitted breach of defendant's rules. At the trial the defendant alleged as a justification for the discharge the fact that the plaintiff had received premiums by mail from policy holders contrary to a rule of the company adopted after the contract between plaintiff and defendant had been entered upon. The fact was conceded and the claim of the plaintiff was that the defendant had no right to adopt such a rule since it altered the contract.

Justice Swayze said:

"He concedes also that he violated the rule of the company forbidding him to collect premiums by mail. We think the method of collection was also a matter to be determined by the company in the exercise of its right to control the conduct of its own business. Since this rule was adopted after he entered the company's employ he was entitled to notice of it, but that he had. His violation of this rule also justified his discharge."

To the same effect *Walker v. John Hancock Mutual Life Insurance Company*, 75 N. J. L. 281, 68 Atl. 113.

In *Day-Elder Motors Corporation v. Hexter*, 92 N. J. E. 258, 110 Atl. 591, at 593, Vice-Chancellor Fielder said:

"The right to give reasonable orders and to discharge from service when such orders

are not obeyed exists in the ordinary and usual relation between master and servant."

In *Bloomfield v. N. Y. & N. J. Telephone Company*, 68 N. J. L. 207, 52 Atl. 240, Justice Dixon said:

"A contract consists not only of the stipulations which the parties had expressed in words but also of the stipulations that are reasonably implied as concomitants of those stipulations."

The question whether a regulation adopted by an employer for the government of its employees is invalid for unreasonableness is a question for the Court and not one to be submitted to the jury. *Walker v. John Hancock Mutual Life Insurance Company*, 75 N. J. L. 281, 68 Atl. 113.

The plaintiff assumes under Point Two of his brief that the defendant's rules and regulations (Exhibit D-B, Case, pp. 84-87) could only apply to plaintiff by their being made a part of his oral agreement to act as proctor, take charge of and keep order in the dormitory. The cases which we have just cited hold that the particular rules which apply to the plaintiff were implied terms of both his written contract and his oral contract.

The plaintiff contends on pages 5 and 6 of his brief that said rules (Exhibit D-B, Case, p. 84) referred to students of the defendant and did not apply to plaintiff.

An examination of the rules and regulations (Exhibit D-B, Case, pp. 84-87) shows that the defendant was endeavoring to establish a college community where speech and action would conform to the ideals of the college as a Christian institution of learning; to keep out influences injurious to good morals and even to prohibit

some forms of social activities such as pool playing, dancing, secret societies and Sunday sports on which modern opinion differs. While some of the rules specifically and by name prohibit students from doing certain things, other rules, particularly under dormitory regulations where the rule prohibiting girls in the boys' dormitories is also listed, apply to all persons in the dormitories. One rule provides "no loud noise shall occur in the building at any time, and during study hours; after 7:30 P. M. complete quiet must be maintained." A rule prohibiting students from making loud noises but allowing others to do so would be both fruitless and illogical and would fail to accomplish the result desired (Case, p. 86, ll. 24-26).

The rules in regard to men visitors in the girls' dormitory and girl visitors in the boys' dormitory are as follows: "Men visitors are not allowed at the girls' dormitory either inside the building or on the veranda, except during visiting hours. Girls are not permitted to visit boys' dormitories except by special permission and under proper chaperonage" (Case, p. 87, ll. 9-14).

You will note that the prohibition as to the girls' dormitory is not against men students but is against men visitors, and as to the boys' dormitories is not against girl students but against girls. It is a broad prohibition against men visitors in the case of the girls' dormitory and against girls in the case of the boys' dormitory. The reason for this broad prohibition is obvious. These young boys and girls had been entrusted by their parents to the care of this religious institution. Their parents were relying upon the faculty of the college to exercise a proper care and chaperonage over their chil-

dren. Any parent who had received word from his son that women were being kept over night in the rooms of a dormitory where their presence was prohibited even in the daytime except by special permission and under proper chaperonage, and where this court will undoubtedly take judicial notice that boys were apt to be abroad on the way to and from the bath rooms with little or no clothing, would be justly alarmed. There would be much greater need for prohibiting girls who were not members of the college from visiting the boys' dormitories, than there would be for prohibiting such visits by the girl students since the latter were subject to discipline and dismissal by the college while outside girls could not be punished for such visits unless they violated some State law. The result to be accomplished by the rule and the broad words used, "men visitors" and "girls" clearly indicate that the rule was intended to prohibit all girls from visiting the boys' dormitories except by special permission and under proper chaperonage and was not limited to girl students. The control of the visitors to the boys' dormitories was a matter to be determined by the defendant in the exercise of its right and duty to control and properly guard and chaperon the social activities and moral life of its boy students. The wilful disobedience of this lawful order and regulation on the part of the plaintiff tended to injure the reputation of the college and thus to jeopardize and affect the interest of the plaintiff's employer, the defendant herein, and was a sufficient ground for his discharge.

The plaintiff admitted that said rules and regulations were posted in the boys' dormitory, that he saw what the regulations were, that they contained a provision that girls were not permitted

to visit the boys' dormitory except by special permission and under proper chaperonage, and that the regulations were posted in the rooms during the years 1926 and 1927. (Exhibit D-B, Case, pp. 84, 85, 86; p. 44, ll. 18-28; p. 45, ll. 32-40. Plaintiff admitted that he had had two young ladies in his bedroom all night in November, 1926; (Case, p. 48, ll. 26-40; p. 31, ll. 26-28; p. 32, ll. 7-10; p. 49, ll. 1-20; p. 64, ll. 15-22; Plaintiff's brief p. 3, l. 12); that he had had girls in his room at different times (Case, p. 32, l. 15; p. 52, ll. 9-28). Plaintiff admitted that he did not have permission to have said girls in his room on any said occasion; (Case p. 49, l. 34 to p. 51, l. 15; p. 52, ll. 19-28); that there was nobody present in the dormitory to chaperon said girls on any of said occasions (Case p. 51, ll. 16-19; p. 52, ll. 27-28). Plaintiff also admitted that on the night when the two girls slept in his bedroom all night in November, 1926, he had arranged with the girls to go to the girls' dormitory and sleep there; that he had asked the girls to get accommodations in the girls' dormitory and that the matron had arranged for the accommodation; that he had told the girls that they could not stay in his room, that it was not the place for them and that they should go to the girls' dormitory (Case, p. 52, l. 29 to page 53, l. 16; p. 4, ll. 15-22).

As the plaintiff admitted that he knew the rules and regulations, admitted that the girls slept in his room in the boys' dormitory over night without special permission and without chaperonage, and as the regulation in question was a reasonable one, not arbitrary or capricious, the plaintiff's discharge was justified, and as the facts were admitted and as the question whether such a regulation was invalid for unreasonable-

ness was a question for the Court, the judgment of non-suit was proper and should be affirmed.

### POINT TWO.

The waiver or condonation argued by plaintiff under Point Three of his Brief cannot be raised in this court.

The plaintiff argues that if having the women in his room in the boys' dormitory was, in fact a breach of his contract, said breach was waived or condoned by the subsequent action of the defendant in continuing plaintiff in its employ up to June, 1927.

The defendant in the fifth paragraph of the first defense of its answer alleged that the plaintiff misconducted himself in the defendant's service by willfully disobeying the orders of the defendant, by habitually neglecting and failing to enforce rules of the college which defendant had requested plaintiff to enforce and by personally breaking said rules, by violating the rules of the defendant, by lodging a woman in the boys' dormitory over night (Case, pp. 12, 13, 14). Plaintiff's reply to the first and second defenses was merely a denial of the new matter in the answer. He did not plead any waiver or condonation of the breaches of his contract (Case, p. 17). Such alleged waiver or condonation is not within the scope of the issues raised by the pleadings, nor does the record disclose that it was raised in the court below. It cannot be raised for the first time upon appeal. *Titus v. Pennsylvania Railroad Company*, 87 N. J. L. 157, 92 Atl. 944, 946; *Shaw v. Bender*, 90 N. J. L. 147, 100 Atl. 196, 198; *Marinette Knitting Mills v. Rosenthal*, 102 N. J. L. 128, 130 Atl. 626; *A.*

& *F. Brown Company v. Pardee Works*, 88 N. J. L. 346, 95 Atl. 976; *Heiler v. Goodman's Motor Express Van and Storage Company*, 92 N. J. L. 415, 105 Atl. 233; *Pavlika v. Giglio*, 137 Atl. 528, 529, 5 N. J. Misc. Reports, 590.

The Practice Act (1912) P. L. 1912, p. 377 in section 3 provides that the "pleadings in all actions shall be according to rules of court."

Supreme Court rule 58 (Rule 40, Practice Act of 1912) provides as to the answer that:

"\* \* \*It must specifically state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint. For instance, the statute of fraud, or of limitations, release, payment, performance, or facts showing fraud, illegality, or contributory negligence."

Supreme Court rule 70 provides:

"A reply may contain two or more distinct avoidances of the same defense or counter-claim, but they must be separately stated and numbered, and the rules respecting the form and manner of pleading in the answer apply to the reply." (Rule 50, Practice Act 1912.)

Supreme Court rule 35 (Rule 21, Practice Act 1912) provides:

"Acts and contracts may be stated according to their legal effect, but, in so doing, the pleading must be such as fairly to apprise the adverse party of the state of facts which it is intended to prove."

In *Titus v. Pennsylvania Railroad Company*, 87 N. J. L. 157, 92 Atl. 944, 946 (E. & A.) the defendant requested the Court to charge that if the plaintiff was aware of certain facts he was guilty of contributory negligence and could not

recover. This the Court declined to do and the defendant on appeal urged this as one of the grounds of appeal. Chancellor Walker said:

“The question thus raised is not, however, necessary to be considered because it was not pleaded as a defense. \* \* \* Now in the answer filed by the defendant Company there is no statement of fact showing contributory negligence on the part of the plaintiff, nor any pleading of such a defense according to its legal effect, nor does such an issue arise out of the complaint in this case. Therefore, by the terms of the Practice Act and rules of Court under which this suit was instituted and tried, the defense of contributory negligence was not put in issue and could not be availed of on the trial, and, upon familiar principles it cannot be raised here.”

In *Shaw v. Bender*, 90 N. J. L. 147, 100 Atl. 196 E. and A.), Chancellor Walker said:

“It is argued in the brief of the appellant that the alleged slander was privileged. Privilege is not pleaded, nor is it assigned as a reason for reversal. \* \* \* The present practice requires that a defendant’s answer must specifically state any defense which, if not stated, would raise issues not arising out of the complaint. The present case is within this provision. And in a case where defenses are not so pleaded they are not available on appeal.”

In *Marinette Knitting Mills v. Rosenthal*, 102 N. J. L. 128, 130 Atl. 626 (E. and A.) the Court of Errors and Appeals refused to amend the defendant’s pleadings by alleging rescission by reason of a breach of warranty, for the purpose of reversing the judgment. It said:

“But that we cannot do. In an action such as this, for the purchase of goods sold and delivered, if a defendant wishes to set up as a defense rescission because of plaintiff’s breach of warranty his answer must speci-

ally state such defense because it is consistent with the truth of the material allegations of the complaint and would raise an issue not arising out of the complaint." Practice Act 1912 P. L. p. 391, rule 40 (now rule 58).

In *A. & F. Brown Company v. Pardee Works*, 88 N. J. L. 346, 95 Atl. 976 the Court of Errors and Appeals held that it was not error for the trial court to charge the jury that there was no warranty in the case that a certain article would be fit for the purpose for which it was to be used where the answer did not plead such a warranty. The Court said:

"Manifestly the answer to this is that a warranty is outside of the issue. \* \* \*

"The Practice Act of 1912, p. 391, section 40, provides that the answer must specially state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint."

In *Heiler v. Goodman's Motor Express Van and Storage Company*, 92 N. J. L. 415, 105 Atl. 233 (E. & A.) the judgment of non-suit was reversed and Justice Parker held that the granting of the motion to non-suit on the ground that the plaintiff was an alien enemy was clear error, "because the issue was not raised upon the pleadings."

In *Pavlika v. Giglio*, 137 Atl. 528, 529 (Supreme Court) the Court held that the court below erred in charging the jury that a child under the age of seven years old cannot be charged with contributory negligence, but that the instruction was harmless since contributory negligence is a defense under rule 58, Supreme Court, and it was not pleaded as a defense.

The plaintiff's argument that the defendant waived the plaintiff's breach of its rules is based on an admission of the breach of those rules and is, therefore, consistent with the truth of the allegation of said breach in the defendant's answer and should have been specially stated in his reply as an avoidance of said defense. Said claim of waiver raises an issue which did not arise out of the complaint and under Supreme Court rule 58 which is made to apply to the reply by Supreme Court rule 70 should have been specially stated in plaintiff's reply. Therefore, by the terms of the Practice Act and said rules of Court the avoidance of waiver was not put in issue and could not be availed of by the defendant on the trial, and upon familiar principles cannot be availed of upon appeal. It is not within the scope of the issues raised by the pleadings.

#### **Conclusion.**

The defendant respectfully submits that the trial court did not err in granting the judgment of non-suit in favor of the defendant and against the plaintiff, and that said judgment of non-suit should be affirmed.

Respectfully submitted,

GABRIELSON, CONOVER & STASSE,  
Attorneys for and of Counsel  
with Defendant-Respondent.



